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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. MATTHEW WADE BEASLEY et. al. Defendants, THE JUDD IRREVOCABLE TRUST et. al, Relief Defendants.	Case No. 2:22-cv-0612-CDS-EJY **NON-PARTY KAMILLE DEAN'S APPEAL FROM AND OBJECTION TO MAGISTRATE'S 11-17-22 ORDER AND REQUEST FOR DE NOVO REVIEW UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 72.3** TIME: TBD DATE: TBD PLACE: Courtroom 6B

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I.

INTRODUCTION

Non-Party, Kamille Dean, submits this Appeal and Objection to Magistrate's 11-17-22, Order pursuant to Federal Rules of Civil Procedure, Rule 72.3. Ms. Dean's Objections and Appeal are based on:

(1) The Magistrate erred by holding the Receiver complied with 28 U.S.C. section 754 by obtaining an Amended Order on July 28, 2022, without notice to Ms. Dean and without disclosing his failure to comply with section 754, when the Amended Order was not a Reappointment, was never filed in Arizona, and Ms. Dean was precluded from showing prejudice to her from the Receiver's failure to file Notice of his Order within 10-days as required by section 754;

(2) Ms. Dean's other five (5) clients and the Contract Attorneys claimed an Attorneys' Liens in the funds, and they received no notice of the Receiver's Order to Show Cause re contempt despite their interests and property being adversely affected;

(3) Ms. Dean was subjected to conflicting demands from her five (5) Clients and the Contract Attorneys not to distribute the funds from her account, and pursuant to the standard established by *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801-02 (2019), there was "[a] fair ground of doubt as to the wrongfulness of the defendant's conduct" because of the conflict created by Arizona law meant Ms. Dean had unresolvable conflicts against the funds in her Trust Account;

(4) There was no evidence Ms. Dean held Receivership property, and the Receiver's hearsay claim from the unsworn Attorney Janeen Isaacson 6-13-22 Letter (Dkt. 276-1) and Affidavits of Attorneys Kara Kendricks and David Zaro (Dkts 210-2 & 210-3) were insufficient to find by clear and convincing evidence the elements of a Contempt of Court or requirement that Ms. Dean Turn Over property to the receiver;

(5) the Magistrate utilized an improper standard in holding Ms. Dean had the burden of proof to show the funds in her Trust Account were not receiver property because the Receiver had the burden of proof that the funds in Ms. Dean's account were Receivership Property which the Receiver never demonstrated;

(6) The Magistrate never ruled on whether Ms. Dean was a Bona Fide Purchaser and Seller of Services without Notice and deprived her of a trial where she could present her defense;

(7) The Magistrate granted the Motion to Compel for OSC Re Contempt and Turn Over order depriving her of a trial and due process of law.

A. Preliminary Statement

1. Ms. Dean Purged Any Allegation of Contempt by Sending the Funds to the Receiver

On November 19, 2022, Ms. Dean sent to the Receiver all of the funds in her Trust Account. She

has no money in her possession which the Receiver could claim and no money in her Trust Account which would be subject to the Magistrate's ruling. Ms. Dean has purged any claim of Contempt or Turn Over order against her and this matter is moot.

In *United States v. Ayres*, 166 F.3d 991, 997 (9th Cir. 1999), the Court stated:

> "Civil contempt sanctions, however, are only appropriate where the contemnor is able to purge the contempt by his own affirmative act and "carries the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828, 114 S.Ct. 2552 (citations omitted). A contemnor's ability to purge civil contempt, therefore, cannot be contingent upon the acquiescence of an opposing party because such an arrangement effectively renders the contempt punitive, rather than civil. *See id.* at 829, 114 S.Ct. 2552 ("[A] fine ... is civil only if the contemnor is afforded an opportunity to purge."). While Ayres may have procrastinated, there is no dispute that he made a timely attempt to purge his contempt by complying with the district court's order, but was frustrated by the IRS's refusal to hear his testimony or to accept his documents. By ignoring the IRS's intransigence and by imposing sanctions despite Ayres's inability to purge the contempt by his own affirmative act, the district court effectively imposed punitive, rather than coercive, contempt sanctions without following the heightened procedural requirements for such sanctions. *See generally Bagwell*, 512 U.S. at 826–31, 114 S.Ct. 2552. Put most simply, the district court abused its discretion because it fined Ayres for the IRS's delay. We therefore reverse the order assessing the $1,500 fine."

Ms. Dean has sent the Receiver all funds in her Trust Account. She has purged any allegation of contempt. The attempt of an allegation of Contempt of Court to obtain a Turn Over Order is moot.

2. <u>The award of attorney's fees is also moot because of the purging of any contempt</u>

In the absence of a final Order holding Ms. Dean in contempt or requiring the Turn Over of the funds in her Trust Account, attorney's fees are inappropriate. *Rolex Watch USA Inc. v. Zeotec Diamonds Inc.*, 2021 WL 4786889, at *1 (C.D. Cal. Aug. 24, 2021) (judgment for civil contempt necessary for the award of attorney's fees) This matter is now moot and there can be no final order of Contempt requiring the Turn Over of property. The absence of that Order makes an award of attorney's fees improper. Ms. Dean's conduct was the product of conflicting legal demands on her, and there is no justification for an attorney's fees award against her. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801-02 (2019).

B. <u>Statement of the Case</u>

1. <u>Ms. Dean's Trust Account funds were earned fees</u>

This is a Receivership proceeding concerning Receiver Geoff Winkler who was appointed by this Court's Order dated June 3, 2022, (Dkt. 88) over property of several Defendants, one of whom was Jeffrey Judd. Ms. Dean is an attorney licensed to practice law in Arizona, California, Colorado, Minnesota, and Utah, who was retained on March 25, 2022, by six (6) clients who are Kennedy Judd, Khloe Judd, Jeffrey Judd, Jennifer Judd, Parker Judd, and Preston Judd, to respond to Securities Exchange Commission ("SEC") subpoenas issued from Utah. Only Jeffrey Judd is a Defendant in this action.

Ms. Dean is a resident of Arizona, and on March 30, 2022, she placed a $250,000 retainer from all of her six (6) Clients into a Trust Account located in Arizona pursuant to a March 25, 2022, Attorney Client Agreement from her six (6) Clients which provided for an Attorney's Lien on the funds in her Trust Account for payment of her work and services. Only one of Ms. Dean's six (6) Clients are a defendant in this proceeding, Jeffrey Judd, and the other five (5) Clients are not parties and have no notice of the Receiver's Order to Show Cause re Contempt and Turn Over. Each of these Clients claim they have an interest in the money placed into Kamille Dean, PC's Trust Account and that the money was not the property of Jeffrey Judd, which under Arizona law, required Ms. Dean hold the money her Trust Account until the matter is resolved among all claimants and Ms. Dean. Arizona Supreme Court Rules 42 E.R. 1.5 (fees), 1.15 (safekeeping property) and Rule 43 (disputed trust account funds).

Ms. Dean earned $201,060 of the Retainer through her work, labor, and services prior to June 4, 2022, when she learned of the June 3, 2022, Order Appointing Receiver. The Receiver contacted Ms. Dean on June 9, 2022, demanding that she send the Receiver all $250,000 of the money under threat of holding her in Contempt of Court in this proceeding. *Bloom v. Illinois*, 391 U.S. 194,202 (1968) (the contempt power is uniquely "liable to abuse"). Ms. Dean responded that the funds did not belong to Jeffrey Judd, they were not Receivership property, and she had already earned as fees most of the funds she held. The Receiver was aware of the location of the funds in Arizona when the Receiver contacted Ms. Dean, and the Receiver knowingly violated 28 U.S.C. section 754 by failing to file Notice of Appointment in Arizona.

2. <u>Failure to file Notice in Arizona deprived the Court of jurisdiction</u>

Pursuant to section 754, if receivership assets are located in other districts outside the State of Nevada, as in Ms. Dean's case, the Receiver must file a copy of the Order of Appointment and the Complaint in such other District Courts in which property is located within 10-days of the entry of his Order of appointment. *Securities Exchange Commission v. Ross*, 504 F.3d 1130, 1145 (9th Cir. 2007)("failure to file [Notice of Receivership and Complaint] in any given district within ten days of the receiver's appointment generally 'divest[s] the receiver of jurisdiction and control over all such property in that district.'")(quoting 28 U.S.C. § 754). Only if the filing requirement under 28 U.S.C. section 754 is met will the appointing court's process extend to any judicial district where receivership property is found. *Securities Exchange Comm'n v. Bilzerian*, 378 F.3d 1100 (D.C. Cir. 2004); L. Griffith, Jr., Federal Procedure Lawyers Ed., Creditors' Provisional Remedies§ 21:38 (2022). The statute provides that a receiver who fails to make a timely filing will be divested of jurisdiction. *Securities Exchange Comm 'n v. Vision Communications, Inc.*, 74 F.3d 287 (D.C. Cir. 1996); L. Griffith, Jr., Federal Procedure- Lawyers Ed., Creditors' Provisional Remedies § 21:38 (2022)

In *S.E.C. v. Vision Commc'ns, Inc.*, 74 F.3d 287, 290 (D.C. Cir. 1996), the Court stated:

> "Under§ 754, which is quoted in the margin, a receiver appointed in one district may obtain jurisdiction over property located in another district by filing in the district court of that district, within ten days after the entry of his order of appointment, a copy of the complaint and his order of appointment. The receiver in this case filed the required documents in Pennsylvania, but not until July 5, 1994-almost two months after the court appointed him and one week after the court issued its injunction. In light of the following language in § 754, this was fatal: 'The failure to file such copies in any district shall divest the receiver of jurisdiction and control over all such property in that district.' 28 U.S.C. § 754. As the parties here understand, the court's jurisdiction to reach Vista Vision and the Pennsylvania property had to be through the court's agent, the receiver. *Haile [v. Henderson Nat. Bank*, 657 F.2d 816, 823 (6th Cir. 1981)], explains that a receiver's compliance with § 7 54 in a particular district extends the territorial jurisdiction of the appointing court into that district. By not complying with§ 754, the receiver failed to establish control over the property. His failure precluded the district court from using§ 754 as a stepping stone on its way to exercising in personam jurisdiction over Vista Vision. *See American Freedom Train Found. v. Spurney*, 747 F.2d 1069, 1073-74 (1st Cir.1984)."

