The following constitutes the ruling of the court and has the force and effect therein described.

Signed February 1, 2017

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
ONDOVA LIMITED COMPANY,	§	**CASE NO. 09-34784-SGJ-7**
DEBTOR.	§	**(Chapter 7)**
	§	
JEFFREY BARON, INDIVIDUALLY, AND ON BEHALF OF THE UNITED STATES OF AMERICA,	§	
PLAINTIFF,	§	
	§	
VS.	§	**ADVERSARY NO. 14-03121-SGJ**
	§	
DANIEL J. SHERMAN, TRUSTEE, MUNSCH HARDT KOPF & HARR, P.C., AND LIBERTY MUTUAL INSURANCE COMPANY,	§	
DEFENDANTS.	§	**U.S.D.C. No. 3:16-CV-00947-M**

REPORT AND RECOMMENDATION TO DISTRICT COURT THAT IT GRANT DEFENDANTS' MOTIONS TO DISMISS IN THE ABOVE-REFERENCED ADVERSARY PROCEEDING

I. Introduction.

Plaintiff Jeffrey Baron (the "Plaintiff" or "Baron") is an individual who was the former principal (*i.e.*, the manager and indirect equity owner) of the above-referenced debtor known as Ondova Limited Company ("Ondova"). Baron filed a voluntary Chapter 11 bankruptcy case for Ondova on July 27, 2009. Soon thereafter, Baron lost his debtor-in-possession status as to Ondova. Specifically, the bankruptcy court entered an order directing the appointment of a Chapter 11 Trustee over Ondova, about seven weeks after the filing of the bankruptcy case (on September 17, 2009), due to Baron's unwillingness to testify regarding basic information involving Ondova.[1] In compliance with the bankruptcy court's order directing that a Chapter 11 Trustee be appointed, the United States Trustee appointed Daniel J. Sherman as the trustee (hereinafter, the "Bankruptcy Trustee").[2] The Bankruptcy Trustee thereafter employed the law firm of Munsch Hardt Kopf & Harr, P.C. (the "Munsch Law Firm") to assist him in carrying out his duties in the Ondova bankruptcy case. The Bankruptcy Trustee, like other trustees operating in the Northern District of Texas, Dallas Division, is covered by a surety bond issued by Liberty Mutual Insurance Company ("Liberty Mutual"), which bond is a requirement under section 322

[1] Baron asserted the Fifth Amendment privilege not to testify at various early hearings in the Ondova bankruptcy case.

[2] Fundamentally, a bankruptcy trustee—whenever one is appointed in any bankruptcy case—serves as the "representative of the [bankruptcy] estate." 11 U.S.C.A. § 323(a) (West, Westlaw through P.L. 114-254). Chapter 39 of Title 28 of the United States Code currently authorizes the United States Attorney General to appoint and supervise "United States Trustees" who, in turn, appoint bankruptcy trustees (private citizens) and supervise the administration of cases. 28 U.S.C.A § 581 (West, Westlaw through P.L. 114-254). Thus, while it is the bankruptcy judge that actually orders the appointment of a trustee, when he or she determines there is cause in a Chapter 11 case, it is the United States Trustee who selects and appoints the actual person to serve as a trustee. The American bankruptcy system can be thought of as "bifurcated," such that it is the trustee's role to handle the ***ministerial*** functions associated with case administration, while the bankruptcy judge handles all ***judicial*** functions necessary. *See generally* Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is There a Method in the Madness?*, 15 LEWIS & CLARK L. REV. 153 (2011).

of the Bankruptcy Code to insure a trustee's faithful performance of his official duties owing to the bankruptcy estate.

In the above-referenced adversary proceeding (the "Adversary Proceeding"), Baron is now suing: (a) the Bankruptcy Trustee regarding certain of the Bankruptcy Trustee's actions taken while serving as trustee over the Ondova bankruptcy estate; (b) the Munsch Law Firm regarding its role in providing legal representation to the Bankruptcy Trustee; and (c) Liberty Mutual for the bond that was issued to insure the Bankruptcy Trustee's faithful performance of his official duties. The Bankruptcy Trustee, the Munsch Law Firm, and Liberty Mutual will sometimes collectively be referred to as the "Defendants." Baron has asserted the following causes of action in his Original Complaint commencing the Adversary Proceeding (the "Complaint") [DE # 1 in the AP][3]: (a) ***breach of contract***, as to the Bankruptcy Trustee, for his alleged breach of a Global Settlement Agreement (the "GSA") entered into during the Ondova bankruptcy case (approved by the bankruptcy court on July 29, 2010) that was intended to resolve disputes among Ondova, Baron, various non-debtor entities affiliated with Baron, and various disputed creditors; (b) ***fraud***, as to the Bankruptcy Trustee and the Munsch Law Firm, for their alleged misrepresentations to Baron in connection with the aforementioned GSA; (c) ***malicious prosecution***, as to the Bankruptcy Trustee and the Munsch Law Firm, relating to their request made to Retired District Judge Royal Furgeson that he impose a receivership over Baron personally—in an allegedly malicious way and allegedly through false representations—which receivership was granted by the District Court but later set aside, by the Fifth Circuit Court of Appeals, as having been ordered in error; and (d) ***gross negligence***, as to the Bankruptcy Trustee,

[3] Note that references to "DE # __ in the AP" throughout this Report and Recommendation refer to the docket entry number at which a pleading appears in the docket maintained by the Bankruptcy Clerk in this Adversary Proceeding.

citing section 322 of the Bankruptcy Code and Bankruptcy Rule 2010(b),[4] for the Bankruptcy Trustee's alleged neglect of his duties in administering the case and effectuating the terms of the GSA, including failure to minimize administrative expenses and, again, moving for a receivership over Baron (and expending cash resources for same). As to the gross negligence claim, Baron, on behalf of the United States of America, is seeking payment on the Liberty Mutual bond (presumably in addition to seeking to hold the Bankruptcy Trustee personally liable).[5] Baron is seeking monetary damages ***for himself*** in excess of $1,000,000—alleging that he "was caused to suffer and incur ruinous damages."[6]

Baron earlier filed a Motion to Withdraw the Reference in this Adversary Proceeding based on his alleged right to a jury trial. This bankruptcy court, in a prior Report and Recommendation to the District Court on the Plaintiff's Motion to Withdraw the Reference [DE # 58 in the AP], determined that Baron was entitled to a jury trial, if this Adversary Proceeding should ever go to trial, and that the Motion to Withdraw the Reference should be granted—if and when this Adversary Proceeding is ready for trial. The District Court agreed with the bankruptcy court and granted the Motion to Withdraw the Reference, referring all pretrial matters to the bankruptcy court and ordering that all dispositive matters be sent to the District Court with a recommendation for disposition.[7]

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[4] Bankruptcy Code Section 322 is actually the statute that requires any bankruptcy trustee who is appointed in a bankruptcy case to obtain a surety bond in favor of the United States, to insure the trustee's "faithful performance" of his "official duties." 11 U.S.C.A. § 322(a) (West, Westlaw through P.L. 114-254). Bankruptcy Rule 2010(b) also provides that "a proceeding on the trustee's bond may be brought by any party in interest ***in the name of the United States*** for the use of the entity injured by the breach of the condition." FED. R. BANKR. PROC. 2010(b) (West, Westlaw through 12-1-16) (emphasis added).

[5] The Complaint is less than clear on this point.

[6] *See* DE # 1 in the AP at ¶ 50-51.

[7] *See* DE # 62 in the AP.

The Defendants in this matter have now filed Motions to Dismiss the Adversary Proceeding, pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing that—even accepting all factual allegations in Baron's Complaint as true—Baron cannot recover against the Defendants, as a matter of law, because: (a) the Bankruptcy Trustee is (1) entitled to absolute or qualified ***immunity*** from liability in the circumstances of this case—since every single averment and cause of action asserted by Baron relates solely to the acts of the Bankruptcy Trustee performed in his official capacity as a bankruptcy trustee, and (2) even if the Bankruptcy Trustee's conduct fell outside the scope of immunity, Fifth Circuit case authority and rulings during the bankruptcy case preclude recourse under Baron's asserted theories; (b) the Munsch Law Firm, in merely providing legal services to its client the Bankruptcy Trustee, is not only entitled to derivative immunity, but is further protected by the Texas doctrine of ***attorney immunity*** (shielding attorneys from liability to non-clients); and (c) as to Liberty Mutual, Baron has not articulated conduct that would trigger liability under the bond. Baron has responded that the Bankruptcy Trustee's actions that he complains of constituted "***ultra vires acts"*** which would preclude the qualified immunity doctrine from being applicable to any of the Defendants, and the Defendants should all have personal liability to Baron (and there should be liability on the bond). And as to the Munsch Law Firm specifically, Baron has barely acknowledged the possible applicability of the attorney immunity defense.

