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7 **UNITED STATES DISTRICT COURT**
8 **FOR THE DISTRICT OF NEVADA**

9
10 SECURITIES AND EXCHANGE COMMISSION,
11

12 Plaintiff,

13 v.

14 MATTHEW WADE BEASLEY et. al.

15 Defendants,

16 THE JUDD IRREVOCABLE TRUST et. al,

17 Relief Defendants.
18

Case No. 2:22-cv-0612-CDS-EJY

**NON-PARTY KAMILLE DEAN'S REPLY
TO RECEIVER'S OPPOSITION (DKT. 391)
TO MS. DEAN'S OBJECTION AND
REQUEST FOR TRIAL DE NOVO (DKT
380)**

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PLACE: Courtroom 6B

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I.

INTRODUCTION

Third Party, Kamille Dean, submits this Reply to the Receiver's Opposition in Support of her December 1, 2022, Objection (Dkt 380) of the Magistrate's November 17, 2022, Order. (Dkt. 368)

A. This Proceeding is Moot

On November 18, 2022, Ms. Dean sent the Receiver \$201,060 which consisted of all of the funds in Ms. Dean's Trust Account. There is nothing further Ms. Dean can do regarding this matter, and there is no reasonable expectation that Ms. Dean could repeat any conduct toward the Receiver. *United States v. W.T. Grant Company*, 345 U.S. 629, 633 (1953) (cessation of the complained of conduct renders case moot where defendant can establish there is no reasonable expectation that complained of conduct will be repeated). It is certain that the alleged conduct of which the Receiver has complained cannot recur.¹ 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533.5 (3d ed. 2002) (certainty of caseation and that there is an inability to repeat complained of action renders case moot).

While the Receiver has requested Attorney's fees, there can be no attorney's fees in a Turnover case. *In re Owners of Harvey Oil Ctr.*, 788 F.2d 275, 279 (5th Cir. 1986)(no attorney fees can be awarded in a property turnover case); *Clark v. F.D.I.C.*, 849 F. Supp. 2d 736, 755 (S.D. Tex. 2011)("FDIC [as Receiver] insists Plaintiffs cannot recover attorneys' fees [in a turnover case], and not just because their claim for wrongful foreclosure fails. Unless a statute or contract authorizes an award of such fees, the American Rule requires each party in federal litigation to pay its own fees."). There is no statute or contract which permits attorney's fees in this case, and there has been no showing of contempt of court, bad faith, or the generation of a common fund which are the other exemptions in the American Rule that each side bear their own fees. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 448, (2007)(attorney's fees not available unless exception to American Rule of no fees exists, including a statute, contract, bad faith contempt, or common fund). This is a property Turnover case, and there is no statue, contract, bad faith contempt, or common fund which would permit attorney's fees. *In re Promedco of Las Cruces, Inc.*, 2003 WL 21962443, at *16 (N.D. Tex. Aug. 12, 2003) (no attorney's fees available in turnover proceeding).

B. The Receiver Refused to Discuss Mootness

In Ms. Dean's 12-1-22 Objection to the Magistrate's November 17, 2022, Order (Dkt 380, 381), she set out her November 18, 2022, transfer of \$201,060 to the Receiver and that this case was moot. However,

¹ See *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67,72-73 (1983) (University's cessation of policy which permitted discriminatory organizations on campus rendered Title IX suit moot); . *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) ("[i]nterim relief or events have completely and irrevocably eradicated the effects of the alleged violation.").

1 when the Receiver filed his Opposition on December 15, 2022 (Dkt. 391) the Receiver failed to discuss
 2 whether this case was moot. In the Opposition the Receiver acknowledged in a footnote that Ms. Dean says
 3 she forwarded the funds to the Receiver (Dkt. 391, p. 3, line 26 n. 2), yet the Receiver still failed to discuss
 4 whether or not such action moots this case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23
 5 (1997) (plaintiff's counsel has a duty to bring to the court's attention facts which may raise an issue of
 6 mootness); *DHX, Inc. v. Allianz AGF MAT, Ltd.*, 425 F.3d 1169, 1175 (9th Cir. 2005) ("The failure to
 7 promptly disclose such facts is sanctionable conduct."). The Receiver has not contested Ms. Dean's
 8 Objection that the case is moot (Dkt. 381 Dean 12-1-22 Dec., p 1, lines 5-9; Dkt. 380 Dean 12-1-22
 9 Objection, pp. 1-2), and the Receiver has not identified any basis upon which the Court has jurisdiction to
 10 continue these moot proceedings. *In re Koo*, 2013 WL 5460138, at *3 n. 4 (B.A.P. 9th Cir. Oct. 1, 2013)
 11 (counsel has a duty to bring to the federal tribunal's attention, 'without delay,' facts that may raise a
 12 question of mootness.).