In this case, the Receiver failed to file Notice of his Appointment and a copy of the Complaint in Arizona until August 5, 2022, more than two (2) months after his appointment on June 3, 2022. 7-Pt. 2 Moore's Federal Practice ¶ 66.08(1) at 1949-50 (2d ed. 1980) ("Failure to file copies of the complaint and order of appointment in any district no longer divests the appointing court of jurisdiction over all property located outside the state in which the suit was brought; it now divests the court of jurisdiction only over the property in the district where the copies are not filed."). There is no excuse for the Receiver's failure to have complied with section 754 because the receiver knew immediately after his appointment that Ms. Dean and her Trust Account were located in Arizona, and while the Receiver chose to obtain certified copies of his Order on June 6, 2022, as shown by the Certification described in Ms. Dean's Declaration, the Receiver knowingly failed to file in Arizona. (Dean Declaration in Support of Motion to Quash Dkt. 257 and Exhibit "B" and "C"). The prejudice against Ms. Dean is overwhelming, and the Receiver's failure has meant extensive costs, detrimental reliance, false demands against Ms. Dean by the SEC, and damages to Ms. Dean's relationship with her Clients and with attorneys who work for Ms. Dean because they cannot be paid.

C. <u>The Receiver Filed an Order to Show Cause re Contempt Against Ms. Dean</u>

On July 25, 2022, Receiver Geoff Winkler filed a Motion for OSC re Contempt and Turn Over Order against Ms. Kamille Dean. (Dkt. 21. Ms. Dean is an Attorney who is licensed to practice law in Arizona, California, Colorado, Utah, and Minnesota. Her office is located in Arizona and her Trust Account which contains the $201,060 in Trust funds in the name of Kamille Dean, P.C., which is the subject of this proceeding and is located in a bank account in Phoenix, Arizona. Ms. Dean does not practice law in Nevada and she has no minimum contacts in Nevada whereby the Court could assert Jurisdiction over her.

The Receiver alleged Ms. Dean held property belonging to Jeffrey Judd and therefore it was Receivership property. However, the money in the Trust Account belongs to Kamille Dean for earned fees. Her other five (5) Clients have a claim on the funds as the original owners. The Receiver presented no declaration, evidence, or testimony that the funds in the Account were Receivership funds. Yet, the Receiver argued in his Memorandum that Ms. Dean admitted to Mr. Zaro's "office" that Jeffrey Judd gave her money, However, Ms. Dean has never made any such statement. Who Mr. Zaro's "office" might be was never identified. (Receiver 8-1-22 Memo Dkt. 210, p. 3, lines 13-16). Rather, the money was from all six (6) of Ms. Dean's Clients, and both the Clients and their other attorney assured Ms. Dean the funds were not tainted with illegality and that the funds were not Receivership property.

D. Ms. Dean Moved to Quash and Strike the OSC for lack of Jurisdiction

Ms. Dean filed a Motion to Quash and a second Motion to Strike the OSC re Contempt for Jurisdictional Defects both pointing out the receiver had failed to file Notice of the Receivership Proceeding in Arizona where the funds were located in Ms. Dean's Trust Account within 10-days of the Receiver's Appointment. Ms. Dean objected that there was no contempt affidavit specifying the basis for the Receiver's request for contempt of court. *Autotech Techs. LP v. Integral Rsch. & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007) ("One consequence of this failure [to submit sufficient affidavits in support of contempt] was that it neglected to provide enough information to carry its burden of proof."). Ms. Dean objected that the Affidavits submitted by Kara Kendrick and David Zaro (Dkts 210-2 & 210-3) were hearsay and did not state that the funds held in Ms. Dean's account were Receivership Property because the affiants had no idea if they were Receivership property. (Dean 8-15-22 Motion to Strike Dkt. 258, pp. 11-12).

Ms. Dean objected that the Receiver's attempt to hold a summary proceeding as opposed to a plenary hearing with a Complaint, discovery, jury trial, and due process of a plenary proceeding is jurisdictionally defective, and violates Ms. Dean's and her other five (5) Clients' claimed ownership rights in a jurisdictionally void attempt to take property from them without due process of law.

Ms. Dean objected and indicated that the Receiver has failed to allege that Ms. Dean has the ability to comply with a Turn Over order when her other five (5) Clients and the laws of the State of Arizona require she not disburse funds from her trust account in the face of competing demands, and Ms. Dean cannot be held in Contempt of Court because she had no ability to comply with any Order from this Court to turn over funds in her Trust Account. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 (9th Cir. 1983)("No matter how reprehensible the conduct is it does not warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow.' *Maggio*, 333 U.S. at 64, 68 S.Ct. at 405."). Because of the conflicting demands made on Ms. Dean and the requirements of Arizona law that

she maintain the funds in her trust account, Ms. Dean had no ability to comply, or at a minimum did not act without "[a] fair ground of doubt as to the wrongfulness of the defendant's conduct." as specified in *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801-02 (2019).[1]

In *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801-02 (2019), the Court started:

> "we have said that civil contempt "should not be resorted to where there is [a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *California Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618, 5 S.Ct. 618, 28 L.Ed. 1106 (1885) (emphasis added). This standard reflects the fact that civil contempt is a "severe remedy," *ibid.*, and that principles of "basic fairness requir[e] that those enjoined receive explicit notice" of "what conduct is outlawed" before being held in civil contempt, *Schmidt v. Lessard*, 414 U.S. 473, 476, 94 S.Ct. 713, 38 L.Ed.2d 661 (1974) (per curiam). *See Longshoremen*, supra, at 76, 88 S.Ct. 201 (noting that civil contempt usually is not appropriate unless "those who must obey" an order "will know what the court intends to require and what it means to forbid"); 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2960, pp. 430–431 (2013) (suggesting that civil contempt may be improper if a party's attempt at compliance was "reasonable")."

In this case, there was "[a] fair ground of doubt as to the wrongfulness of the defendant's conduct" because Ms. Dean was subject to conflicting demands not only from her five (5) clients, but also the Contract Attorneys Mr. Phil Escolar and Ms. Maureen Jaroscak who had provided Ms. Dean with review of thousands of the SEC subpoena documents pursuant to Attorney Client Agreement with them dated March 29, 2021. The Agreements each granted the Attorneys a security interest and Attorney's Lien in the funds in Ms. Dean's Trust Account. When each of these individuals demanded Ms. Dean not release funds from their Trust Account, Ms. Dean was placed in a conflict of either complying with Arizona law which prohibited her from distributing the funds in her trust account or being in Contempt of Court which created a fair ground of doubt as to the wrongfulness of her actions.

E. <u>The Magistrate Granted the Receiver's Motion</u>

Without holding a hearing or permitting Ms. Dean to establish her defense of being a Bona Fide Purchaser and Seller of Services for Value and Without Notice of any taint in the funds, the Magistrate

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[1] In *Lund v. Donahoe*, 227 Ariz. 572, 583, 261 P.3d 456, 467 (Ct. App. 2011), the Court stated: "Our concern for the lack of due process also extends to the court's imposition of contempt sanctions. A finding of civil contempt requires that the contemnor (1) has knowledge of a lawful court order, (2) has the ability to comply and (3) fails to do so. *See generally Ong Hing*, 101 Ariz. 92, 416 P.2d 416; *State v. Cohen*, 15 Ariz.App. 436, 440, 489 P.2d 283, 287 (1971). In this case, we have held that the court's order compelling disclosure of communications within the scope of the CIA [Common Interest Agreement] was not lawful. Accordingly, the finding of contempt based on noncompliance with that order was error. And from the trial court's perspective, it should have been apparent at a minimum that counsel's invocation of privilege created a substantial question worthy of review before a finding of contempt. Moreover, because the Attorneys faced ethical constraints on their ability to answer the court's questions, they lacked the immediate ability to comply with the court's order."

granted the Receiver's Motion based on the affidavits alone. *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1324 (9th Cir. 1998), the Court found that "a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits." Ms. Dean presented extensive controverting evidence and testimony that she had no notice of any taint in the funds and was a BPF entitled to receive her attorney's fees which she had earned in the amount of $201,060. *United States v. McCorkle*, 321 F.3d 1292, 1295 n. 4 (11th Cir. 2003) (attorney entitled to trial on whether attorney knew funds in trust account were tainted or belonged to others and whether attorney earned fees as a BFP).