The bankruptcy court recommends that the Defendants' Motions to Dismiss be granted and that the District Court enter a judgment dismissing all causes of action asserted in the Adversary Proceeding. As will be further explained below, Plaintiff has failed to articulate facts that might expose the Bankruptcy Trustee and his counsel to personal liability or that might trigger liability under the Bankruptcy Trustee's bond. Rather all complained of acts were not

only performed in the Bankruptcy Trustee's official capacity as a trustee (and in the Munsch Law Firm's role as trustee's counsel), but occurred: (a) pursuant to a court order, (b) under the supervision of the bankruptcy court, or (c) were otherwise consistent with statutory and fiduciary duties. Thus, as explained fully below, various immunity doctrines and Fifth Circuit precedents shield the Defendants from liability in this Adversary Proceeding.

II. The Alleged Facts as Presented in the Complaint.

A. The District Court Litigation.

Many years ago, the Plaintiff, Baron, and certain of the business entities he controlled, including Ondova, entered into a joint venture with an individual named Munish Krishan and two of Mr. Krishan's related entities, Netsphere, Inc., and Manila Industries, Inc. (collectively, the "Netsphere Parties") to build an internet search engine and to own and operate a large portfolio of internet domain names. Ondova was a domain name registration company that maintained necessary information for the operation of domain names on the internet. This joint venture ultimately failed and litigation ensued.[8] Beginning in November 2006, various lawsuits were filed by the Netsphere Parties, and on May 28, 2009, the Netsphere Parties filed a lawsuit against both Baron and Ondova in the United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3:09-CV-988-L (the "Netsphere DC Case").[9]

B. The Ondova Bankruptcy Case.

On July 27, 2009, Ondova filed a voluntary petition under Chapter 11 of the United

[8] *See* Plaintiff's Complaint, ¶ 6. Note that references to "Plaintiff's Complaint, ¶ _" throughout the remainder of this Report and Recommendation refer to the Plaintiff's Original Complaint [DE # 1 in the AP].

[9] *See* Plaintiff's Complaint, ¶ 7.

States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, Case No. 09-34784-SGJ-11 (the "Ondova Bankruptcy Case"). As noted earlier, on September 17, 2009, Daniel J. Sherman was appointed in the Ondova Bankruptcy Case as the Bankruptcy Trustee,[10] and he thereafter employed the Munsch Law Firm to assist him in carrying out his duties in the Ondova Bankruptcy Case.[11]

C. The Global Settlement Agreement.

Around February 2010, Baron, the Netsphere Parties, and the Bankruptcy Trustee commenced negotiations with respect to a global settlement intended to resolve the Netsphere DC Case, the Ondova Bankruptcy Case, and various other related cases then being litigated. In June 2010, the parties reached a global settlement, which was documented in a Mutual Settlement and Release Agreement (the "GSA"). The Plaintiff has alleged that the GSA was intended to provide Baron a fresh start, to pay Ondova's administrative and unsecured debts, to resolve the Ondova Bankruptcy Case through a conversion or dismissal, to return control of Ondova to Baron, and, most importantly for Baron, to resolve the Netsphere DC Case and other lawsuits through dismissals or joint stipulations of dismissal with prejudice. The Plaintiff has further alleged that the GSA allowed Baron's affiliated companies to retain over 230,000 income-producing internet domain names and provided additional revenue through other provisions of the GSA. The GSA also provided for payments to the Bankruptcy Trustee in the amount of $1.75 million, which, along with other funds on hand, was to provide sufficient funds to pay 100% of all allowed administrative, priority, and unsecured claims against Ondova and

[10] *See* Plaintiff's Complaint, ¶ 8.

[11] *See* DE # 138 in the Bankruptcy Case. Note that references to "DE # __ in the Bankruptcy Case" throughout this Report and Recommendation refer to the docket entry number at which a pleading appears in the docket maintained by the Bankruptcy Clerk in this Bankruptcy Case.

allow Ondova to emerge from bankruptcy with approximately $1 million in cash to finance its ongoing operations. The GSA also annexed four agreed orders of dismissal or joint stipulations of dismissal with prejudice, which were executed by the parties and delivered to the Bankruptcy Trustee. The Bankruptcy Trustee was then directed to file the dismissals or joint stipulations of dismissal with prejudice promptly after the receipt of same. The Bankruptcy Trustee ultimately filed all of these except for the Joint Stipulation of Dismissal With Prejudice as to the Netsphere DC Case. The Plaintiff has alleged that this was the primary consideration flowing to him under the GSA.[12]

On July 2, 2010, the Bankruptcy Trustee filed a motion for approval of the GSA in the Ondova Bankruptcy Case. Several hearings occurred during the month of July, and on July 29, 2010, the bankruptcy court approved the GSA. Following the approval of the GSA and the payment of $1.75 million to the bankruptcy estate, the Plaintiff has alleged that the Bankruptcy Trustee took actions to unravel the GSA and avoid closing the Ondova Bankruptcy Case.[13]

D. Alleged Breaches of the GSA and the Baron Receivership.

Beginning in September 2010, the Plaintiff has alleged that various persons (all of whom happen to be attorneys), including Elizabeth Schurig, Gary Lyon, Gerrit Pronske ("Pronske")—the latter of whom was Plaintiff's former attorney who had negotiated the GSA on the Plaintiff's behalf—the Bankruptcy Trustee, and his counsel, Ray Urbanik ("Urbanik") at the Munsch Law Firm, commenced a concerted effort to persuade the bankruptcy court that: (a) Baron had breached or was intending to breach the GSA; (b) Baron was transferring assets outside the jurisdiction of the court; and (c) Baron was a vexatious litigant because he was allegedly hiring,

[12] *See* Plaintiff's Complaint, ¶¶ 9-11.

[13] *See* Plaintiff's Complaint, ¶¶ 12-13.

firing, and failing to pay numerous attorneys. The Plaintiff has further alleged that other individuals (yet more lawyers) including Robert Garrey, Joshua Cox, and James Eckels, counsel for two Baron-related entities known as NovoPoint and Quantec, acted in concert with the above-mentioned individuals to support some or all of such efforts.[14]

On September 15, 2010, the bankruptcy court held a status conference at which Pronske alleged that Baron was engaging in fraudulent and criminal activities designed to "hide assets offshore." The Bankruptcy Trustee and Urbanik joined Pronske in making these statements. At the hearing on September 15, 2010, the bankruptcy court expressed concern that there was a deadline of September 15, 2010 under the GSA for Baron to identify a new trustee and protector for a certain offshore trust that would be holding domain names (*i.e.*, the Village Trust) and was concerned that Baron had not done so and did not have a compelling explanation for why this had not been accomplished. Moreover, on September 16, 2010, the bankruptcy court entered an Order Directing Establishment of Security Deposit, where Baron was directed to transfer to the Bankruptcy Trustee the sum of $330,000 as a security deposit to be held by the Bankruptcy Trustee to insure against Baron's possible breaches of the GSA.[15]

On September 17, 2010, the bankruptcy court issued an order commanding Baron to appear and show cause why he was not in contempt of the bankruptcy court's order approving the GSA, which directed the parties to fulfill all of their respective obligations under the GSA. Baron was also ordered to show cause why the bankruptcy court should not make a report and recommendation to the District Court in the Netsphere DC Case to appoint an equity receiver

[14] *See* Plaintiff's Complaint, ¶¶ 18-19.

[15] *See* Plaintiff's Complaint, ¶¶ 20-22. The Plaintiff did turnover the deposit and these funds were later distributed as part of another settlement agreement approved by the bankruptcy court on August 24, 2016. *See* DE # 1276 & 1279 in the Bankruptcy Case.

over Baron, pursuant to 28 U.S.C. §§ 754 and 1692, to perform Baron's obligations under the GSA should Baron fail to comply with his obligations under the GSA.[16]

On September 22, 2010, the bankruptcy court commenced a three-day evidentiary hearing at which evidence was adduced from Baron and other parties, including the Bankruptcy Trustee, regarding the extent to which the GSA had been consummated. On October 13, 2010, the bankruptcy court issued a Report and Recommendation to the District Court (the "October 2010 Report and Recommendation"). In the October 2010 Report and Recommendation, the bankruptcy court recommended the appointment of Peter Vogel ("Vogel"), who was then serving as a special master in the Netsphere DC Case, to mediate possible claims of an ever-growing cavalcade of attorneys whom the bankruptcy court feared might assert such claims against the Ondova bankruptcy estate as administrative expenses.[17] The Plaintiff has alleged, essentially, that the bankruptcy court was duped into being alarmed about the ever-growing cavalcade of attorneys, because, around this same period of time, the Bankruptcy Trustee was aggressively soliciting claims from various lawyers that had formerly represented Baron and his related entities in connection with the Netsphere litigation, and was misrepresenting to the bankruptcy court that Baron was "hiring and firing" dozens of lawyers without paying them, making grievances, and being difficult. The Plaintiff has also alleged that instead of setting a bar date within which creditors (including lawyers) could file administrative claims, and waiting for the bar date to expire, the Bankruptcy Trustee actively solicited lawyers, who had not made claims

[16] *See* Plaintiff's Complaint, ¶ 23.