11 **C. The Court Should Take No Further Action**

12 There is nothing further the Court should do regarding this case. There is no basis to make an
 13 attorney's fee award or impose damages against Ms. Dean. *Church of Scientology of California v. United*
 14 *States*, 506 U.S. 9, 12 (1992) (a case is moot when the court cannot give any "effectual" relief to the party
 15 seeking it). There is no basis for an award of attorney's fees in a property Turnover case. *SEC v. Faulkner*,
 16 2019 WL 918222, at *3 (N.D. Tex. Feb. 25, 2019) ("But the Receiver has not established his entitlement to
 17 relief on the merits of his motion for turnover of assets, and, moreover, has failed to specify a legal basis for
 18 his request for attorney's fees. The court therefore denies his request for attorney's fees."). There is nothing
 19 more to be done in this case except to find it moot because there is no basis for an attorney's fees award in a
 20 turnover proceeding. *In re Owners of Harvey Oil Ctr.*, 788 F.2d 275, 279 (5th Cir. 1986) (no attorney's fees
 21 available in turn over proceeding); *In re Promedco of Las Cruces, Inc.*, 2003 WL 21962443, at *16 (N.D.
 22 Tex. Aug. 12, 2003) (no attorney's fees available in turn over proceeding).

22 **II.**

23 **MS. DEAN'S OBJECTION AND REQUEST FOR DE NOVO REVIEW IS MADE FROM A** 24 **DISPOSITIVE MAGISTRATE ORDER WHICH VIOLATES DUE PROCESS**

24 **A. The Turnover Proceeding Cannot Support an Attorney's Fees Award**

25 **1. The Claims of gamesmanship and delay are baseless**

26 The Receiver argues:

27 "Fees were awarded to the Receiver because of Ms. Dean's delays and gamesmanship that came at a
 28 significant expense to the estate." (Receiver 12-15-22 Opposition, p. 20, line 23).

1 However, there was no gamesmanship, and gamesmanship is not a basis for attorney's fees. A
 2 Turnover proceeding is not a basis for fees. *In re Owners of Harvey Oil Ctr.*, 788 F.2d 275, 279 (5th Cir.
 3 1986). Rather, it was the Receiver's violation of 28 U.S.C. section 754 and failure to file Notice of
 4 Receivership in Arizona within 10-days of his June 3, 2022, Receivership Order which has caused the
 5 problems in this case. (See Dean 12-1-22 Dec. Dkt. 395; Dean 12-22-22 Reply to SEC, pp. 7-12). The
 6 American Rule requires that there be a statute, contract, contempt of court involving bad faith, or common
 7 fund to support an award of attorney's fees, and none of the exceptions exist in Ms. Dean's case.²
 8 *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (courts have identified narrow exceptions to the
 9 American Rule requiring parties to bear their own attorney's fees, which "fall into three categories": (1) the
 10 common fund exception, discussed *supra*, (2) assessment of fees as a sanction for "willful disobedience of a
 11 court order," and (3) assessment of fees when a party has "acted in bad faith, vexatiously, wantonly, or for
 12 oppressive reasons." None of these requirements exist in Ms. Dean's case.

13 *In re Promedco of Las Cruces, Inc.*, 2003 WL 21962443, at *16 (N.D. Tex. Aug. 12, 2003), the
 14 Court stated:

15 "PMC-SW's request to recover attorneys' fees in connection with its turnover and accounting claims
 16 can also be disposed of at this time. The turnover claim arises under the Bankruptcy Code. As such,
 17 the general rule in federal court, the so-called 'American Rule,' is that attorneys' fees may not be
 18 awarded in the absence of express statutory authority or a contractual provision entitling the party to
 19 such a recovery. See *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and*
 20 *Human Res.*, 532 U.S. 598, 602 (2001); *Alaska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240,
 21 247 (1975); *Crain v. Limbaugh (In re Limbaugh)*, 155 B.R. 952, 961 (Bankr.N.D.Tex.1994); see
 22 *generally*, 20 Am.Jur. 2d, Costs § 59. As there is no statutory basis for an award of attorneys' fees
 23 for bringing a turnover and/or accounting claim under the Bankruptcy Code, see *Leverette v. NCNB*
 24 *South Carolina*, 118 B.R. 407 (Bankr.D.S.C.1990), even if PMC-SW prevails at trial on this claim,
 25 it is not entitled to recover attorneys' fees."