Ms. Dean has assigned numerous errors to the Magistrate's Order which make the award of attorney's fees in this case improper. *See* pp. 1-2 *supra.*

II.

THE DISTRICT COURT SHOULD NOT ADOPT THE MAGISTRATE'S REPORT AND ORDER BECAUSE IT DEPRIVED MS. DEAN OF DUE PROCESS OF LAW

Contempt of Court and Turn Over of the funds are no longer an issue in this case because Ms. Dean turned over the funds to the Receiver on November 18, 2022. There is no final judgment of contempt in this case because Ms. Dean has timely sought review of the Magistrate's Order pursuant to Federal Rules of Civil Procedure, Rule 72.3. The award of attorney's fees in the absence of a final order is improper. *Rolex Watch USA Inc. v. Zeotec Diamonds Inc.*, 2021 WL 4786889, at *1 (C.D. Cal. Aug. 24, 2021) (judgment for civil contempt necessary for the award of attorney's fees). An award of attorney's fees is inappropriate because the Magistrate's finding and Order deprive Ms. Dean of due process of law and are reversible error.

A. Attorney's Fees Are Improper Because Conflicting Demands on Ms. Dean

1. The Magistrate ignored the conflicting demands on Ms. Dean

The Magistrate ignored the conflicting demands placed on Ms. Dean and made no finding whether there was "[a] fair ground of doubt as to the wrongfulness of the defendant's conduct." *Taggart v. Lorenzen*, 204 L. Ed. 2d 129, 139 S. Ct. 1795, 1801–02 (2019). Ms. Dean was placed in an impossible position by (1) the Demands of her five (5) clients that she not turn over the funds in her Trust Account to the Receiver, and (2) the demands from her contract attorneys' Phil Escolar and Maureen Jaroscak that she not violate their attorney's liens or part with the funds. Ms. Dean sought to resolve these conflicting demands by requesting she be permitted to bring an Interpleader Action to determine the claims of all parties, and the Magistrate ignored the request.

In *Billion Motors, Inc. v. 5 Star Auto Grp.*, 2020 WL 8372653, at *2 (C.D. Cal. Oct. 22, 2020), the Court stated:

> "Clear and convincing evidence requires greater proof than preponderance of the evidence. To meet this higher standard, a party must present sufficient evidence to produce 'in the ultimate factfinder an

> abiding conviction that the truth of its factual contentions are highly probable.' " *Sophanthavong v. Palmateer*, 378 F.3d 859, 866–67 (9th Cir. 2004). Indeed, civil contempt "should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019).

In this case, Ms. Dean had a fair ground of doubt as to the wrongfulness of her conduct. She was under the demands of her five (5) Clients and two Attorneys with Attorney's Liens not to distribute funds from her trust account. She was under the obligations imposed by the Arizona bar not to distribute funds from a trust account where there are conflicting demands. (Dean Dec., 8-15-22 Memo to Quash Dkt 257, p. 18, line 28, to p. 19, line 5) ("The Receiver's failure to file in Arizona has created irremediable prejudice against me and my Clients **who have demanded I not comply with the Receiver's threats** of Contempt of Court while I have incurred additional fees of many thousands of dollars based on my Client's demands I provide work, labor, and services pursuant to the retainer they have provided to me. Arizona law regarding my Trust Account mandates that I cannot distribute funds where there are conflicting demands and ownership Claims as in this case from me, my Clients, and the Receiver.") (emphasis added).

2. Ms. Dean testified she was the subject of conflicting demands

The Magistrate stated that Ms. Dean had not submitted sufficient evidence of conflicting demands having been made on her. (Magistrate 11-17-22 Order, pp. 18, lines 13-17). However, the Magistrate ignored Ms. Dean's unchallenged testimony there were conflicting demands on her. (Dean Dec. Motion to Quash Dkt. 257, p. 19, lines 1-3) ("my Clients who have demanded I not comply with the Receiver's threats"). Ms. Dean had a good faith concern of expensive litigation and multiple liabilities if she responds to the instructions of one claimant and not to others.

In *Bank of New York Mellon Tr. Co., Nat'l Ass'n v. Telos CLO 1006-1 Ltd.*, 274 F. Supp. 3d 191, 212-13 (S.D.N.Y. 2017), the Court stated:

> "An interpleading plaintiff has no obligation to weigh competing claims to the res; '[t]he availability of interpleader does not depend on the merits of the potential claims against the stakeholder.' *William Penn Life Ins. Co. of N.Y. v. Viscuso*, 569 F.Supp.2d 355, 359 (S.D.N.Y. 2008) (*citing Sotheby's, Inc. v. Garcia*, 802 F.Supp. 1058, 1065 (S.D.N.Y. 1992)); *see also John Hancock Mut. Life Ins. Co. v. Kraft*, 200 F.2d 952, 953 (2d Cir. 1953) ('The stakeholder should not be obliged at its peril to determine which of two claimants has the better claim.'). The interpleader plaintiff 'is not required to evaluate the merits of [the interpleader defendants'] conflicting claims at its peril; rather, it need only have a good-faith concern of expensive litigation and multiple liability if it responds to the instructions of certain claimants and not others.' *Bache Halsey Stuart Shields Inc. v. Garmaise*, 519 F.Supp. 682, 684-685 (S.D.N.Y. 1981); *see also* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil 3d § 1704 (3d ed. 2001) ('It is immaterial whether the stakeholder believes that all the claims against the fund are meritorious. Indeed, in the usual case, at least one of the claims will be quite tenuous.')."

In this case Ms. Dean experienced competing claims against her Trust Account funds. *6247 Atlas Cop. v. Marine Ins. Co., Ltd., No. 2A/C*, 155 F.R.D. 454, 462 (S.D.N.Y. 1994) (the existence of multiple claims to the disputed res and vexatious litigation are sufficient to sustain an interpleader action regardless of the merits of the competing claims). The Magistrate's claim that she needed additional evidence was reversible error. Nevertheless, Ms. Dean has provided the Letter dated November 7, 2022, from Attorney Maureen Jaroscak where she demands Ms. Dean not distribute funds from her Trust Account and explains the effect of the Attorney's Lien for herself and Attorney Phil Escolar. (*See* Dean 12-1-22 Declaration). The Magistrate's ruling was clearly erroneous in the face of the conflicting demands Ms. Dean faced. *Lee v. West Coast Life Insurance*, 688 F 3d. 1004, 1009. (9th Cir. 2012)(interpleader prevents the stakeholder from being obliged to determine at his/her peril which claimant has the better claim); *United States v. High Tech. Prod., Inc.*, 497 F.3d 637, 641 (6th Cir. 2007)(interpleader "affords a party who fears being exposed to the vexation of defending multiple claims to a limited fund or property that is under his control a procedure to settle the controversy and satisfy his obligation in a single proceeding.") (*quoting* 7 Charles Alan Wright, Federal Practice and Procedure §§ 1704, 1714 (3d ed. 2001)).

3. <u>The Magistrate ignored Ms. Dean's ethical obligations under Arizona law</u>

Ms. Dean is an Arizona attorney and the Trust Account where the $201,060 in disputed funds are held in located in Phoenix, Arizona. Arizona law requires that Ms. Dean file an Interpleader action to determine the ownership of the funds held in her Trust Account among the numerous competing claims asserted against those funds. The magistrate ignored these mandates which placed Ms. Dean in the untenable position of violating Arizona law or being held in Contempt of Court which by definition constituted "fair grounds of doubt" as to the wrongfulness of her actions. *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019). *See Billion Motors, Inc. v. 5 Star Auto Grp.*, 2020 WL 8372653, at *2 (C.D. Cal. Oct. 22, 2020) (attorneys for contempt should not be imposed absent clear and convincing evidence of contempt or where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct.).

In this case Arizona Supreme Court Rules 42 E.R. 1.5 (fees), 1.15 (safekeeping property) and Rule 43 (disputed trust account funds) mandated Ms. Dean not disburse funds from her Trust Account in the face of completing demands and requires she file an interpleader action. The Arizona State Bar states:

> "If a dispute arises about funds in your trust account, you must not withdraw the disputed amount. If you are holding funds that are in dispute, create ticklers to assure that you take action to resolve the dispute as promptly as possible. This is another advantage of reviewing client ledgers monthly - disputed amounts sitting in the trust account will come to your attention each time you do. If the dispute cannot be resolved promptly, you may have an ethical obligation to interplead or file a declaratory action regarding the disputed funds." State Bar of Arizona, Client Trust Accounting for Arizona Attorneys., p. 9 (2014) https://www.azbar.org/media/cldktlty/trust-account-manual-rev-8-2017.pdf.