[17] *See* Plaintiff's Complaint, ¶¶ 24-25.

against Ondova and who had no contractual right to recover from the Ondova estate, to make additional claims in the Ondova bankruptcy for "substantial contribution" to the Ondova estate.[18]

On October 19, 2010, the District Court entered an order adopting the bankruptcy court's October 2010 Report and Recommendation. On the same date, the District Court, following the recommendation of the bankruptcy court, appointed Vogel as mediator to mediate attorney fee disputes between Baron and certain former counsel. The Plaintiff has alleged that he complied with the District Court's order to mediate the former attorneys' alleged claims, although the Bankruptcy Trustee and Vogel represented he was not cooperating with the mediator and was obstructing the mediation efforts.[19]

On November 19, 2010, Baron objected to a fee application filed by the Bankruptcy Trustee's attorney, Urbanik of the Munsch Law Firm. Three business days later, on November 24, 2010, the Bankruptcy Trustee filed an *ex parte* Application for the Appointment of a Receiver in the Netsphere DC Case over the assets owned by Baron and over entities that he owned and entities that were owned by the Village Trust, as to which Baron was a principal beneficiary. In support of his *ex parte* motion for the appointment of a receiver, the Bankruptcy Trustee and his attorney argued that, because Baron was violating the District Court's mediation order, the District Court needed to "appoint Vogel as the receiver in essence to make sure that a mediation of those attorneys' fees claims occurred."[20]

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[18] *See* Plaintiff's Complaint, ¶¶ 15. The bankruptcy court would be remiss in not mentioning that it observed for itself an ever-growing number of lawyers appearing and then exiting from representing Baron, and the bankruptcy court had threatened to *sua sponte* recommend that the District Court appoint a receiver largely to: (a) ensure implementation of the GSA; and (b) prevent delays and case administration expenses that—even without "substantial contribution claims"—were harming the Ondova Bankruptcy Case.

[19] *See* Plaintiff's Complaint, ¶¶ 26-27.

[20] *See* Plaintiff's Complaint, ¶¶ 16 & 27. The Plaintiff has also alleged that, when confronted under oath in later proceedings (without identifying the time and place of such proceedings), the Bankruptcy Trustee admitted that the mediation failed because the former lawyers refused to mediate, not Baron. The Plaintiff has alleged that both

After conducting an *ex parte* hearing, District Judge Royal Furgeson granted the Bankruptcy Trustee's application and appointed a receiver. On the same date, the District Court in the Netsphere DC Case entered an order (the "Receivership Order") establishing an equity receivership over Baron's assets (the "Receivership"), and appointed Vogel as the receiver (the "Receiver"). The Plaintiff has alleged that "[p]ursuant to the receivership order, Receiver Vogel confiscated all of Baron's possessions, including his documents, and forbade him from engaging in even the basic essential functions of life such as entering into agreements, owning property and traveling freely."[21]

The Plaintiff has also alleged that at the point in time the Bankruptcy Trustee moved to place Baron into the Receivership, there were enough funds in the Ondova bankruptcy estate to pay in full all administrative, priority, and unsecured claims. The Plaintiff has alleged that, if the Bankruptcy Trustee and Urbanik had simply set an administrative bar date and proceeded to resolve the Ondova estate's claims through a plan of reorganization, all of Ondova's creditors would have been paid in full.[22]

E. The Appeal of the Receivership Order and Reversal of the Receivership.

Baron spent the next two years appealing the Receivership Order and various related orders entered by the District Court. Eleven appeals to the Fifth Circuit were taken and one

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the Bankruptcy Trustee and Vogel knew of this fact, but deliberately misled the District Court into believing that it was Baron who had caused the mediation to fail. *See* Plaintiff's Complaint, ¶ 28.

[21] *See* Plaintiff's Complaint, ¶¶ 29-30 & fn 5. Pursuant to an Order Granting the Receiver's Motion to Clarify the Receiver Order With Respect to Novo Point, LLC and Quantec, LLC, the Receiver also took possession and control of Novo Point and Quantec. Both companies are limited liability companies formed under the laws of the Cook Islands, and they are purportedly in good standing. Both companies are owned entirely by the Village Trust, which is a trust created under the laws of the Cook Islands. Baron is a primary beneficiary of the Village Trust. *See* Plaintiff's Complaint, ¶ 31.

[22] *See* Plaintiff's Complaint, ¶ 17.

petition for mandamus was filed regarding the Receivership Order and related orders that were entered in the Netsphere DC Case. These eleven appeals and one original proceeding were consolidated, and they were resolved on December 18, 2012, when the Fifth Circuit released its opinion in *Netsphere, Inc. v. Baron*, 703 F.3d 296 (5th Cir. 2012).[23] With respect to the Receivership Order, the Fifth Circuit held that the appointment of the Receiver was legally improper.[24] The Fifth Circuit explained, "[a] court lacks jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy."[25] The Fifth Circuit then stated:

> The receivership ordered in this case encompassed all of Baron's personal property, none of which was sought in the Netsphere lawsuit or the Ondova bankruptcy other than as a possible fund for paying the unsecured claims of Baron's current and former attorneys that had not been reduced to judgment. The receivership also included business entities owned or controlled by Baron, including Novo Point, LLC and Quantec, LLC. Although Novo Point and Quantec were listed as parties on the global settlement agreement, they were never named parties in the Netsphere lawsuit or the Ondova bankruptcy. We conclude the District Court could not impose a receivership over Baron's personal property and the assets held by Novo Point and Quantec.[26]

However, the Fifth Circuit also held that:

> [B]ased on this record, that in creating the receivership '***there was no malice nor wrongful purpose, and only an effort to conserve property in which [the court] believed' it was interested in maintaining for unpaid attorney fees and to control Baron's vexatious litigation tactics***. . . . We recognize that the district court was dealing with a conundrum when it decided to appoint the receiver—the problem was great, but standard remedies seemed inadequate. We also take into account that, to a large extent, Baron's own actions resulted in more work and more fees for the receiver and his attorneys. For these reasons, charging the current receivership fund for reasonable receivership expenses, without allowing any additional assets to be sold, is an equitable solution. In light of our ruling that the receivership was

[23] *See* Plaintiff's Complaint, ¶ 32.

[24] *Netsphere, Inc. v. Baron*, 703 F.3d 296, 302 (5th Cir. 2012).

[25] *Id.* at 311.

[26] *Id.* at 310.

> improper, equity may well require the fees to be discounted meaningfully from what would have been reasonable under a proper receivership. Fees already paid were calculated on the basis that the receivership was proper. Therefore, the amount of all fees and expenses must be reconsidered by the district court. Any other payments made from the receivership fund may also be reconsidered as appropriate. We also conclude that everything subject to the receivership other than cash currently in the receivership, which Baron asserts in a November 26, 2012 motion amounts to $1.6 million, should be expeditiously released to Baron under a schedule to be determined by the district court for winding up the receivership. The new determination by the district court of reasonable fees and expenses to be paid to the receiver, should the amount be set at more than has already been paid, may be paid from the $1.6 million. To the extent the cash on hand is insufficient to satisfy fully what is determined to be the reasonable charges by the receiver and his attorneys, those charges will go unpaid. No further sales of domain names or other assets are authorized.[27]

The Fifth Circuit then remanded to the District Court for reconsideration of the Receiver's attorney's fees.

This Adversary Proceeding was then filed by the Plaintiff almost two years later on October 6, 2014.[28] As stated in the Introduction of this Report and Recommendation, Baron has asserted causes of action for: (a) ***breach of contract*** (*i.e.,* alleging that the Bankruptcy Trustee breached the GSA—"The intent [of the GSA] was to pay the Ondova Bankruptcy Estate Claims and give the keys back to Mr. Baron, but that didn't happen")[29]; (b) ***fraud*** (*i.e.,* alleging that the Bankruptcy Trustee and the Munsch Law Firm made false representations in connection with the GSA); (c) ***malicious prosecution*** (*i.e.,* alleging that the Bankruptcy Trustee and the Munsch Law Firm acted in concert to pursue an improper receivership action over Baron); and (d) ***gross negligence*** (*i.e.,* alleging that the overall actions of Bankruptcy Trustee were grossly negligent and caused injury to Baron and also caused the Ondova Bankruptcy Estate to be administratively

[27] *Id.* at 313-314 (emphasis added).