26 In Ms. Dean's case, there is no statute, contract, showing of bad faith, contempt of court, or
 27 generation of a common fund which could support an attorney's fees award. The Receiver's moot request
 28

29 ² In *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 448, (2007), the Court
 30 stated:

31 "Under the American Rule, "the prevailing litigant is ordinarily not entitled to collect a reasonable
 32 attorneys' fee from the loser." *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95
 33 S.Ct. 1612, 44 L.Ed.2d 141 (1975); see *Hauenstein v. Lynham*, 100 U.S. 483, 490-491, 25 L.Ed. 628
 34 (1880); *Arcambel v. Wiseman*, 3 Dall. 306, 1 L.Ed. 613 (1796). This default rule can, of course, be
 35 overcome by statute. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404,
 36 18 L.Ed.2d 475 (1967). It can also be overcome by an "enforceable contract" allocating attorney's fees.
 37 *Ibid.*"

1 for a Turn Over Order cannot support attorney's fees under any circumstances. The Receiver's request is
 2 improper, and the Magistrate's award of attorney's fees was plain error.

3 **2. The Receiver's claim of non-cooperation does not permit attorney fees**

4 The Receiver argues:

5 "Certainly, blatant and unjustified refusal to cooperate with the Receiver and the applicable Court
 6 mandates runs afoul of the purpose of a Receivership—to marshal and preserve the assets for the
 7 benefit of the victims." (Receiver 12-15-22 Response, p. 22, lines 5-7).

8 However, refusal to cooperate is not a basis for awarding attorney's fees. Here, it was the Receiver's
 9 failure to file in Arizona which was the problem. There must be a showing of a contract, statute, willful bad
 10 faith contempt, or creation of a common fund, none of which exist here.³ A "blatant and unjustified refusal
 11 to cooperate," which did not take place here, has never been a standard for awarding attorney's fees.⁴

12 In *SEC v. Faulkner*, 2019 WL 918222, at *3 (N.D. Tex. Feb. 25, 2019), the Court stated:

13 "The Receiver also requests that the court award him the attorney's fees he has incurred in
 14 attempting to recover assets from Frost. He contends that he is entitled to such fees because Frost
 15 has 'no valid reason' for failing to turn over the cash backing the cashier's checks. Receiver Br. 12.
 16 But the Receiver has not established his entitlement to relief on the merits of his motion for turnover
 17 of assets, and, moreover, has failed to specify a legal basis for his request for attorney's fees. The
 18 court therefore denies his request for attorney's fees."

19 ³ In *Clark v. F.D.I.C.*, 849 F. Supp. 2d 736, 755 (S.D. Tex. 2011) the Court stated:

20 FDIC [as Receiver] insists Plaintiffs cannot recover attorneys' fees, and not just because their claim
 21 for wrongful foreclosure fails. Unless a statute or contract authorizes an award of such fees, the American
 22 Rule requires each party in federal litigation to pay its own fees. *Alyeska Pipeline Serv. Co. v. Wilderness
 23 Society*, 421 U.S. 240, 245–65, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Plaintiffs fail to identify a contract or
 24 statutory authorization providing for fees here.

25 ⁴ In *Baker Botts L.L.P. v. ASARCO, LLC*, 276 U.S. 121, 126, 135 S.Ct. 2158, 2164, 192 L.Ed.2d 208
 26 (2015), the Court stated:

27 "Our basic point of reference when considering the award of attorney's fees is the bedrock principle
 28 known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute
 or contract provides otherwise." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253,
 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010) (internal quotation marks omitted). The American Rule has
 roots in our common law reaching back to at least the 18th century, *see Arcambel v. Wiseman*, 3
 Dall. 306, 3 U.S. 306, 1 L.Ed. 613 (1796), and "[s]tatutes which invade the common law are to be
 read with a presumption favoring the retention of long-established and familiar [legal] principles,"
Fogerty v. Fantasy, Inc., 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994) (internal
 quotation marks and ellipsis omitted). We consequently will not deviate from the American Rule "
 'absent explicit statutory authority.'" *Buckhannon Board & Care Home, Inc. v. West Virginia Dept.
 of Health and Human Resources*, 532 U.S. 598, 602, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001)
 (quoting *Key Tronic Corp. v. U.S.*, 511 U.S. 809, 814, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994))."

1 In this case, the Receiver's request for Turnover Order does not arise under any statute. There is no
 2 contract, bad faith contempt, or a common fund. There is no legal basis for the award of attorney's fees.