Rules ER 1.15 and 43 require an Arizona Attorney to file an interpleader action whenever there is a dispute and conflicting demands to money held in the attorney's Trust Account. *Employers Reinsurance Corp. v. GMAC Ins.*, 308 F. Supp. 2d 1010, 1016 (D. Ariz. 2004)(Arizona rules of professional conduct requires attorney should segregate and hold disputed property and file interpleader where dispute cannot in good faith be resolved amicably). No attorney should be placed in such a manufactured legal vice created by the Receiver who knew he violated section 754 and yet improperly demands in bad faith Ms. Dean turn over funds to the Receiver. *In the Matter of A Member of the State Bar of Arizona, Jesus R. Romo Vejar*, 2004 WL 5739531, at *3 (Sep. 2, 2004)(attorney's failure to file interpleader action of funds in trust account when faced with competing demand on the money was sanctionable conduct).

The vice in which Ms. Dean has been placed is intolerable. The Magistrate's Order was reversible error because it ignored the conflicting requirements of law on Ms. Dean. The Magistrate made no finding which complied with the requirements of *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801–02 (2019), that contempt and attorney's fees are improper where there is "fair grounds of doubt as to the wrongfulness" of her actions.

4. <u>Attorneys' fee are neither reasonable or necessary in this case</u>

Ms. Dean has been faced with conflicting demands from her Clients and Contract Attorneys where Arizona law mandates she not distribute funds from her Trust Account. *See* pp. 6-7, 9 *infra*. It was not proper for the Magistrate to ignore these conflicting demands. Nevertheless, Ms. Dean has sent the funds to the Receiver, and an award of attorney's fees without a final judgment in the face of the undeniable conflict is unnecessary and unreasonable.

In *Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co.*, 281 F. Supp. 3d 967, 993 (C.D. Cal. 2017), the Court stated:

> [A]ttorneys' fees in a civil contempt proceeding are limited to those reasonably and necessarily incurred in the attempt to enforce compliance." *Abbott Labs. v. Unlimited Beverages, Inc.*, 218 F.3d 1238, 1242 (11th Cir. 2000); *see also Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1028 (9th Cir. 1985) (affirming award of attorneys' fees for successful contempt motions); *Robin Woods, Inc. v. Woods*, 28 F.3d 396, 401 (3d Cir. 1994) (affirming the district court's conclusion that it was proper to award plaintiff compensation for management's time and expense in preparing for contempt hearing, but remanding as to the amount of damages); *Mead Johnson & Co. v. Baby's Formula Serv., Inc.*, 402 F.2d 23, 24 (5th Cir. 1968) (affirming the trial court award of out-of-pocket costs incurred in bringing proceeding for civil contempt). Toyo may seek an award of reasonable attorneys' fees and costs reasonably and necessarily incurred in an attempt to enforce compliance <u>with **the Final Judgment**</u> and should file the appropriate motion forthwith." (Emphasis added).

The Receiver took an unreasonable and draconian position of demanding funds from Ms. Dean when Arizona law prohibited her from distributing funds from her Trust Account. The Magistrate's award of

attorney's fees is unreasonable when Ms. Dean reasonably sought to abide by Arizona law. An Attorney should never be placed in such an unreasonable legal vise.

5. Ms. Dean purged the allegation of contempt and there can be no final judgment

In the absence of a final judgment of contempt of court the Court may not award attorney's fees. *Rolex Watch USA Inc. v. Zeotec Diamonds Inc.*, 2021 WL 4786889, at *1 (C.D. Cal. Aug. 24, 2021) (judgment for civil contempt necessary for the award of attorney's fees). On November 19, 2022, Ms. Dean sent the Receiver all of the funds in her Trust Account and she has purged herself of any civil contempt. The Receiver's demand for the funds and the Magistrate's Order that she be held in Civil Contempt is not a final order, and it cannot be entered as a final order because the issue of contempt and turnover of the property is moot. *Toyo Tire & Rubber Co. v. Hong Kong Tri-Ace Tire Co.*, 281 F. Supp. 3d 967, 993 (C.D. Cal. 2017) (attorneys' fees in a civil contempt proceeding are limited to those reasonably and necessarily incurred in to obtain a final judgment of contempt).

In *United States v. Ayres*, 166 F.3d 991, 997 (9th Cir. 1999), the Court stated:

> "Civil contempt sanctions, however, are only appropriate where the contemnor is able to purge the contempt by his own affirmative act and "carries the keys of his prison in his own pocket." *Bagwell*, 512 U.S. at 828, 114 S.Ct. 2552 (citations omitted). A contemnor's ability to purge civil contempt, therefore, cannot be contingent upon the acquiescence of an opposing party because such an arrangement effectively renders the contempt punitive, rather than civil. *See id.* at 829, 114 S.Ct. 2552 ("[A] fine ... is civil only if the contemnor is afforded an opportunity to purge.").
> While Ayres may have procrastinated, there is no dispute that he made a timely attempt to purge his contempt by complying with the district court's order, but was frustrated by the IRS's refusal to hear his testimony or to accept his documents. By ignoring the IRS's intransigence and by imposing sanctions despite Ayres's inability to purge the contempt by his own affirmative act, the district court effectively imposed punitive, rather than coercive, contempt sanctions without following the heightened procedural requirements for such sanctions. *See generally Bagwell*, 512 U.S. at 826–31, 114 S.Ct. 2552. Put most simply, the district court abused its discretion because it fined Ayres for the IRS's delay. We therefore reverse the order assessing the $1,500 fine."

On November 18, 2022, Ms. Dean sent all the funds in her Trust Account to the Receiver. There is nothing for the Court to Order to be Turned Over. The OSC re Contempt and Turn Over is moot.

B. Ms. Dean was a Bona Fide Purchaser and Seller of Services Without Notice

1. The Magistrate ignored Ms. Dean was a BPF in awarding fees

The Magistrate stated:

> "According to Ms. Dean, Receiver "stands in the shoes" of Judd's one-sixth share of the $250,000 and does not have any legal interests in the remaining portion of the $250,000 that belong to the non-defendant members of the Judd family. Id. at 66.25 [¶] Ms. Dean submitted no evidence and cites no case law supporting her proposition that the Court should segregate one-sixth of the $250,000 retainer because only one of the six individuals who retained her is named as involved in illegal activity." (Magistrate 11-17-22 Order, p. 14, lines 4-10)."

However, the segregation of monies in Ms. Dean's trust account does not have any bearing on whether she is a bona fide purchaser and seller of services without notice of the illegality of the funds. The Magistrate failed to address whether Ms. Dean knew that the funds were tainted in the first instance. *Carrick v. Santa Cruz Cnty.*, 2013 WL 3802809, at *6 (N.D. Cal. July 16, 2013), *aff'd*, 594 F. App'x 443 (9th Cir. 2015) (every element of civil contempt must be demonstrated by "clear and convincing evidence"). There was no evidence Ms. Dean knew the funds were tainted, and Ms. Dean testified she had no such knowledge. Ms. Dean had a right to present a defense at trial that her total lack of knowledge precluded taking money she had earned away from her, something the Magistrate never addressed.

Ms. Dean incurred her $201,060 in fees as a Bona Fide Purchaser for value in good faith without notice of any taint or the Receiver's existence. None of Ms. Dean's Clients are subject to any criminal or forfeiture proceeding, and there is no prior Order which mentions Ms. Dean or property in her possession. The SEC and Receiver cannot pretend Ms. Dean is bound by Orders which have nothing to do with her, and the SEC and Receiver have not presented one scrap of evidence to assume their burden of proof by showing clear and convincing evidence that the Receiver is entitled to the funds in Ms. Dean's account.

In *United States v. McCorkle*, 321 F.3d 1292, 1295 (11th Cir. 2003), the District Court ordered criminal defense attorney F. Lee Bailey to return $2,000,000 he had withdrawn from his Trust Account following his client's criminal conviction and a 10-day trial in which the Court found the funds were subject to forfeiture. The Court stated, that had Bailey shown he rendered services before such knowledge, he would have been a BFP. The Court stated:

> "A criminal defendant cannot pay an attorney for the rendition of future legal services with the expectation that the entire payment will be immune from forfeiture. Rather, the court would have to pro rate the value of services that have been rendered by the attorney, immunizing from forfeiture only those fees earned while meeting the BFP test. For example, if an attorney receives an up-front payment of $5 million for his future legal services and the attorney loses his BFP status a week later (say, because the client is indicted and the attorney learns additional information about his client's guilt), the attorney may keep only the reasonable value of his services prior to losing his BFP status; he may not keep the entire $5 million." *Id.* at 1295 n. 4.