[28] The Adversary Proceeding was abated by agreement of the parties between October 27, 2014 and March 4, 2016.

[29] *See* Plaintiff's Complaint, ¶ 36.

insolvent). As aforementioned, the Defendants have filed Motions to Dismiss pursuant to Rule 12(b)(6) as to all four causes of action, asserting various theories of immunity and preclusion.[30] In ruling on the Motions to Dismiss, this court refers to:

- The Bankruptcy Trustee's and Liberty Mutual's Rule 12(b)(6) Motion to Dismiss [DE # 23], Brief in Support [DE # 24], and Appendix [DE # 25] (collectively, the "Bankruptcy Trustee Motion to Dismiss");

- The Munsch Law Firm's Rule 12(b)(6) Motion to Dismiss [DE # 26], Brief in Support [DE # 27], and Appendix [DE # 28] (collectively, the "Munsch Law Firm Motion to Dismiss" and, with the Bankruptcy Trustee Motion to Dismiss, the "Motions to Dismiss");

- Baron's Amended Response to Defendant's Motions to Dismiss [DE # 48] (the "Response") and Appendix [DE # 43]; and

- Defendants' Reply in Support of Defendants' Rule 12(b)(6) Motions to Dismiss [DE # 56] (the "Reply).

III. Legal Standard for Motions to Dismiss.

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is warranted if "a plaintiff fails to allege sufficient facts that, taken as true, state a claim that is plausible on its face."[31] In considering a Motion to Dismiss under Rule 12(b)(6), a complaint is to be charitably construed, with all well pleaded factual allegations being accepted as true, and with any reasonable inferences from those facts being drawn in favor of the non-moving party.[32] Moreover, "factual allegations must be enough to raise a right to relief above the speculative level on the assumption

[30] The Defendants have asserted additional reasons that the Plaintiff's Complaint should be dismissed including that: (a) the Plaintiff's theories of recovery cannot be asserted as standalone claims; (b) with respect to the Plaintiff's fraud claim, the Plaintiff cannot plausibly aver the predicate facts, because he contractually disclaimed such facts as part of the GSA; and that (c) prior factual findings by the Fifth Circuit Court of Appeals foreclose the "probable cause" element for the Plaintiff's malicious prosecution claim. Finally, the Munsch Law Firm has asserted that it cannot be held liable for any alleged breach of the GSA because it was not a signatory nor a party to the GSA.

[31] *Amacker v. Renaissance Asset Mgmt. LLC*, 657 F.3d 252, 254 (5th Cir. 2011).

[32] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 1964-66 & 1973 n. 14 (2007).

that all the allegations in the complaint are true (even if doubtful in fact)."[33] Courts may also consider matters of public record such as related court proceedings and items appearing in the record.[34]

IV. Legal Analysis.

First, the court turns to the Bankruptcy Code, the Bankruptcy Rules, and other statutes for guidance as to when a bankruptcy trustee may face personal liability for his acts or, alternatively, when he may have some type of immunity. Unfortunately, they fail to provide much guidance. Moreover, the common law that has developed on this topic is imprecise, inconsistent, and confusing. One bankruptcy court shared this court's frustration on the topic, stating that: "the case law regarding trustee liability is ***extremely confusing and often contradictory***" and it is "difficult from the case law alone to formulate guidelines specifying when a trustee is immune from personal liability and when he is not."[35] In any event, this court will now attempt to navigate, first, through the statutes and rules that are tangentially germane to lawsuits against a trustee and, then, the complicated jurisprudence surrounding bankruptcy trustee immunity and liability.

[33] *Id.* at 1965.

[34] *See, e.g.*, *CleanCOALition v. TXU Power*, 536 F.3d 469, 471 n. 2 (5th Cir. 2008) (holding courts may take judicial notice of facts "not subject to reasonable dispute" and: (i) generally known within the territorial jurisdiction of the trial court, or (ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned). *See also Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) ("Normally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint. However, courts may also consider matters of which they may take judicial notice.").

[35] *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91, 96 (Bankr. W.D. Pa. 2015), *aff'd*, 554 B.R. 747 (W.D. Pa. 2016) (quoting from *Kirk v. Hendon (In re Heinsohn)*, 231 B.R. 48, 64 (Bankr. E.D. Tenn. 1999)).

A. There Will Be Blood (and Lawsuits): Statutory Authority and Rules With Regard to Suing a Bankruptcy Trustee.

Preliminarily, there should be no doubt that the Bankruptcy Code and related statutes and rules contemplate that, on occasion, lawsuits may be prosecuted against a bankruptcy trustee. First, turning to the statutory guidance, section 323 of the Bankruptcy Code addresses a bankruptcy trustee's "capacity" to sue and be sued stating that "[t]he trustee in a case under this title has capacity to sue and be sued."[36]

Additionally, section 322 of the Bankruptcy Code contemplates that bankruptcy trustees may, on occasion, fail in "the faithful performance of [their] official duties" and, therefore, must file a bond in favor of the United States as a condition to their employment in a case, so that there is a readily available source of recovery for parties-in-interest to pursue, if a bankruptcy trustee fails in faithfully performing his duties. There also happens to be a "carve out," of sorts, in section 322(c) of the Bankruptcy Code, providing that a "trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor"—thus further indicating, by implication, that bankruptcy trustees are sometimes going to be liable for damages for their actions.[37]

Further, the Judiciary and Judicial Procedure chapter of the United States Code, at 28 U.S.C. § 959(a), provides that trustees "may be sued, without leave of the court appointing them, ***with respect to any of their acts or transactions in carrying on business*** connected with such property" and "[s]uch actions shall be subject to the general equity power of [the appointing

[36] 11 U.S.C.A § 323(b) (West, Westlaw through P.L. 114-254).

[37] 11 U.S.C.A § 322 (West, Westlaw through P.L. 114-254). *See also* FED. R. BANKR. PROC. 2010(b) ("A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.").

court] so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury."[38] The type of lawsuit contemplated in section 959(a) has sometimes been described as a "slip and fall lawsuit"—because it contemplates that a bankruptcy trustee operating the business or assets of a bankruptcy estate is subject to litigation just like anyone else in society operating a business, and that a harmed party ought not to have to ask the bankruptcy court for permission to sue if the party slips and falls on a hazard the bankruptcy trustee left or otherwise suffers a harm.[39]

Finally, it is appropriate to note that, to the extent a party-in-interest or the court is dissatisfied with a bankruptcy trustee's actions in a bankruptcy case, there are plenty of mechanisms available to address the situation, short of a lawsuit. First, there is certainly the opportunity to object to a trustee's compensation or his counsel's fees, pursuant to Bankruptcy Code sections 326 and 330. There is certainly the opportunity that any litigant has to move for "Rule 11" sanctions, when appropriate, pursuant to Bankruptcy Rule 9011. Moreover, section 324 of the Bankruptcy Code provides a mechanism to even ***remove*** a trustee. Specifically, section 324(a) of the Bankruptcy Code provides that "[t]he court, after notice and a hearing, may remove a trustee, other than the United States trustee, or an examiner, for cause."[40] What constitutes cause for removal is not defined in the Bankruptcy Code, but is to be determined on a

[38] 28 U.S.C.A § 959(a) (West, Westlaw through P.L. 114-254) (emphasis added).

[39] *E.g., Muratore v. Darr*, 375 F.3d 140, 144 (1st Cir. 2004) (section 959(a) "is intended to 'permit actions redressing torts committed in furtherance of the debtor's business, such as the common situation of a negligence claim in a slip and fall case where a bankruptcy trustee, for example, conducted a retail store'") (quoting *Carter v. Rodgers*, 220 F.3d 1249, 1254 (11th Cir. 2000)). *See also Lebovits v. Scheffel (In re Lehal Realty Assocs.)*, 101 F.3d 272, 276 (2d Cir. 1996); *In re Am. Associated Sys., Inc.*, 373 F. Supp. 977, 979 (E.D. Ky. 1974).

[40] 11 U.S.C.A § 324 (West, Westlaw through P.L. 114-254).

case-by-case basis.[41] "Cause may include trustee incompetence, violation of the trustee's fiduciary duties, misconduct or failure to perform the trustees duties,[42] or lack of disinterestedness or holding an interest adverse to the estate."[43]

B. The Confusing Jurisprudence Regarding Suing a Bankruptcy Trustee.

So if a bankruptcy trustee may sometimes be sued (pursuant to the framework of the Bankruptcy Code and Bankruptcy Rules set forth above), ***when*** can he be sued and when is it "off limits"? In other words, when does the trustee have personal exposure to (and when might his bond be reachable by): (a) creditors (*i.e.*, beneficiaries of the trust), or (b) perhaps third parties unrelated to the bankruptcy process?