3 **3. There is no evidence of and the Magistrate did not find vexation**

4 The Receiver argues:

5 "That is, in this case, Ms. Dean's dilatory and unwarranted behavior and her vexatious litigation
 6 tactics have diminished the amount of funds available to make the victims whole. For that reason,
 the Order provides for an award of all fees and costs incurred in bringing the Motion to Compel."
 (Receiver 12-15-22 Response, p. 22, lines 7-10).

7 However, the Magistrate did not find any vexatious tactics from Ms. Dean, and the Receiver's claim
 8 is made from whole cloth. The Receiver's December 1, 2022, Motion for Fees (Dkt. 378), never mentions
 9 vexation, bad faith, or any basis for sanctions, and it gave Ms. Dean no notice of any attempt to sanction her
 10 for vexatious acts. There is no basis to award attorney's fees for "vexatious litigation tactics," of which the
 11 Magistrate found no evidence and the Receiver never mentioned. There was no notice of a claim that Ms.
 12 Dean "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501
 U.S. 32, 45 (1991).⁵ This is a Turnover proceeding where there can be no attorney's fees award.

13 The Receiver cites *Fed. Trade Comm'n v. Consumer Def LLC*, 2019 WL 861385 (D. Nev. Feb. 22,
 14 2019), claiming the Court may award attorney's fees "to replenish the receivership estate following the filing
 15 of unnecessary motion" (Receiver 12-15-22 Opposition, p. 20, line 26, to p. 21, line 2). However, in Ms.
 16 Dean's 12-1-22 Objection she points out that *Consumer Defense* is a discovery case involving subpoenas
 17 and document turnover under Rule 37 which provides for an attorney's fee award. (Dean 12-1-22
 Objection, pp. 17-18). The Receiver has ignored the obvious, and the use of a discovery case is baseless.

18 In *In re Leverette*, 118 B.R. 407 (Bankr. D.S.C. 1990) the debtor filed a Chapter 13, proceeding and
 19 then brought an adversary proceeding against a creditor who had repossessed their automobile seeking a
 20 Turnover Order. The Court held that automobile was property of the bankruptcy estate and ordered it to be
 21 turned over to the Estate. However, the Court denied attorney's fees finding that there was no statute,
 22 contract, showing of bad faith, or contempt of court which would support an attorney's fees award in a turn
 over proceeding under federal law. *Id.* at 409. The Court stated:

23 "There has been no showing of malice or bad faith on the part of the defendant, nor has the
 24 defendant acted willfully in refusing to return the automobile, and contempt is not warranted.
 25 "This court has previously held in *In re Smith*, Case No. 87-02792, C-88-0015 (Bankr.D.S.C. 8-5-
 88) that:

26
 27 ⁵ The Receiver's argument of counsel, which is not evidence, is a fiction with no supporting evidence,
 28 declaration, or facts. *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir. 1986) ("statements and
 argument of counsel are not evidence.").

1 “As a general policy, federal courts follow the ‘American Rule’ which does not allow the
2 award of attorney fees or costs to successful litigants absent a statutory basis for such an
award or unless by specifically recognized exceptions such as bad faith litigation.

3 “See, *Mailers Unlimited, Inc. v. World Wide Direct Marketing*, 6 B.R. 238 (Bankr.E.D.Pa.1980),
4 *citing Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141
(1975), *Daly v. Hill*, 790 F.2d 1071 (4th Cir.1986), *In re Jessee* 77 B.R. 59 (Bankr.W.D.Va.1987), *In*
5 *re Ratmansky*, 2 B.R. 527 (Bankr.E.D.Pa.1980); 9 Collier on Bankruptcy ¶ 7054.07 (15th ed.).

6 “Congress has not ... extended any roving authority to the Judiciary to allow counsel fees as
7 costs or otherwise whenever the courts might deem them warranted. What Congress has
done, however, while fully recognizing and accepting the general rule, is to make specific
and explicit provisions for the allowance of attorney fees under selected statutes granting or
protecting various federal rights. *Alyeska Pipeline Co.*, 421 U.S. at 260 [95 S.Ct. at 1623].”

8 “Since there is no statutory basis for an award of attorney fees and costs in bringing an
9 adversary proceeding for turnover, the general “American Rule” against awarding attorney fees and
costs to the successful litigants would appear to prevail.” *Id.* at 409-10.