In Ms. Dean's case, she has prorated the fees she actually earned prior to any knowledge of the Receivership or criminal claims against Jeffrey Judd. There are no criminal claims against her other five (5) Clients and there is no forfeiture proceeding pending. Ms. Dean earned $201,060, before she had any knowledge of the Receivership or alleged wrongdoing by any of her Clients. In the *McCorkle* case, there was a 10-day trial of Bailey's Bona Fide Purchaser for value status, and Ms. Dean is entitled as a matter of due process to the same protections and the filing of an Interpleader to achieve that purpose. The Magistrate's ruling that the Receiver can take from Dean her earned fees without according her a trial on her BFP and other defenses is without merit. The Magistrate's Order deprived Ms. Dean of due process of law.

2. Ms. Dean incurred $201,060 in fees in good faith prior to June 4, 2022

The Magistrate ignored that Ms. Dean is a Bona Fide Purchaser and Seller for value without notice prior to June 4, 2022, when she learned of the Receiver's existence and committed plain error in not making a ruling on Ms. Dean's status as a bona fide purchaser and seller for value without notice. There is no denying Ms. Dean acted with good faith, without notice, and incurred $201,060 in fees pursuant to her March 30, 2022, Attorney Client Agreement before she ever knew of the Receiver. Ms. Dean has a right to demonstrate her BFP status, and she cannot do so in a summary Contempt proceeding.

Ms. Dean incurred $201,060 in attorney's fees as an innocent Bona Fide Purchaser and Seller for Value before June 4, 2020, and Ms. Dean incurred her fees in good faith prior to her ever knowing about the Receiver's Order. *Hunnicutt Const., Inc. v. Stewart Title & Tr. of Tucson Tr.* No. 3496, 187 Ariz. 301, 307, 928 P.2d 725, 731 (Ct. App. 1996) (a bona fide purchaser and holder for value in good faith and without notice cuts off the rights of a prior owner or defrauded party). The SEC demanded emergency compliance with its subpoenas served on Ms. Dean's Clients, and the SEC engaged in gamesmanship of concealing that Ms. Dean had to comply with the subpoenas when the SEC knew there would be a Receivership proceeding which would claim Ms. Dean could not be paid for the work the SEC demanded she perform. The Receiver does not address Ms. Dean's status as a BPF and fails to address the unfairness of taking money from her which she earned without any notice or knowledge of taint, illegality, or the existence of the Receiver.

Whether this matter is considered under Arizona law or Nevada law, Ms. Dean's BFP status cuts off the Receiver's claims. The use of summary proceedings which preclude Ms. Dean's affirmative defense of Bona Fide Purchaser and Seller for Value Without Notice is a violation of due process. *Indep. Coal & Coke Co. v. United States*, 274 U.S. 640, 650, 47 S. Ct. 714, 718, 71 L. Ed. 1270 (1927) ("Bona fide purchase is an affirmative defense. *Wright-Blodgett Co. v. United States*, 236 U. S. 397, 403, 35 S. Ct. 339, 59 L. Ed. 637."). The Magistrate's failure to make any finding on whether Ms. Dean was a Bona Fide purchaser and seller for value without notice was reversible error.

3. Ms. Dean had no way to know the funds were tainted

The Magistrate stated:

> "Here, just as in [*Securities and Exchange Commission v. King*, 2021 WL 3598732, at *1 (C.D. Cal. Apr. 27, 2021], there is evidence before the Court that the funds in Ms. Dean's possession were commingled and, therefore, are within the scope of the Receivership Order. [¶] Specifically, Receiver provides to the Court a letter from an attorney who was aware of the chain of events involving the funds at issue. ECF No. 275-1 at 2. In that letter, the attorney describes the money changed hands as follows: (1) on October 15, 2021, two wire transfers were received by Michael Lee Peters—an attorney for one or more of the Defendants and/or Receivership Defendants related to Judd—for services rendered; (2) the transfers totaled $2,000,000 and were placed in Mr. Peters' IOLTA account; and (3) on March 30, 2022, $250,000 of that amount was wired to the

Kamille Dean, P.C. Arizona IOLTA trust account as a retainer for attorney services. *Id.* at 2-3." (Magistrate 11-17-22 Order, p. 12, line 23, to p. 13, line 7).

However, the Magistrate assumed that somehow Ms. Dean knew from the Attorney Isaacson's June 13, 2022, Letter, which was long after the fact and which the Receiver never showed to Ms. Dean and of which Ms. Dean knew nothing until the Receiver filed the document August 29, 2022 (Dkt. 276-1) long after Ms. Dean earned her fees, that Ms. Dean would thereby know funds were tainted. However, Ms. Dean had no notice or knowledge the funds were tainted or claimed by the Receiver until long after she provided extensive work and incurred her attorney's pursuant to her Attorney's Lien on the funds.

The Receiver bears the burden of proof by clear and convincing evidence whenever the receiver seeks to obtain funds from a third party. *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) ("It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the trustee and how he can meet it. This Court has said that the turnover order must be supported by 'clear and convincing evidence,' *Oriel v. Russell*, 278 U.S. 358, 49 S.Ct. 173, 174, 73 L.Ed. 419"); *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990) (trustee and receiver have burden of proof to show entitlement to third party funds); *Donell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008) (receiver has the burden of proof by clear and convincing evidence in recovering false profits from third parties); *In re Lawrence*, 251 B.R. 630, 640 (S.D. Fla. 2000), aff'd, 279 F.3d 1294 (11th Cir. 2002) ("The burden of proof in a turnover proceeding is at all times on the receiver or trustee; he must at least establish a prima facie case. After that, the burden of explaining or going forward shifts to the other party, but the ultimate burden or risk of persuasion is upon the receiver or trustee." *Id.* (*quoting Gorenz v. Illinois Dept. of Agriculture*, 653 F.2d 1179, 1184 (7th Cir.1981) (further cites omitted));" 65 Am. Jur. 2d Receivers § 249 (2022)("As in any other action, in an action by a receiver, the receiver bears the burden of proof of entitlement to the relief requested."); Fletcher Cyclopedia of the Law of Corporations § 7853.20 (2022)("The receiver has the burden of proof to sustain his or her claim in an action to recover assets."); 3B Fed. Proc. Forms § 8:274 (2022)("The burden of proof is on the receiver in an action to collect bank assets").

The cases cited by the Magistrate involve the withdrawal of frozen funds, and neither the Magistrate nor the Receiver have established that Ms. Dean has the burden of showing her retainer is not tainted. Ms. Dean had no knowledge the funds were so-called tainted. The case law is overwhelming that the Receiver has a high burden of proof to show with clear and convincing evidence that the Receiver is entitled to Ms. Dean's funds. All of the cited cases by the Magistrate are distinguishable and generally deal with Defendants who are seeking to unfreeze funds or withdraw money to pay an attorney which Ms. Dean does not seek.

C. <u>The Evidence the Magistrate Relied on In Awarding Fees was Inadmissible</u>

1. The Magistrate erred in granting the Motion to Compel for OSC Re Contempt and Turn Over order **based on Affidavits alone**

The Magistrate committed reversible error and deprived Ms. Dean of due process and a hearing by Granting the Motion to Compel for OSC Re Contempt and Turn Over order based on the affidavits alone. There was no competent Affidavit from the Receiver establishing the elements of a contempt. However, no matter what the Magistrate's view of the content or admissibility of the Affidavits, it is reversible error to find civil contempt without a trial.

In *Hoffman for & on Behalf of N.L.R.B. v. Beer Drivers & Salesmen's Loc. Union No. 888, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 536 F.2d 1268, 1277 (9th Cir. 1976), the Court stated:

> " We hold that a civil contempt proceeding, which may lead to the assessment of a fine, is a trial within the meaning of Fed.R.Civ.P. 43(a), rather than a hearing on a motion within the meaning of Fed.R.Civ.P. 43(e) (*see Locklin v. Switzer Brothers, Inc.*, 348 F.2d 244 (9th Cir. 1965); and *NLRB v. Rath Packing Co.*, 123 F.2d 684 (8th Cir. 1941)) and that the issues may not be tried on the basis of affidavits. A trial court may in a contempt proceeding narrow the issues by requiring that affidavits on file be controverted by counter-affidavits and may thereafter treat as true the facts set forth in uncontroverted affidavits."

Although the Magistrate here did not hold Ms. Dean in Contempt, the Magistrate imposed sanctions of attorneys' fees. In *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1324 (9th Cir. 1998), the Court found that "a district court ordinarily should not impose contempt sanctions solely on the basis of affidavits." 140 F.3d at 1324. Unless there were no issues of fact to be decided by a trial, affidavits alone were insufficient for the Court to make a finding of concept. The Court found that where "the affidavits offered in support of a finding of contempt are uncontroverted; we have held that a district court's decision not to hold a full-blown evidentiary hearing does not violate due process." *Id.* In the absence of such a circumstance, the contemnor is entitled to a trial. *Id.*

In Ms. Dean's case, the Receiver's hearsay and insufficient affidavits were controverted by Ms. Dean's extensive testimony. The Receiver had no competent evidence to support a contempt citation. *Autotech Techs. LP v. Integral Rsch. & Dev. Corp.*, 499 F.3d 737, 751 (7th Cir. 2007) ("One consequence of this failure [to submit sufficient affidavits in support of contempt] was that it neglected to provide enough information to carry its burden of proof."). The Magistrate's ruling of granting the Motion to Compel for OSC Re Contempt and Turn Over order and awarding attorney's fees was reversible error because there was no trial in the face of Ms. Dean's extensive controverting of the Receiver's claims and hearsay affidavits.