1. The Barton Doctrine: The Requirement of Asking the Bankruptcy Court for Permission to Sue a Trustee.

First, it should be noted that, long ago, courts came up with the so-called *Barton* doctrine. The *Barton* doctrine (so called from its articulation in a United States Supreme Court case called *Barton v. Barbour*,[44] but first actually birthed in a case called *Davis v. Gray*),[45] provides that, as a general rule, before a suit may be brought against a trustee, leave of the appointing court (*i.e.*, the bankruptcy court) must be obtained. The *Barton* doctrine is ***not*** an immunity doctrine but—strange as this may sound—has been held to be a ***jurisdictional*** provision (in other words, a

[41] *Dye v. Brown (In re AFI Holding, Inc.)*, 530 F.3d 832, 845 (9th Cir. 2008); *see also Miller v. Miller (In re Miller)*, 302 B.R. 705, 709 (BAP 10th Cir. 2003).

[42] The specific duties and responsibilities of Chapter 7, 11, 12, and 13 trustees are set forth primarily in sections 704, 1106, 1202, and 1302 of the Bankruptcy Code.

[43] *AFI Holdings*, 530 F.3d at 845. *See also* 3 COLLIER ON BANKRUPTCY 324-4 & 324-5 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016) (examples of cause sufficient to remove a trustee include breach of fiduciary duty, trustee misconduct, and disinterestedness).

[44] *Barton v. Barbour*, 104 U.S. 126 (1881).

[45] *Davis v. Gray*, 83 U.S. 203, 218 (1872).

court will not have subject matter jurisdiction to adjudicate a suit against a trustee ***unless and until*** the bankruptcy court has granted leave for the lawsuit to be filed).[46] Courts have articulated numerous rationales for having this jurisdictional gatekeeping doctrine. One is that, because the "trustee in bankruptcy is an officer of the court that appoints him,"[47] the appointing court "has a strong interest in protecting him from unjustified personal liability for acts taken within the scope of his official duties."[48] Another rationale is that the leave requirement "enables the bankruptcy court to maintain control over the estate and furthers the goal of centralizing all creditors' claims so they can be efficiently administered."[49] Yet other courts have expressed an underlying reason for the doctrine is to maintain a panel of competent and qualified trustees and to ensure efficient administration of bankruptcy estates: Without the leave requirement, "trusteeship w[ould] become a more irksome duty" and it would become "harder for courts to find competent people to appoint as trustees. Trustees w[ould] have to pay higher malpractice premiums" and "this w[ould] make the administration of bankruptcy estates more expensive."[50] Finally, another policy concern underlying the doctrine is a concern for the overall integrity of the bankruptcy process and the threat of trustees being distracted from or intimidated from doing their jobs. For example, losers in the bankruptcy process might turn to other courts to try to become winners there—by alleging the trustee did a negligent job.[51] The Fifth Circuit has

[46] *Satterfield v. Malloy*, 700 F.3d 1231, 1234 (10th Cir. 2012).

[47] *Lehal Realty*, 101 F.3d at 276.

[48] *Id.*

[49] *In re Ridley Owens, Inc.*, 391 B.R. 867, 871.

[50] *McDaniel v. Blust*, 668 F.3d 153, 157 (4th Cir. 2012) (citing *In re Linton*, 136 F.3d 544, 545 (7th Cir. 1998)). *See also generally* 1 COLLIER ON BANKRUPTCY 10-4 & 10-5 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016).

[51] *Linton*, 136 F.3d 544 at 545-546.

recently recognized the continuing vitality of the *Barton* doctrine—even after *Stern v. Marshall*[52] (that is, even in a scenario in which the appointing bankruptcy court might not itself have Constitutional authority to ***adjudicate*** the claims asserted against the trustee pursuant to the *Stern* decision).[53]

There are a couple of exceptions to the *Barton* doctrine. First, there is a statutory exception, set forth in 28 U.S.C. § 959(a) (mentioned above), which states that trustees may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in "carrying on business connected with [the] property [they manage]" and that the suits shall be "subject to the general equity power of [the appointing court] so far as the same be necessary for the ends of justice, but this shall not deprive a litigant of his right to trial by jury."[54] As mentioned earlier, this exception is generally thought to apply in situations in which the trustee is operating a business and some stranger to the bankruptcy process might be harmed—such as "a negligence claim in a slip and fall case" and is "inapplicable 'to suits based on actions taken to further the administering or liquidating the bankruptcy estate.'"[55]

Another exception to the *Barton* doctrine was set out in the *Barton* case itself and is referred to as the "ultra vires" exception. Specifically, there need not be bankruptcy court permission to file a lawsuit against a trustee where "by mistake or wrongfully, the receiver [or trustee] takes possession of property belonging to another . . . for in such case the receiver

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[52] *Stern v. Marshall*, 564 U.S. 462 (2011).

[53] *See Villegas v. Schmidt*, 788 F.3d 156, 58-59 (5th Cir. 2015).

[54] 28 U.S.C.A § 959(a) (West, Westlaw through P.L. 114-254).

[55] *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC)*, 545 B.R. 91, 98 (Bankr. W.D. Pa. 2015), *aff'd*, 5545 B.R. 747 (W.D. Pa. 2016) (citing *Coen v. Stutz (In re CDC Corp.)*, 610 Fed. Appx. 918 (11th Cir. 2015) & *In re VistaCare Group, LLC*, 678 F.3d 218, 227 (3d Cir. 2012)).

[trustee] would be acting ultra vires."[56] "Ultra vires" means "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or the law."[57] Note that there are reported cases in which plaintiffs have argued this "ultra vires" doctrine should be applied in a ***broader sense*** than "seizure of property." It appears that it is rare for a court to extend the "ultra vires" exception "beyond situations where a trustee seizes property which is found not to be property of the estate." For example, where a trustee ***filed a lawsuit*** "in an attempt to seize property that [was] not an asset of the estate," courts have declined to apply the ultra vires exception.[58]

Finally, it should be noted that many courts have held that the *Barton* doctrine does not apply if a lawsuit is commenced in the bankruptcy court (*i.e.*, the appointing court).[59] Thus, since Baron filed this Adversary Proceeding in the bankruptcy court, it appears that the *Barton* doctrine is technically not implicated here. However, the bankruptcy court has chosen to discuss the *Barton* doctrine at length, since so much of the jurisprudence that deals with lawsuits against bankruptcy trustees deals with the *Barton* doctrine and—confusingly—intermingles some of the concepts underlying this jurisdictional gatekeeping doctrine with immunity.

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[56] *Barton*, 104 U.S. at 134.

[57] Black's Law Dictionary (10th ed. 2014).

[58] *E.g., Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404, 415 (6th Cir. 2013), *cert denied*, 134 S. Ct. 444 (2013); *Satterfield v. Malloy*, 700 F.3d 1231 (10th Cir. 2012). *See generally* 1 COLLIER ON BANKRUPTCY 10-14.1 & 10-14.2 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016). *But see McCauley v. Jackson (In re United Eng'g & Contracting Co.)*, 151 N.Y.S. 120, 121 (N.Y. App. Div. 1915) (bankruptcy trustee who had been operating a debtor's construction business for 14 months with no authority was personally liable to owner of nearby land when debtor's horses and mules that were used in construction business escaped and grazed on nearby owner's land); *Clark v. Baen*, 242 P. 872, 872-74 (Cal. Distr. Ct. App. 1926) (bankruptcy receiver personally liable on a contract for failure to disclose to plaintiff the fact that he was a receiver acting in his official capacity in purchasing lumber for the debtor-entity).

[59] *E.g., CERx Pharmacy Partners, LP v. RPD Holdings, LLC (In re Provider Meds, LP)*, 514 B.R. 473, 476-477 (Bankr. N.D. Tex. 2014) (and cases cited therein).

2. Separate and Apart From the Barton "Jurisdictional" Gatekeeping Doctrine, Where Does the Whole Notion of Trustee Immunity Come From?

Next, turning to the more relevant issue of trustee immunity, where does this come from? The United States Supreme Court issued its one and only opinion concerning the possible immunity of a bankruptcy trustee (*i.e.*, a reorganization trustee) in an old case called *Mosser v. Darrow*.[60] In *Mosser*, the Court essentially suggested that immunity from suit may apply for trustees if: (a) they provide candid periodic accountings to the court and parties-in-interest of their actions, or (b) if they seek instructions or orders from the court on difficult questions of judgment. Since the trustee in *Mosser* had neither provided periodic reporting nor sought orders from the court (while having willfully and deliberately set up "an interest in employees adverse to that of the trust"), the trustee was determined to ***not*** be immune from some personal liability.[61] *Mosser* is not terribly enlightening as to how and when trustee immunity works.