10 In this case, the Receiver’s Motion to Compel a Turnover of property involved no statutory, contract,
11 bad faith, or common fund exception to the American Rule which prohibits the award of attorney’s fees
absent these limited factors. There was not one word in the Receiver’s Memorandum of Attorney’s Fees
12 and Costs (Dkt. 378) that Ms. Dean acted in bad faith, vexatiously, or wantonly, and the Receiver’s
13 improper attempt to change the basis for an award of attorney’s fees to claim without one scrap of evidence
or declaration to support the baseless claim is improper. The Receiver has asked this Court to turn a blind
14 eye to the conflicting claims which were asserted against Ms. Dean by her Clients and Contract Attorneys,
15 while the Receiver had violated 28 U.S.C. section 754 by not filing Notice in Arizona, which meant the
16 Receiver had no jurisdiction over Ms. Dean.

17
18 **4. The Receiver states this is a Turnover and not a contempt proceeding**

19 The Receiver argues the Magistrate did not find Contempt against Ms. Dean and this is only a
20 Turnover proceeding. (Receiver 12-15-22 Opposition, p. 10, lines 4-78 (“the Order does not make findings
of contempt against Ms. Dean and the arguments in this regard should be summarily discarded. [¶] As this
21 Court is certainly aware, Ms. Dean was not found to be in contempt nor did any contempt proceedings
22 occur. The Receiver’s Motion sought an order compelling Ms. Dean’s compliance with court mandates”).
Because there was no failure to comply with Court mandates, the Receiver must demonstrate a Turnover
23 Order can support an award of attorneys’ fees, which is something the law does not permit.

24
25 In *In re Deiss*, 166 B.R. 92, 93 (Bankr. S.D. Tex. 1994), Chapter 13 debtor Deiss filed an adversary
26 proceeding against Southwest Recovery, who repossessed Deiss’ vehicles, for turnover of the vehicle that
27 was repossessed prepetition nonpayment of the merchant, The Wheel Hub (“TWH”), for “wheels” installed
28 on the vehicle. The Bankruptcy Court held creditor TWH was secured to extent of the vehicle’s value, but
that the debtor was entitled to return of car upon proof of adequate protection payments to TWH. The Court

1 denied the debtor any recovery of attorney's fees as the prevailing party for having to bring the turnover
2 action because attorney's fees are not recoverable in turnover actions. *Id.* at 94. The Court stated:

3 "However, attorneys' fees are not recoverable, as neither had any agreement with Deiss [the debtor]
4 covering attorneys' fees. *Lincoln Sav. Bank, FSB v. Ron Pair Enter.*, 880 F.2d 1540, 1549 (2nd
5 Cir.1989) (*interpreting United States v. Ron Pair Enter.*, 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d
6 290 (1989)); *City of Farmers Branch v. Pointer*, 952 F.2d 82 (5th Cir.1992), *cert. denied*, 505 U.S.
7 1222, 112 S.Ct. 3035, 120 L.Ed.2d 904 (1992)." *Id.*

8 The Receiver's reference to "months" of attempting to obtain funds from Ms. Dean are the same
9 months where the Receiver failed to file Notice of the Receivership in Arizona. Ms. Dean relied on the
10 failure to file because she was faced with conflicting claims from her Clients and contract attorneys' who
11 had the only viable claims against her and demanded she not distribute funds from her Trust Account, while
12 the Receiver had no jurisdiction or legal claim to the funds. (See Dean 12-15-22 Dec. Dkt. 395).

13 **5. Ms. Dean violated no Court Orders and there was no gamesmanship**

14 The Receiver argues:

15 "The award of attorneys' fees in this case comes down to Ms. Dean's failure to following valid
16 orders from this Court and her subsequent gamesmanship regarding the same. For months, the
17 Receiver attempted to work with Ms. Dean while she presented numerous excuses and
18 misrepresentations regarding her intended actions." (Receiver 12-15-22 Response, p. 22, lines 11-
19 14).

20 However, Ms. Dean never failed to follow any Order from the Court, and the Magistrate made no
21 findings that any Order existed as to Ms. Dean which she violated. Ms. Dean did not violate the Courts 4-
22 21-22 Preliminary Injunction (Dkt. 56), nor did she violate the Court's 6-3-22 Order Appointing the
23 Receiver (Dkt. 88). Neither of these Orders was directed at her and she did not violate them. The Magistrate
24 made no finding of gamesmanship, and gamesmanship is not a basis to award attorney's fees.