2. The Magistrate's fee award was based on hearsay

a. The Isaacson Letter was hearsay

The Magistrate stated:

> "Receiver provides to the Court a letter from an attorney who was aware of the chain of events involving the funds at issue. ECF No. 275-1 at 2." (Magistrate 11-17-22 Order, p. 13, lines 1-2).

However, it is improper to force Kamille Dean to pay attorney's fees based on the unauthenticated and hearsay letter of "an attorney." The only evidence to which the Magistrate could turn to was the unsworn Letter from Attorney Janeen Isaacson dated June 13, 2022 (Dkt. 276-1), who has no personal knowledge of the matters contained in her letter. She testified to what some other attorney did in her law firm, and her testimony was incompetent hearsay upon hearsay.

The statements in the Letter did not set forth where the money came from, who the owner of the money might be, or any basis to claim the money was Receivership property. *Progressive Cas. Ins. Co. v. F.D.I.C.*, 80 F. Supp. 3d 923, 934 (N.D. Iowa 2015) ("Similarly, statements in an affidavit based on what the affiant 'learned' or 'heard' about a decision or a decision-making process are hearsay and do not satisfy the 'personal knowledge' requirement. *Ward v. International Paper Co.*, 509 F.3d 457, 462 (8th Cir.2007)."). The Isaacson Letter was unauthenticated, hearsay on hearsay, and irrelevant because it did not establish the source of the funds. *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (unauthenticated documents cannot be considered in the absence of testimony establishing authenticity).

b. Allegations of Contempt of Court may not be based on hearsay

The Magistrate stated:

> "Ms. Dean makes an unpersuasive argument that this evidence is hearsay and fails to identify the source of the funds. The letter clearly states the funds were transferred from Judd or one of the other Defendants/Receivership Defendants to Mr. Peters and then to Ms. Dean. There is no mention of Judd's family members or that the source of funds was other than Defendants or Receivership Defendants. The letter is based on the personal knowledge of an attorney familiar with the chain of events involving the funds at issue. Id." (Magistrate 11-17-22 Order, p. 13, lines 8-13).

However, the Letter (Dkt. 276-1) was unsworn and based on hearsay upon hearsay reciting what some other attorney told Attorney Isaacson. (Dkt. 276-1). It was not admissible in evidence. Ms. Isaacson not only failed to submit a sworn affidavit, but also she did not know who wired funds, from where they were wired, the purpose for which they were wired, or where the funds came from. She did not state in her Letter if they belonged to Jeffrey Judd or some other person, when the funds were acquired, or the source or legitimacy of the funds. Her statement is incompetent hearsay and provides no proof to support the Receiver. *Le v. Humphrey*, 2012 WL 12871812, at *13 (N.D. Ga. Aug. 10, 2012) ("In considering petitioner's motion for sanctions and contempt, the court has disregarded the affidavit to the extent that it is not based on personal knowledge, is based on hearsay, or contains legal conclusions.").

Evidence that would not be admissible under established federal rules regarding the competency of evidence at trial may not be considered on a motion for contempt. *See United States v. Bukowski*, 435 F.2d 1094, 1105–06 (7th Cir.1970) ("the standard for proof of guilt assumes the competency of the evidence considered in testing its sufficiency. We see no grounds for departing in contempts from established federal rules regulating the competency of evidence"); 17 C.J.S. Contempt § 89 ("Under the general rules of evidence which are applicable in civil or criminal proceedings, evidence which is not competent, relevant, and material is inadmissible in a contempt proceeding"). A contempt finding may not be based on hearsay. *Lindell v. Frank*, 2003 WL 23167276, at *1 (W.D. Wis. Dec. 31, 2003) ("He does not have personal knowledge of the reason other prisoners believe they may have been denied photocopies or clippings. Therefore, his statements are hearsay and not admissible as evidence in support of his contempt motion.").

Ms. Isaacson was not the Custodian of Records for the other Attorney Peters' trust account and she had no personal knowledge of how the Trust Account was administered, when money was deposited, where the money came from, or when or why it was disbursed. *Allen v. Campbell*, 2021 WL 2936129, at *2 n. 1 (D. Idaho July 13, 2021) (statements made in a contempt proceeding which are hearsay should be stricken); *F.T.C. v. Neovi, Inc.*, 2011 WL 1465590, at *3 (S.D. Cal. Apr. 18, 2011) (evidence of thousands of pages of websites was hearsay and may not be considered in a contempt proceeding). Ms. Isaacson's unsworn Letter was testimonial and came as hearsay upon hearsay from some other person. Ms. Isaacson is an Attorney working for a law firm other than Mr. Peters' law firm, where the funds were held and then wired. She never identifies how she "learned" of any of the hearsay information contained in her letter. She had no personal knowledge which the Magistrate ignored. *Progressive Cas. Ins. Co. v. F.D.I.C.*, 80 F. Supp. 3d 923, 934 (N.D. Iowa 2015) ("Similarly, statements in an affidavit based on what the affiant 'learned' or 'heard' about a decision or a decision-making process are hearsay and do not satisfy the 'personal knowledge' requirement. *Ward v. International Paper Co.*, 509 F.3d 457, 462 (8th Cir.2007).").

3. <u>The Consumer Defenders case does not support the Magistrate's Order</u>

The Magistrate cites *Fed. Trade Comm'n v. Consumer Def. LLC*, 2019 WL 861385, at *1 (D. Nev. Feb. 22, 2019), for the proposition the Court may award attorney's fees "to replenish the receivership estate following the filing of unnecessary motion" (Magistrate 11-17-22 Order, p. 19, lines 19-20). However, the *Consumer Defense* case involved a Defendant's Motion to Compel Production of Records and Quash Subpoenas. The Court found that the Motions were frivolous and awarded discovery sanctions and attorney's fees. The Court stated:

> "The court finds that both motions are indeed a waste of judicial resources and an unnecessary dissipation of the assets of the receivership estate. Hanley is warned that sanctions will be imposed

for any future abusive litigation misconduct requiring the court, the parties, or non-parties to expend unnecessary resources on motion practice." *Id.* at * 3.

In Ms. Dean's case, the Magistrate made no such finding. Ms. Dean was placed in a legal vice where her five (5) Clients and two (2) contract Attorneys with Attorney's Liens demanded she not part with the funds in her Trust Account. For the Magistrate to suggest that Ms. Dean was frivolous or wasting judicial resources by complaining of the improper legal vice the Receiver knowingly created without any evidence to meet his burden of proof lacks foundation. Ms. Dean did not waste the Court's resources and her objections to the receiver's Contempt of Court was well taken.

D. <u>The Magistrate's Committed Error in Not Permitting an Interpleader</u>

1. <u>The Court awarded attorney's fees based on an improper burden of proof</u>

The Magistrate stated:

"Ms. Dean argues she must file an interpleader action in Arizona because the disputed funds are held in an Arizona attorney trust account. ECF No. 259 at 6. The Court finds that an interpleader action is not necessary because the District of Nevada is the proper overseer of property subject to Receiver's powers. The burden of proving the funds at issue are not property of the receivership estate is on Ms. Dean. Ms. Dean has not met her burden." (Magistrate 11-17-22 Order, p. 18, lines 9-13).

However, this was a contempt proceeding where the Receiver has the burden to prove by clear and convincing evidence every element of contempt. *Carrick v. Santa Cruz Cnty.*, 2013 WL 3802809, at *6 (N.D. Cal. July 16, 2013), aff'd, 594 F. App'x 443 (9th Cir. 2015) ("The Court notes that, in a civil contempt proceeding, "[t] he party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by 'clear and convincing evidence[.]" *Ayres*, 166 F.3d at 994 (*quoting In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir.1993)."). The Magistrate's ruling that Ms. Dean had the "burden of proving the funds at issue are not property of the receivership" was plain error. The Magistrate has permitted a Receiver to take Ms. Dean's property without due process of law based on his hearsay claim that the property belongs to him, which thereby permits a Receiver to take any property from any person unless the victim can assume the burden of proof of showing the property belongs to the victim. That is not the law.

The Receiver has the burden of proof by clear and convincing evidence in a Contempt and Turn Over proceeding to prove every element of contempt and that the funds belong to the Receiver. *Maggio v. Zeitz*, 333 U.S. 56, 64, 68 S. Ct. 401, 405, 92 L. Ed. 476 (1948) ("This Court has said that the turnover order must be supported by 'clear and convincing evidence,' *Oriel v. Russell*, 278 U.S. 358, 49 S.Ct. 173, 174, 73 L.Ed. 419,"); *Carrick v. Santa Cruz Cnty.*, 2013 WL 3802809, at *6 (N.D. Cal. July 16, 2013), aff'd, 594 F. App'x 443 (9th Cir. 2015) (every element of civil contempt must be demonstrated by "clear and convincing evidence"). The Kendricks and Zaro Affidavits recounted hearsay emails that contain none of the elements

of a Contempt of Court and provided no clear and conniving evidence to justify a Contempt of Court. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir.1990) (as part of a prima facie case, the trustee or receiver must demonstrate by clear and convincing evidence that the assets in question are part of the trustee or receiver's estate). The Magistrate's Order for fees was based on hearsay and an improper allocation of burden of proof.