Three decades later, the Fifth Circuit gave a little more guidance about the concept of trustee immunity (but not much) in a short opinion in the case of *Boullion v. McClanahan.*[62] In *Boullion*, former debtors (husband and wife) filed suit against their former bankruptcy trustee, in federal district court, arguing that the trustee should bear tort liability (apparently to them directly) for his hiring of an inexperienced appraiser during their case and thereafter filing an incorrect appraisal, improperly handling sales of estate property, and failing to surrender exempt assets. All of the trustee's actions had been approved by orders of the bankruptcy court. The former trustee moved for summary judgment, arguing that, as a trustee appointed by the

[60] *Mosser v. Darrow*, 341 U.S. 267 (1951).

[61] *Id.* at 272.

[62] *Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981).

bankruptcy court, and as to actions directed or approved by the judge, he was entitled to absolute immunity. Summary judgment was granted and the Fifth Circuit affirmed.[63] The Fifth Circuit started by addressing the concept of ***judicial*** immunity, stating that "[f]ew doctrines were more solidly established at common law than the immunity of ***judges*** from liability for damages for acts committed within their judicial discretion."[64] The Fifth Circuit seemed to acknowledge that a bankruptcy trustee is a functionary with a unique role to play in the bankruptcy system, stating that "the court-appointed trustee was acting under the supervision and subject to the orders of the bankruptcy judge."[65] He was, thus, "an arm of the Court" and, having sought and obtained court approval for his actions, he was entitled to ***derived*** immunity.[66] The court elaborated that this type of derived immunity "is not lost even though [the action taken] was in error, was done maliciously, or was in excess of his authority.'"[67] In making this last point, the Fifth Circuit relied on the Supreme Court case of *Stump v. Sparkman*, which was not a bankruptcy case and involved rather horrendous facts.

In *Stump*, a judge of an Indiana trial court of general jurisdiction had approved an *ex parte* petition of a mother who sought to have her "somewhat retarded" 15-year-old daughter, who was consorting with older men, sterilized. The judge had approved the mother's petition the same day that the mother had filed it, without a hearing or any notice to the daughter or an appointment of a guardian ad litem. The sterilization procedure was performed on the daughter

[63] *Id.* at 214.

[64] *Id.* (emphasis added).

[65] *Id.*

[66] *Id.* (emphasis added).

[67] *Id.* at 214 (citing to *Stump v. Sparkman*, 435 U.S. 349, 356 (1978)).

soon thereafter, and the daughter was told she was having her appendix removed. Years later, the daughter was married and subsequently learned that she had been sterilized. She and her husband thereafter sued her mother, the judge, and various others involved in the sterilization.[68] The Supreme Court, in approving the dismissal of the lawsuit, stated that a "judge is absolutely immune from liability for his judicial acts even if his exercise of authority is flawed by the commission of grave procedural errors."[69] The Supreme Court further stated that a judge will not be deprived of immunity because the action he took was in error, done maliciously, or was in excess of his authority. A clear absence of jurisdiction would be the only thing that would deprive the judge of immunity, or, alternatively, if the act committed was not somehow a judicial act. Neither was the case here.[70] The fact that "tragic consequences ensued" from the judge's acts was not enough to deprive him of immunity.[71] The Court stated that the "fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit."[72] "Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in [the] courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility."[73]

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[68] *Id.* at 352-53.

[69] *Id.* at 359.

[70] *Id.* at 360.

[71] *Id.* at 363.

[72] *Id.* at 364.

[73] *Id.*

Thus, *Stump* is a strong statement of the breadth of ***judicial*** immunity.[74] And the Fifth Circuit expressed in *Boullion* that this immunity concept should be expanded to a ***bankruptcy trustee***, where the trustee acted "under the supervision and subject to the orders of the bankruptcy judge."[75] Other courts around the country have similarly determined that a trustee is entitled to derived judicial immunity because he acts under the authority of the bankruptcy judge and performs an integral part of the judicial process.[76]

3. So Derived Judicial Immunity Applies Sometimes. But When Does it Not?

While it seems clear that a court-appointed trustee will often enjoy derived judicial immunity from any personal liability, if he is acting under the supervision and subject to the orders of the bankruptcy judge (as set forth above), clearly it is not this simplistic. Sometimes (as noted early on), a trustee is going to face liability. He will not always have immunity. To better understand the scope and limits of trustee immunity, and when it applies and when it does not (other than in the easiest scenario where there is a ***court order*** authorizing a trustee's action—such as in *Bouillion*), one must first consider the duties of bankruptcy trustees.

[74] *See also Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (discussing broad scope of judicial immunity doctrine and that it is "not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences"); *Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (in explaining rationale for judicial immunity, Court stated that "[l]iability to answer every one who might feel himself aggrieved by the action of the judge, would . . . destroy [judicial] independence without which no judiciary can be either respectful or useful").

[75] The Fifth Circuit also observed that the Boullions could have appealed orders of the bankruptcy court approving trustee actions, if they were discontent with them.

[76] *Mullis v. U.S. Bankr. Ct.*, 828 F.2d 1385, 1390 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988); *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096, 1097 (9th Cir. 1986). *See also Curry v. Castillo (In re Castillo)*, 297 F.3d 940 (9th Cir. 2002); *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1 (1st Cir. 1999), *cert. denied*, 530 U.S. 1230 (2000).

a.) Duties of a Bankruptcy Trustee.

As earlier footnoted, a Chapter 7 trustee's duties are set forth in section 704 of the Bankruptcy Code (and include such things as collecting and liquidating property of the estate), and a Chapter 11 trustee's duties are set forth in section 1106 of the Bankruptcy Code (and include such things as investigating the debtor and its business, perhaps filing a plan of reorganization, and perhaps operating the business of the debtor). There are additional duties imposed upon trustees by the United States Trustee's office, pursuant to 28 U.S.C. § 586(a)(3)(A)(i), as well as reporting obligations pursuant to 18 U.S.C. § 3057(a). And, of course, as a matter of common law, a trustee has fiduciary duties to the beneficiaries of the bankruptcy estate beyond his statutory duties[77]—including, primarily, the duties of care, loyalty, and obedience.[78]

b.) Who is Suing and for What?

Next, to further understand trustee immunity, one must consider ***who*** might be suing the trustee and for what: (a) a beneficiary of his trust (creditors or shareholders) who are interested in their payoff in the case and are concerned about breaches of statutory or fiduciary duties and loss to the estate assets; or (b) a third party who somehow finds himself interacting with the trustee and is suing for a personal loss. The trustee owes heightened fiduciary duties in the former situation, but not in the latter.

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[77] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 345 (1985); *United Pac. Ins. Co. v. McClelland (In re Troy Dodson Constr. Co.)*, 993 F.2d 1211, 1216 (5th Cir. 1993); Steven Rhodes, *The Fiduciary and Institutional Obligations of a Chapter 7 Trustee*, 80 AM. BANKR. L.J. 147, 154 (2006) (in which Retired Judge Rhodes notes a bankruptcy trustee's duties of "loyalty, distribution maximization, diligence, due care, accountability, competence, claims review, information disclosure, candor, civility, proper litigation preparation and conduct, impartiality and its appearance, enforcement, supervision, compliance, and good faith and fair dealing.").

[78] Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is There a Method in the Madness?*, 15 LEWIS & CLARK L. REV. 153 (2011) (and authorities cited therein).

After considering both the duties of a trustee and the significance of who is suing and for what, this court concludes that the confusing case law can be distilled down to the following guiding principles: (a) ***absolute immunity*** (*i.e.*, a type of derived judicial immunity) will always apply to a bankruptcy trustee (no matter who the plaintiff is and whether or not the plaintiff is asserting personal damages or damages incurred by the bankruptcy estate) if a bankruptcy trustee acted pursuant to a court order; (b) ***no immunity*** will apply where a beneficiary to the trust (*i.e.*, a creditor or shareholder) is suing for ***injury to the estate*** ("Estate Loss Cases") and there was no court order *per se*—rather the court must make a fiduciary duties analysis and the heightened standard of "gross negligence" is the minimum standard to impose personal liability on the trustee; and (c) ***qualified immunity*** or ***quasi-immunity*** (*i.e.* another type of derived judicial immunity, that is fuzzier than absolute immunity) will generally apply where a third party who interacted with the trustee is suing for personal harm/damages—so long as the trustee was acting in his ***official capacity*** in the discharge of his duties—the most common and perhaps only exception to this is when the trustee commits an *ultra vires* seizure of property ("Third Party Damages Cases").

c.) Estate Loss Cases.