25 Nevertheless, the Receiver claims attorney's fees based on "Ms. Dean's failure to follow valid orders
26 from this Court." However, there was no Order directed to Ms. Dean, and there is no basis for attorney's
27 fees. The Receiver acknowledges the Magistrate made no contempt finding and this is a turnover
28 proceeding. (Receiver 12-15-22 Opposition, p. 10, lines 4-78 ("the Order does not make findings of
contempt against Ms. Dean and the arguments in this regard should be summarily discarded. [¶] As this
Court is certainly aware, Ms. Dean was not found to be in contempt nor did any contempt proceedings
occur. The Receiver's Motion sought an order compelling Ms. Dean's compliance with court mandates").

In *Johnson v. United States*, 578 F. Supp. 226, 228 (S.D.N.Y. 1984), the Court stated:

"Although this Court's October 28, 1983 Opinion and Order stated that plaintiff's entitlement to
costs, expenses, and counsel fees 'to date' was based in part upon 'the government's conduct in
derogation of the Court's order of September 27, 1983,' the Court did not expressly hold the

1 government in contempt of court, nor did it expressly find that the government had willfully violated
2 the order.

3 “In these circumstances, the Court finds that the government's conduct in derogation of this
4 Court's orders does not provide an independent basis for plaintiff's recovery which would allow
5 recovery beyond that permitted by § 7430. An award of the reasonable costs of prosecuting a
6 contempt, including attorney's fees, is appropriate only ‘if the violation of the decree is found to
7 have been willful.’ *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979). The
8 Court at this point in time is loath to engage in an examination of the intent of the New Orleans and
9 New York representatives of the defendant United States and its tax department in connection with
10 this matter, which for the moment is quiescent.

11 “For these reasons, the Court finds it appropriate to limit the recovery of expenses and
12 attorney's fees in this case to that allowable under § 7430.”

13 In this case, there is no basis to award Attorney's fees. There was no contempt of Court and a
14 Motion for Turnover Order cannot support an award of attorney's fees because there is no statute, contract,
15 bad faith contempt of court, or common fund involved. *Alyeska Pipeline Service Co. v. Wilderness Society*,
16 421 U.S. 240, 247 (1975). This case is moot, and there is no basis for an award of attorney's fees.⁶

17 **B. The November 17, 2020, Order was Dispositive and Subject to De Novo Review**

18 **1. This is a Turnover proceeding and not a Discovery matter**

19 The Receiver argues:

20 “Here, Dean has not demonstrated for the Court that the Order falls within the purview of
21 Rule 72(b)(3) as a dispositive motion, thereby warranting *de novo* review. Indeed, relevant authority
22 from the Ninth Circuit demonstrates that matters such as motions to compel are non-dispositive and
23 therefore subject to a “clearly erroneous” standard of review.” (Receiver 12-15-22 Opposition, p. 5,
24 lines 23-26).

25 However, the Receiver has played fast and loose with the phrase “motion to compel” as if this were
26 a Discovery proceeding. This is not a Discovery matter, and the Receiver may not pretend his Motion to
27

28 ⁶ In *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 609-10
(2001), the court stated:

“We have also stated that ‘[a] request for attorney's fees should not result in a second major
litigation,’ *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and have
accordingly avoided an interpretation of the fee-shifting statutes that would have ‘spawn[ed] a second
litigation of significant dimension,’ *Garland, supra*, at 791, 109 S.Ct. 1486. Among other things, a ‘catalyst
theory’ hearing would require analysis of the defendant's subjective motivations in changing its conduct, an
analysis that ‘will likely depend on a highly fact bound inquiry and may turn on reasonable inferences from
the nature and timing of the defendant's change in conduct.’ Brief for United States as Amicus Curiae 28.
Although we do not doubt the ability of district courts to perform the nuanced ‘three thresholds’ test
required by the ‘catalyst theory’—whether the claim was colorable rather than groundless; whether the
lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the
defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense,
see post, at 1852 (dissenting opinion)—it is clearly not a formula for ‘ready administrability.’ *Burlington v.*
Dague, 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).”

1 Compel is a discovery motion. Ms. Dean is not a party to this proceeding, and the Magistrate's Order was a
2 dispositive ruling on both Contempt and a Turnover Order subject to *de novo* review.

3 In *Lenard v. Argento*, 1986 WL 4182, at *2 (N.D. Ill. Mar. 26, 1986)

4 "Lenard's motion for a turnover order directly pertains to the garnishment of the proceeds of those
5 insurance policies. Hartford misreads Rule 1.70 c. 1, which authorizes Magistrates in this district to
6 review and report on dispositive pretrial matters generally. Although turnover orders are not listed in
7 sub-paragraphs (a) through (g) of that Rule, that list is illustrative and not exclusive since the list is
8 introduced with the phrase "such as the following."