2. <u>The Magistrate misallocated the burden of proof in awarding fees</u>

The Affidavits of Attorneys Zaro and Kendricks in support of the Receiver's Order to Show Cause re Contempt were hearsay and provided no evidence that the funds were Receivership property. The Letter from Attorney Janeen Isaacson attached to the 8-29-22 Opposition Dkt. 276, p. 5, line 25, to p. 6, line 4. *See* Dkt. 276-1) was hearsay because Ms. Isaacson purported to testify about the trust account of another attorney from a different firm where she had no personal knowledge of any of the events to which she attempted to recount in an unsworn Letter. There was no evidence to support the Magistrate's conclusion the funds Ms. Dean held were Receivership property.

In *Sec. & Exch. Comm'n v. Torchia*, 922 F.3d 1307, 1312-13 (11th Cir. 2019), the Court stated:

> "As the movant, the receiver had the burden to show that the receivership was entitled to the requested relief. *See, e.g., Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990). *Cf. Donell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008) (discussing a receiver's burden in recovering false profits); *In re Bernard L. Madoff Inv. Sec. LLC*, 454 B.R. 317, 331, 334-35 (Bankr. S.D.N.Y. 2011) (same). Throughout the process, however, the receiver did not submit any evidence to the district court justifying his determination that the Sutherlands were obligated to remit fictitious profits or supporting his calculations of the fictitious profits. *Cf. Wiand*, 753 F.3d at 1199, 1204 (affirming summary judgment order that allowed the receiver to recover "false profits" where the receiver alleged that the Ponzi scheme paid out investors in excess of their original investment and provided evidence of specific transactions)."

The Courts and commentators are overwhelming in their conclusion that the Receiver bears the burden of proof by clear and convincing evidence whenever the receiver seeks to obtain funds from a third party. *Evans v. Robbins*, 897 F.2d 966, 968 (8th Cir. 1990) (trustee and receiver have burden of proof to show entitlement to third party funds); *Donell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008) (receiver has the burden of proof by clear and convincing evidence in recovering false profits from third parties); *In re Lawrence*, 251 B.R. 630, 640 (S.D. Fla. 2000), *aff'd*, 279 F.3d 1294 (11th Cir. 2002) ("The burden of proof in a turnover proceeding is at all times on the receiver or trustee; he must at least establish a prima facie case. After that, the burden of explaining or going forward shifts to the other party, but the ultimate burden or risk of persuasion is upon the receiver or trustee." *Id.* (*quoting Gorenz v. Illinois Dept. of Agriculture*, 653 F.2d 1179, 1184 (7th Cir.1981) (further cites omitted));" 65 Am. Jur. 2d Receivers § 249 (2022)("As in any other action, in an action by a receiver, the receiver bears the burden of proof of entitlement to the relief

requested."); Fletcher Cyclopedia of the Law of Corporations § 7853.20 (2022)("The receiver has the burden of proof to sustain his or her claim in an action to recover assets."); 3B Fed. Proc. Forms § 8:274 (2022)("The burden of proof is on the receiver in an action to collect bank assets")

The Magistrate's ruling that the burden is on Ms. Dean to prove the funds were not tainted was clear error and violated the requirement the Receiver prove every element of contempt by clear and convincing evidence and that to obtain a turn over order the Receiver has the burden to show the property belongs to the Receivership Estate. The Magistrate's placement of the burden on Ms. Dean was a violation of due process and permitted the taking of property without evidence. The Magistrate's Order should be reversed.

E. The Magistrate Awarded Attorney's Fees in Violation of 28 U.S.C. Section 754

1. The Receiver violated section 754 by failing to file Notice in Arizona

The Magistrate and the Receiver conceded that the Receiver failed to file the Receivership Order in Arizona as mandated by section 754. That failure deprived the District Court of jurisdiction over the funds in Ms. Dean's Trust Account. *Securities Exchange Commission v. Ross*, 504 F.3d 1130, 1145 (9th Cir. 2007)("failure to file [Notice of Receivership and Complaint] in any given district within ten days of the receiver's appointment generally 'divest[s] the receiver of jurisdiction and control over all such property in that district.'")(quoting 28 U.S.C. § 754). However, in an illegitimate attempt to save the Receiver from his jurisdictional error, the Magistrate attempted to call an Amended Order to the Receivership Order a "Reappointment" when the Receiver never asked for such relief in the Motion for the Amendment, never told Ms. Dean or the Court that he had failed to file the Notice in Arizona, and the July 28, 2022, Order on its face is not a Reappointment where Ms. Dean would have had the opportunity to show the prejudice the failure to file the Notice in Arizona had on her, her Clients and the Contract Attorneys.

2. An Amendment does not meet the requirements for Reappointment

The Magistrate ruled that the Receiver obtained Amended Order on July 28 2022, and thereafter filed the Original June 3 2022, order in Arizona, but not the Amended Order. (Magistrate 11-17-22 Order, pp. 14-17). The Amended Order had nothing to do with Ms. Dean or the property she held, but was an order dealing solely with control over property of Larry Jeffery, Jason Jenne, Seth Johnson, Christopher Madsen, Richard Madsen, Mark Murphy, Cameron Rohner, and Warren Rosegreen. The Amended Order did not constitute an a Reappointment and did not purport to be a Reappointment of the Receiver. An Amended Order is not the same as a Reappointment, and the Amended Order in this case had nothing to do with a Reappointment. The Magistrate's holding that an amendment is a reappointment is clear error.

The Magistrate's holding allowed the Receiver to conceal when he applied for the Amended Order on June 30, 2022 (Dkt. 120) that he had not filed Notice in Arizona, and that the Receiver used the

Amended Order which had nothing to with Ms. Dean or his section 754 failure to mislead the Court into thinking the Amendment was a simple matter which had nothing to do with Reappointment. The Receiver never filed the Amended Order dated July 28, 2022, in Arizona and only filed the Original Order in Arizona on August 5, 2022, which had been superseded and only half-an-Order given the Amendment.

Ms. Dean's name is absent from the Receiver's request to Amend the Receivership Order although the Receiver knew all about Ms. Dean on June 30, 2022, when the Motion was filed (Dkt. 120). The Receiver engaged in material concealment of his section 754 violation. The Amendment to the Order did not constitute a Reappointment because the standards for a Reappointment are different from the standards for an Amendment. 28 U.S.C. § 3103; Rule 66, Federal Rules of Civil Procedure; *Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 844 (9th Cir. 2009) (setting for specific requirements for appointment).

3. <u>The Amended Order was not a Reappointment</u>

When assessing whether a federal receivership is appropriate, federal courts first determine whether they may exercise jurisdiction and then consider the following factors: "(1) the probability that fraudulent conduct has occurred or will occur; (2) the validity of the claim by the party seeking the appointment; (3) whether there is an imminent danger that property will be concealed, lost, or diminished in value; (4) the inadequacy of [alternative] legal remedies; (5) the lack of a less drastic equitable remedy; and (6) the likelihood that appointing the receiver will do more good than harm." *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316-17 (8th Cir. 1993) (discussing the factors relevant to the receivership inquiry). Because the Receiver has a fiduciary duty to the Court, the proposed Receiver must be qualified to serve in the role and have a demonstrated capability and competence to assume his responsibilities.

The Receiver's request for an Amendment was not a Reappointment, and the Receiver's request for an Amendment without disclosing the failure to file in Arizona would be misleading if somehow the Amendment was a Reappointment. The SEC and Receivers have sought reappointment in many different cases, and they are required to make full disclosure of the reasons for Reappointment in direct contradiction to the Receiver's concealment in this case. *See Terry v. Walker*, 369 F. Supp. 2d 818, 820 (W.D. Va. 2005) (order reappointing receiver mandatory after SEC Receiver failure to comply with 28 U.S.C. section 754); *Warfield v. Arpe*, 2007 WL 549467, at *12 (N.D. Tex. Feb. 22, 2007) (SEC sought receiver reappointment following failure to comply with section 754); *Federal Trade Comm'n v. Digital Altitude, LLC.*, 2019 WL 5290384 (C.D. Cal. May 31, 2019) (Motion to Reappoint Receiver following failure to comply with section 754); *SEC v. Arisbank*, Case No. 18 V 0186, Docket No. 21 (N.D. Tex. Apr 3, 2018)(Motion for Reappointment for failure to comply with section 754).

In this case, the Amendment to the Order was not a Reappointment. The Amendment contained no finding the Receiver should be reappointed. Reappointment is not automatic, and the Magistrate committed error in holding the Amendment was a Reappointment.