The court has already discussed the Fifth Circuit authority in which it held ***absolute immunity*** applies to a bankruptcy trustee who has acted pursuant to court orders (*i.e.*, *Boullion*). But the Fifth Circuit has discussed trustee liability in several Estate Loss Cases where there were not orders, *per se,* approving the trustee's conduct. In each case—rather than mention the concept of immunity—the Fifth Circuit discussed fiduciary duties and made clear that a trustee will be liable for malfeasance that causes loss to an estate, but only if his acts have amounted to gross negligence or willful misconduct. In other words, mere negligence is not sufficient.

The Fifth Circuit's case of first impression on this topic was the *Smyth* case.[79] This case dealt with a chapter 11 trustee who allegedly was negligent in preparing tax returns causing a loss to the estate. A creditor objected to the trustee's fees and to an application for final decree closing case and made a claim that the trustee should be held personally liable for the estate's loss. Without using the term immunity, the Fifth Circuit stated that there should be a "surcharge" on the trustee (*i.e.*, personal liability imposed upon him) if, in performing his duties for the estate, he acted willfully and deliberately in violation of his fiduciary duties, or if he acted with gross negligence.[80] Here, the Fifth Circuit determined that the lower court did not err in finding that there was insufficient evidence in the record to support a finding that the trustee was grossly negligent.

Another Fifth Circuit case on this topic was the *Schooler* case.[81] In *Schooler*, a Chapter 7 trustee and her bond surety were sued by a large unsecured creditor after the trustee had failed to take control of certain assets that the debtor-wife had inherited shortly after the Chapter 7 case was filed, resulting in the estate losing out on more than $100,000 of assets. The bankruptcy court ruled against the trustee, finding that she breached her standard of care in failing to act in the face of obvious danger that the debtors would misappropriate inherited assets belonging to the bankruptcy estate. The bankruptcy court's judgment was affirmed up through the Fifth Circuit.[82] Without ever mentioning the concept of immunity, the court revisited the standard of

[79] *Dodson v. Huff (In re Smyth),* 207 F.3d 758, 762 (5th Cir. 2000).

[80] Gross negligence "is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected." *Id*.

[81] *Liberty Mutual Ins. Co. v. United States (In re Schooler),* 725 F.3d 498 (5th Cir. 2013).

[82] *Id.* at 500-503, 516.

care required of a bankruptcy trustee, as discussed in the *Smyth* case, and reiterated that bankruptcy trustees should be held to a gross negligence standard and mere negligence is not enough. The court held that the evidence had satisfied the gross negligence standard. The estate had lost out on significant assets that could have been administered for creditors.[83]

d.) Third Party Damages Cases.

As mentioned above, it appears that most courts adopt the notion of a qualified immunity or quasi-immunity (not absolute) that generally applies ***where a third party who has interacted with a trustee sues for personal harm/damages***—so long as the trustee had been acting in his official capacity in the discharge of his duties. The most common and perhaps only exception is when a trustee commits an *ultra vires* seizure of property.

There are no genuine examples of this that have been addressed by the Fifth Circuit. But there are many examples from other circuits.[84] One such case is the *McKenzie* case out of the Sixth Circuit.[85] In *McKenzie*, a law firm that had been a defendant in three separate actions filed by a bankruptcy trustee (ranging from a turnover action to an avoidance action to a fraud/conspiracy action), later sued the bankruptcy trustee, alleging malicious prosecution and

[83] *See also Compton v. Walker (In re Coral Petroleum, Inc.)*, 249 B.R. 721, 722-23 (Bankr. S.D. Tex. 2000) (beneficiary of liquidating trust sued a trustee appointed pursuant to a liquidating chapter 11 plan after trust funds he was administering were not paid to creditors and were generally unaccounted for).

[84] It appears that the closest the Fifth Circuit has come to confronting this situation is *Tex. Comptroller of Public Accounts v. Liuzza (In re Pig Stands, Inc.)*, 610 F.3d 937 (5th Cir. 2010), wherein the Texas Comptroller (*i.e.*, a third party) sued a chapter 11 plan trustee to impose personal liability on him for the deficiency that arose when he failed to remit post-confirmation sales taxes from debtor's restaurants. The Fifth Circuit, contrary to the bankruptcy court, determined that the trustee was personally liable to the Texas Comptroller. Rather than potentially discussing qualified immunity or a potential ultra vires exception, the Fifth Circuit relied on a Texas state statute that makes "controlling persons" personally liable for any willful failure to remit sales taxes—which are legally deemed to be the State of Texas' property that the tax payer holds in trust. Since trustees must comply with this state law, the trustee became personally liable to the Texas Comptroller.

[85] *Grant, Konvalinka & Harrison, PC v. Banks (In re McKenzie)*, 716 F.3d 404 (6th Cir. 2013), *cert denied*, 134 S. Ct. 444 (2013). The court notes that neither the Plaintiff nor the Defendants cited to this case in any of their briefing to the court, despite the seemingly similar facts.

abuse of process, arguing that the trustee's lawsuits had all been meritless, without foundation, and brought for the purposes of annoyance or harassment. A footnote discloses that the law firm happened to be a creditor of the estate, with a disputed, unresolved proof of claim.[86] The bankruptcy court dismissed the lawsuits against the trustee, on the grounds of quasi-immunity and failure to state a claim upon which relief may be granted.[87] The district court and Sixth Circuit affirmed. As alluded to above, *McKenzie* addresses in depth a concept that the Fifth Circuit has not heretofore discussed: the concept of quasi-judicial immunity for a trustee when he–***while not acting pursuant to a specific court order***–is nevertheless acting in his official capacity to administer a bankruptcy estate.[88] In discussing the quasi-judicial immunity concept, the Sixth Circuit stated that the appropriateness of extending the concept of ***judicial*** immunity to officials performing ***quasi-judicial*** duties has been recognized for ***those persons performing tasks so integral or intertwined with the judicial process that these persons are considered an arm of the judicial officer who is immune***. The court stated that bankruptcy trustees fall into this category and are immune from some but not all possible liability. Specifically, the court carved out two situations in which quasi-immunity will not shield a trustee from personal liability in connection with his acts in administering the estate: (a) for breach of fiduciary duty to the estate (noting that in the Sixth Circuit and some other circuits, any breach must rise to the level of willful or deliberate breaches of fiduciary duty or at least gross negligence); and (b) in

[86] *Id*. at n. 3.

[87] The bankruptcy court also denied requests by the law firm to sue the bankruptcy trustee in state court and this decision was also affirmed by the Sixth Circuit. *Id.* at 425.

[88] *McKenzie* also addresses the concept of ***counsel*** for a trustee being the functional equivalent of a trustee, when counsel is acting at the direction of the trustee and for purposes of administering the estate or protecting its assets. *McKenzie*, 716 F.3d at 411-12.

the case of ultra vires acts (*i.e.*, acts outside the scope of the trustee's authority).[89] In *McKenzie*, no breach of fiduciary claim was asserted against the trustee—rather this was essentially a third party claim for damages to the third party. Thus, the question was whether ultra vires acts were committed so that no quasi-judicial immunity from suit by third parties applied.[90] The court noted, fundamentally, that a bankruptcy trustee is appointed to take charge of the debtor's estate, collect assets, bring suit on the debtor's claims against other persons, defend actions against the estate, and otherwise administer the estate.[91] ***Showing that a bankruptcy trustee's actions were wrongful or improper does not equate to a transgression of his authority, for purposes of determining whether a trustee acted ultra vires such that his actions were not protected by quasi-judicial immunity.*** The court said that the law firm did not allege facts demonstrating that the trustee exceeded the scope of his authority.[92] Thus, the bankruptcy court did not err in finding as a matter of law that the trustee and his attorneys were entitled to quasi-judicial immunity from the claims of malicious prosecution and abuse of process for bringing the lawsuits.

The ultra vires exception was also discussed by a bankruptcy court in *J & S Props.*[93] In *J & S Props.*, the court was confronted with a chapter 7 trustee's motion to dismiss a lawsuit brought against her by a tenant of a commercial building that had been owned by the debtor.

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[89] *Id.* at 414.

[90] The Sixth Circuit also pointed out that "[w]hether a bankruptcy trustee's actions were *ultra vires* is a question that courts most often addressed in the related context of determining whether jurisdiction is restricted to the bankruptcy court under the common-law Barton doctrine." *Id.*

[91] *Id.* at 416 (citing to 11 U.S.C. § 704).