9 In *Wachova Sec., LLC. v. Loop Corp.*, 2010 WL 1788402 (N.D.Ill. Mar. 29, 2010), the Court stated:

10 "12. Referrals under 28 U.S.C. § 636(b)(3) are subject to Fed. R. Civ. P. 72, which declares
11 magistrate judges' rulings on dispositive motions to be non-binding recommendations only. The
12 FDCPA, by contrast, states that its provisions trump those of the Federal Rules of Civil Procedure
13 where the two conflict. 28 U.S.C. § 3003(f). Thus, the magistrate judge in *Meux* may have been
14 permitted to issue a final turnover order directly appealable to the Seventh Circuit, but nowhere does
15 *Meux* discuss its applicability to cases referred under 28 U.S.C. § 636(b). Given that provision,
16 which limits a magistrate judge's authority to duties 'not inconsistent with the Constitution and laws
17 of the United States,' and given the interpretation of those limits in *King*, *Rajaratnam*, and *Alpern*,
18 *Banco* suggests that *Meux* does not expand a magistrate's powers to enter final judgments in post-
19 judgment proceedings conducted under state law. *Meux* does not discuss much less reconcile itself
20 with § 636(b) or this litany of Seventh Circuit authority.

21 "13. Based on the above authority, this Court's March 24 Order must be a Report and
22 Recommendation to the District Court. Under binding Seventh Circuit law, if a magistrate judge
23 issues a Report and Recommendation, the judge must also notify the parties that they must file any
24 objections to that Order with the District Court within 14 days or further appeal is waived.
25 *Provident Bank*, 882 F.2d at 261."

26 In *Michelson v. Schor*, 1996 U.S. Dist. LEXIS 16928, *5 (N.D. Ill., Nov. 15, 1996), the referral to
27 the Magistrate was pursuant to 28 U.S.C. § 636(b)(3) for "all post-judgment collection proceedings." *Id.* at
28 *2. The plaintiffs filed a motion for turnover of assets, which the Magistrate denied. *Id.* at *1. Defendants
asked the District Court to adopt the magistrate's recommendation, and the plaintiffs objected. *Id.* at *4. The
District Court acknowledged that because the referral to the Magistrate was pursuant to 28 U.S.C. §
636(b)(3), and because the parties did not consent to the referral, the Magistrate's ruling could not be a "final
appealable order" and instead "was actually a 'recommendation' to the district court to which the parties
may object." *Id.* at 5. Thus, the District Court undertook *de novo* review of the Turnover Order. *Id.* at *9.

In *Schiffman v. Schor*, 1996 WL 478637, at *1 (N.D. Ill. Aug. 21), the plaintiff Schiffman, in a
companion case to *Michelson v. Shore* above, filed a separate complaint for fraudulent conveyance against
the Michelson defendant's wife, Lisa Schor ("Schor"). Schor moved to dismiss, arguing that the Magistrate's
denial of the motion for turnover in her husband's case was *res judicata* and barred the claim against her. *Id.*
at * 3-4. Schor's motion to dismiss was denied, in part because the parties had not consented to the

1 Magistrate issuing a final judgment in her husband's case, and thus the Magistrate's disposition of the
2 turnover order in that case could not be a final judgment with preclusive effect. *Id.* at *6.

3 In this case, the Magistrate's ruling was a dispositive Order as to Ms. Dean who is not a party to this
4 proceeding.⁶ The Receiver's claims that the Order is non-dispositive ignores that Non-party Kamille Dean
5 did not consent to any referral to the Magistrate and that any Order as to a third party regarding Contempt of
6 Court or Turnover Order is a dispositive Order under Rule 72.2 and 72.3. Ms. Dean has Objected to the
7 Magistrate's Order and properly sought a *de novo* review from the District Court (Dkt. 380).

8 **2. The Magistrate's use of discovery turnover rulings was plain error**

9 There is no basis for the Receiver to point to Discovery rulings regarding turnover of documents
10 under Rule 37. The reference to these cases is baseless. The Receiver's August 1 2022, Motion for Order
11 to Show Cause re Contempt and Turnover Order (Dkt. 210) was not a discovery matter.