4. The Receiver failed to file the Amended Order in Arizona

The Receiver failed to file the July 28, 2022, Amended Order in Arizona. While the Receiver did file the original June 3, 2022, Order in Arizona two (2) months late on August 5, 2022, (Exhibit "B") that filing was incomplete and ineffective because (1) the late filing was jurisdictionally defective under section 754, and (2) the Amendment which created a new Order and superseded the original Order without the Amendment being attached was not filed. *Sackett v. U.S. Env't Prot. Agency*, 8 F.4th 1075, 1081 (9th Cir. 2021), *cert. granted in part sub nom. Sackett v. Env't Prot. Agency*, 142 S.Ct. 896 (2022) ("The amended compliance order 'supersede[d] and replace[d]' the original compliance order."). The Receiver filed an incomplete half-of-an-Order which failed to comply with section 754 even had the filing not been two (2) months late. (See Arizona Docket which shows no filing until August 5, 2022, and no filing of the Amendment, Exhibit "C").

In *Terry v. Walker*, 369 F. Supp. 2d 818, 820 (W.D. Va. 2005), the Court stated: "In fact, the courts in both cases [*Terry v. Virginia June*, 2003 WL 21738299, at *3, (Jul. 21, 2003) and *Terry v. June, Sr.*, 2003 WL 22125300, at *3, (Sep. 12, 2003)] held that a receiver may comply with the § 754 requirements by obtaining an order of reappointment and then filing the order and the complaint within ten days from the entry of the order of reappointment, even without extraordinary circumstances. *SEC v. Vision Communications, Inc.*, 74 F.3d at 290-91; *SEC v. Heartland Group, Inc.*, 2003 WL 21000363, at *5.

However, in this case the Receiver did not obtain a Reappointment and failed to file the Amended Order in Arizona. The Receiver only filed the original Order on August 5, 2022, which was jurisdictionally void. If there had been an Order Reappointing the Receiver, the Receiver had to file that Order within 10-days of the Reappointment. Here, the Receiver failed to file the Amended Order in Arizona because the Receiver knew the Amendment was not a Reappointment. The subterfuge and jurisdictionally void original half-an-Order of June 3, 2022, did not comply with section 754.

5. The Ashmore case does not support the Magistrate's position

The Magistrate cited *Ashmore v. Barber*, 2016 WL 4555340, at *5 (D.S.C. Sept. 1, 2016), for the proposition that an amended receivership order 'restarts' the 10-day clock under which the receiver is to file a Section 754 registration. (Magistrate 11-17-22 Order, pp. 15-16). However, in *Ashmore* the Order was a Reappointment, not an Amendment. The Ashmore Reappointment took place in *In re Receivership of Wilson*, Case No. 12-cv-02078 (D.S.C. Oct.. 28, 2015) (Dkt. 164). (See Exhibit "D 10-28-15 Order in *In re*

Receiver of Wilson, Dkt. 164)("After consideration, the court GRANTS the Receiver's Motion to remove the Halls from the January 13, 2015 Order. This Order replaces and supersedes the Order of January 13, 2015."). The Order was a Reappointment, not an Amendment. *Id.* 1-26). The Receiver then filed the new Order in Georgia because the original Order was superseded. (Exhibit "E" *In re Receivership of Wilson*, USDC, Southern District of Georgia, Case No.15-mc-00019 Dkt. 1).

In Ms. Dean's case, the July 28, 2022, Amendment (Dkt. 207; Exhibit "A") is an Amendment and not a Reappointment. It does not recite that the Receiver is qualified to assume the receivership and it does not set for the Receivers powers as does the original June 3, 2022, Order (Dkt 88). The July 28, 2022, Order amends, but does not supersede the old Receivership June 3, 2022, Order (Dkt. 88) because it was not a Reappointment and contained none of the descriptions of the Receiver's powers, duties, obligations, or property to be administered other than the addition of the new Defendants. The Receiver did not file the Amended Order (Dkt 207) in Arizona, but rather the Receiver filed the Original June 3, 2022, Order in Arizona as Docket 3 in the US District Court, District of Arizona, Case No. 22-mc-00043. (Exhibit "B").

In Ms. Dean's case there has been no Reappointment. The Amendment, which was never filed in Arizona, did not start the 10-day period of section 754 running anew. The Receiver's effort to conceal his failure is inappropriate.

6. <u>The Magistrate failed to consider Ms. Dean was irreparably prejudiced</u>

The Magistrate failed to address whether Reappointment was proper given the Receiver's Original failure to file in Arizona within 10-days as required by section 754, because Ms. Dean had experience prejudice as a result of the Receiver's failure. *S.E.C. v. Equity Serv. Corp.*, 632 F.2d 1092, 1096 (3rd Cir. 1980) (a Receiver may seek reappointment in order to file a new notice under section 754 when there has been a failure to do so within 10-days of appointment "as long as the rights of others have not been prejudiced during the intervening period."). Ms. Dean demonstrated the violation prejudiced Ms. Dean, her Clients, Attorneys, and vendors by misleading her that there was no Receivership proceeding or jurisdiction asserted over funds in her Trust account. Ms. Dean and here Contract Attorney incurred hundreds of thousands of dollars in attorney's fees as a result.

The Magistrate's holding that the Receiver could use an Amendment obtained without notice and opportunity to Ms. Dean to be heard on the prejudice the Receiver caused by his failure to file in Arizona was clear error and deprived Ms. Dean of due process of law. The Magistrate ignored Ms. Dean's testimony regarding her prejudice and the Receiver's failure to present any evidence to refute Ms. Dean's prejudice. The Magistrate did not discuss any of the following injuries inflicted on Ms. Dean and her Clients to which she testified in her Motion to Quash (Dkt. 210):

(1) Ms. Dean was irreparably injured because she provided $201,060 in emergency service at the demand of the SEC to comply with subpoenas when the SEC knew it would take action to prevent her from being paid with false claims of the Receiver's jurisdiction over her;

(2) Ms. Dean turned over $48,940 to the Receiver in detrimental reliance of the Receiver's concealment of his section 754 violation and false claims of jurisdiction over Ms. Dean;

(3) The Receiver's demands Ms. Dean turn over money in contradiction to her Clients' demands the money not be turned over placed Ms. Dean in a draconian legal vice that has inflicted severe emotional distress, financial harm, and physical injury on Ms. Dean;

(4) The relationship between Ms. Dean and her other five (5) Clients has been irreparably injured by the Receiver's demands the money be turned over to the Receiver and Ms. Dean's inability to fulfill her service to her Clients because of the Receiver's demands;

(5) The relationship between Ms. Dean and her contractor attorneys, Mr. Phil Escolar and Ms. Maureen Jaroscak, has been irreparably injured because of her inability to fulfill her commitments to them;

(6) The relationship between Ms. Dean and her staff and secretaries has been irreparably injured because of Ms. Dean's inability to fulfill her commitments or pay them due to the Receiver's demands;

(7) The Receiver engaged in deception by demanding money and Ms. Dean sending the Receiver $48,940 representing the unused portion of the fees and Jeffrey Judd's beneficial when the Receiver concealed his failure to comply with section 754 thereby inflicting financial harm and emotional distress.

Whenever there is a constitutional violation of an individual's rights damages are presumed. *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983) ("[Plaintiffs] also demonstrated a possibility of irreparable injury by showing violations of their constitutional rights which, if proven at trial, could not be compensated adequately by money damages and by showing that the INS was reasonably likely to continue those practices."); *Trevino v. Gates*, 99 F.3d 911, 921 (9th Cir.1996) ("[p]resumed damages are appropriate when there is a great likelihood of injury coupled with great difficulty in proving damages.").

In this case, Ms. Dean suffered irreparable injury because of the Receiver's failure to file in Arizona. She was entitled to notice, opportunity to be heard, and due process prior to any Reappointment to permit her to show prejudice. The Magistrate not only ignored these requirements, but also permitted the Receiver to use the tactic of an Amendment to constitute a Reappointment knowing of his failure to have filed in Arizona to defeat Ms. Dean's due process rights.

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III.

CONCLUSION

For the foregoing reasons, Third Party Kamille Dean, request the District Court not adopt the Magistrates November 17, 2022, Report and Order.

DATED: December 1, 2022

KAMILLE DEAN

By _____
Kamille Dean
Attorney in Pro Se

PROOF OF SERVICE

I, Maureen Jaroscak, am an attorney at law. I am over the age of 18 and not a party to the within action. My business address is 1440 Harbor Boulevard, Suite 900, Fullerton, CA 92835.

On December 1, 2022, I served the following document described as:

(1) NON-PARTY KAMILLE DEAN'S APPEAL FROM AND OBJECTION TO MAGISTRATE'S 11-17-22 ORDER AND REQUEST FOR DE NOVO REVIEW UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULE 72.3

(2) DECLARATION OF KAMILLE DEAN

on all interested parties in this action by serving a true copy through electronic service by gmail.com on the email addresses and parties indicated below. The machine indicated the electronic transmission was successfully completed as follows:

SEE ATTACHED SERVICE LIST:

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 1, 2022 , at Fullerton, California.

Maureen Jaroscak

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Notice has been delivered placing a copy of the documents in a sealed envelope, first class and affixed thereto, deposited into the US. Mail, at Los Angeles, California, addressed as follows:

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