12 The Receiver cites *Bailey v. Gatan, Inc.*, 783 F. App'x 692, 694 (9th Cir. 2019), for the proposition
13 that the Magistrate makes a non-dispositive ruling on a Motion to Compel. (Receiver 12-15-22 Opposition,
14 p. 6, lines 7-8). However, in *Bailey*, plaintiffs brought action against defendants alleging claims under False
15 Claims Act under federal and California state law. The District Court denied plaintiffs Motion to Compel
16 Discovery and then granted defendants summary judgment. The Ninth Circuit affirmed finding Plaintiff
17 has failed to seek review of the Magistrate's Order on Discovery and was therefore bound by the Order
18 which was a non-dispositive ruling on a discovery matter. *Id.* at 694. The Court stated:

19 "Appellants appeal the magistrate judge's denial of their motion to compel discovery. Appellees
20 argue that Appellants failed to timely object under Rule 72, which provides that a party must object

21 ⁶ Professor Wright and Miller state:

22 "Motions thought "dispositive" of the action warrant particularized objection procedures and a
23 higher standard of review because "of the possible constitutional objection that only an article III judge may
24 ultimately determine the litigation." Other "motions and matters which can arise in the preliminary
25 processing of * * * a civil case" do not warrant this treatment; in those non dispositive cases a "magistrate's
26 determination is intended to be 'final' unless a judge of the court exercises his ultimate authority to
27 reconsider the magistrate's determination." Thus, in all pretrial matters the magistrate acts under the direct
28 supervision of the district judge, but in "dispositive" matters Congress chose to provide a framework for
objection and substantial review so as to avoid any constitutional concerns." 12 C. Wright & A. Miller,
Federal Practice & Procedure, Civil § 3068.2 (3d ed. 2022)

Professors Wright and Miller point to *In re U.S. for an Order Pursuant to 18 U.S.C. Section 2703(D)*, 707 F.3d 283 (4th Cir. 2013), where the Magistrate's decision on whether to unseal an access order entered pursuant to the Stored Communications Act in the pre-grand jury phase of ongoing criminal investigation that required social network service provider to turn over subscriber information should have been regarded as dispositive and subject to *de novo* review. The Magistrate's power to control access to court files falls under the "additional duties" prong of the Federal Magistrates Act, 28 U.S.C. § 636(b)(3), and decisions under this prong are subject to *de novo* review by the District Court. 12 C. Wright & A Miller, Federal Practice & Procedure, Civil § 3068.2 (3d ed. 2022).

1 to a magistrate judge's pretrial non-dispositive order within fourteen days after being served with a
2 copy of the order. Fed. R. Civ. P. 72. Appellants make no attempt to rebut this correct argument." *Id.*

3 In Ms. Dean's case, the Receiver knows this proceeding does not involve a Discovery matter. For
4 the Receiver to make this frivolous claim defies explanation. The Magistrate's November 17, 2022, Order
5 was a dispositive ruling on an Order to Show Cause re Contempt and Turn Over of property having nothing
6 to do with discovery, and Ms. Dean has properly sought a *de novo* review.

7 The Receiver cites *Cadence Design Sys., Inc. v. Syntronic AB*, 2022 WL 4180458, at *1 (N.D. Cal.
8 Sept. 12, 2022), claiming the Court should apply a clearly erroneous standard to a review of the Magistrate
9 Order on a Motion to Compel. (Receiver 12-15-22 Opposition, p. 6, lines 8-10). However, *Cadence Design*
10 is a Discovery case having nothing to do with Contempt or a Turn Over Order against a third party. In
11 *Cadence Design*, Cadence filed a copyright infringement action, and the Magistrate entered an order
12 compelling defendant to produce computers located in China. The District Court recognized the
13 Magistrate's ruling in a Discovery mater was a non-dispositive Order entitled to deference under a clearly
14 erroneous standard. *Id.* at *2. The Court ruled required production of the computers as a Discovery matter,
15 and ordered "the parties should proceed with review of the computers in the normal course of discovery"
16 through an independent expert where defendant maintained possession of the computers. *Id.* at *3.

17 The *Cadence Design* case did not involve a Contempt of Court or Turnover Order as to a Third
18 Party. Rather, there was a non-dispositive Discovery matter where a contempt and Turnover Order to a
19 third party is a dispositive order. The Receiver's reference to the case is frivolous.

20 **III.**

21 **CONCLUSION**

22 For the foregoing reasons, Third Party Kamille dean requests that her Objection and Appeal for De
23 Novo Review from Magistrate's November 17, 2022, Order be granted.

24 DATED: December 22, 2022

25 KAMILLE DEAN

26 

27 By: _____

28 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 22, 2022, I served the following document described as:

THIRD PARTY KAMILLE DEAN'S REPLY TO RECEIVER'S OPPOSITION TO MS. DEAN'S OBJECTION AND REQUEST FOR TRIAL DE NOVO

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 22, 2022 , at Fullerton, California.

/s/ Maureen Jaroscak

Maureen Jaroscak

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