[92] *Id.* at 416-20.

[93] *Phoenician Mediterranean Villa, LLC v. Swope (In re J & S Props., LLC),* 545 B.R. 91 (Bankr. W.D. Pa. 2015), *aff'd*, 554 B.R. 747 (W.D. Pa. 2016).

The tenant sued the bankruptcy trustee claiming that the bankruptcy trustee's act of having the sole key to the building (whose locks were changed postpetition, thus denying the tenant access to the building) had ultimately caused the tenant losses to her restaurant business, when the tenant could not gain access to the restaurant for a period of time. The claims alleged were, essentially, wrongful eviction. The bankruptcy trustee alleged a quasi-immunity defense.[94] The court observed that, "[t]rustee immunity has important implications for the bankruptcy system and the public being served by that system."[95] A bankruptcy trustee acts under the appointment and supervision of the United States Trustee, which is a division of the United States Department of Justice. Moreover, bankruptcy trustees act pursuant to legislative and judicial directives, and it has been stated that "Congress created a hybrid official" with the bankruptcy trustee performing in some ways both adjudicatory and administrative functions.[96] The *J & S Props.* court went on to note that "[t]here is almost universal agreement that bankruptcy trustees are entitled to judicial immunity from personal liability for acts taken within their authority as court officers."[97] "When acting pursuant to an order of court, a bankruptcy trustee is generally afforded ***absolute immunity***."[98] "When not acting pursuant to an order of [the] court, a bankruptcy trustee is generally afforded ***qualified immunity***."[99] With regard to qualified immunity, there are two types of suits that are sometimes blurred: (a) a suit by a nonbeneficiary

[94] *Id.* at 93-95.

[95] *Id.* at 100.

[96] *Id.* at 102-03.

[97] *Id.* at 103 (citing numerous cases).

[98] *Id.* (emphasis in original) (numerous citations therein). *Accord Boullion v. McClanahan*, 639 F.2d 213, 214 (5th Cir. 1981).

[99] *J & S Props.*, 545 B.R. at 103 (emphasis in original).

of the trust, for a tort or breach of contract, where a trustee may be immune from suit if acting within the scope of his authority; or (b) a suit brought by a beneficiary of the trust, where one looks at the standard of care that a trustee owes to the beneficiaries of the estate (typically, these are breach of fiduciary duty claims). As to the former, the bankruptcy court in *J & S Props.* acknowledged that there would be qualified immunity as to a nonbeneficiary of the trust unless the trustee was acting outside of the scope of his duties (with ultra vires acts).[100] Examining the facts of the case, the *J&S Props*. court ultimately held that the chapter 7 trustee had acted in furtherance of her statutory duty to administer and preserve the estate and did not violate any fiduciary duty owing to a beneficiary of the estate. The bankruptcy court also held that there was no evidence that the chapter 7 trustee acted with malice or ulterior motive. She acted as a reasonable chapter 7 trustee would act under the circumstances, and she was protected against suit by qualified immunity resulting in dismissal of the adversary proceeding.[101]

While the Sixth Circuit in *McKenzie* and the bankruptcy court in *J & S Props.* held that ultra vires acts did ***not*** occur in each of its cases, both courts discussed two cases (*Teton Millwork*[102] and *Leonard*[103]) where ultra vires acts were initially found to have occurred—in a *Barton* doctrine examination—and, thus, a trustee was thought ***not*** to be immune from suit.[104]

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[100] *Id.* at 105.

[101] *Id.* at 114.

[102] *Teton Millwork Sales v. Schlossberg*, 311 Fed. Appx. 145 (10th Cir. 2009).

[103] *Leonard v. Vrooman*, 383 F.2d 556 (9th Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

[104] As noted, the courts in both *Teton* and *Leonard* were addressing the applicability of the ultra vires exception ***in the context of examining the Barton doctrine*** (which was previously discussed). As a reminder, the *Barton* doctrine has been described as involving jurisdiction, not substantive law, and involves determining whether a lawsuit may proceed in a non-bankruptcy court. A review of jurisprudence regarding the *Barton* doctrine reveals that a common source of confusion springs from misconstruing it as shielding trustees from liability. Simply stated, the *Barton* doctrine does not shield trustees from liability. *Katz v. Kucej (In re Beibel),* Adv. No. 08–3115, 2009 WL 1451637, at *6, n. 18 (Bankr .D. Conn. May 20, 2009) (unreported decision) ("The Barton Doctrine is jurisdictional. Quasi-judicial immunity is substantive. They are not the same thing."). Nevertheless, as part of

Significantly, both courts indicated that an ultra vires exception to trustee immunity only applies where there was "***the actual wrongful seizure of property by a trustee or receiver***."[105] A discussion of these cases seems important to this court's analysis.

First, in *Teton Millwork*, a court-appointed receiver in a divorce action, Schlossberg (the "Receiver"), was alleged to have wrongfully seized the assets of Teton Millwork Sales ("TMS"), a corporation in which the husband, Michael Palencar (the "Husband"), was only a 25% shareholder. Upon learning that its assets had been seized, TMS filed suit in Wyoming state court asserting that the Receiver "committed abuse of process and fraud."[106] The suit was premised on the allegation made by TMS that the Receiver exceeded his legal authority "by seizing TMS's assets in Wyoming, as well as its proprietary information and mail, even though he knew that [the Husband] was only a 25% shareholder in TMS and that there was no evidence to justify piercing the corporate veil of TMS."[107] TMS further alleged that the Receiver made false representation to and threatened third parties in Wyoming regarding his legal authority to seize assets.[108] The Receiver removed the suit to federal district court, and moved for dismissal under Fed.R.Civ.P. 12(b)(1), (2), (3), and (6).[109] The district court granted the motion under Fed.R.Civ.P. 12(b)(2) and (6), on the grounds that "it lacked personal jurisdiction over [the Receiver] and that TMS failed to state a claim because [the Receiver] enjoyed absolute immunity

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engaging in the *Barton* doctrine examination, a bankruptcy court may, but is not required to, consider whether the trustee should enjoy immunity as a basis for disallowing the matter to proceed in another forum.

[105] *McKenzie*, 716 F.3d at 415 (citing to *Schechter v. Ill. (In re Markos Gurnee P'ship)*, 182 B.R. 211, 217 (Bankr. N.D. Ill. 1995) (citations omitted) (emphasis added)). *See also J & S Props.*, 545 B.R. 105-110.

[106] *Teton Millwork*, 311 Fed. Appx. at 146-47.

[107] *Id.* at 147.

[108] *Id.*

[109] *Id.*

as a court-appointed receiver."[110] TMS appealed and only the Fed.R.Civ.P. 12(b)(6) grounds for dismissal were subjected to review by the Tenth Circuit.[111]

The issue decided by the Tenth Circuit was whether TMS set forth a facially plausible claim that the Receiver was not entitled to ***absolute immunity***. The Tenth Circuit concluded that the facts of the case brought it squarely within the ultra vires exception because TMS alleged that the Receiver wrongfully seized its assets rather than the assets of the Husband. The Tenth Circuit noted that TMS had set forth allegations that the Receiver made "specific false factual representations," including assertions that "[Receiver] was in a position of judicial authority over Teton" and that he "was vested with title to all the assets, property, mail and confidential business and corporate information of Teton," and that TMS' agents were "forbidden from accepting instructions from Teton, and that those agents would be subject to financial penalties should they do so."[112] The court held that such allegations, accepted as true, demonstrated that (a) the Receiver exceeded the scope of his authority by not acting in accordance with court orders and would not enjoy absolute immunity; and (b) perpetrating a fraud was not "intrinsically associated with a judicial proceeding."[113] The Tenth Circuit ultimately reversed and remanded the case back to the district court to develop the facts through discovery.

While the *Teton Millwork* case is cited by Plaintiff as strong authority regarding the application of the ultra vires exception, it is important to take note of *Teton Mills'* subsequent history. As noted by the bankruptcy court in *J & S Props*:

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[110] *Id.*

[111] *Id.*

[112] *Id.* at 151.

[113] *Id.*

> *Teton Mills* is an example of how citations purporting to reflect a legal principle, when applied in haste, can metastasize in the frail body of case law on the topic . . . . Indeed, on remand, the District Court conducted a bench trial and ultimately concluded that that TMS's claims were meritless, and, alternatively, that they were time-barred under West Virginia law and that [Receiver] was entitled to immunity. Thereafter, the matter came before the Tenth Circuit for a second time. *Teton Millwork Sales v. Schlossberg*, 2011 WL 4489643, *1, (10th Cir. Sept. 29, 2011) (unprecedential). The Tenth Circuit affirmed the District Court's merits determination and therefore did not find it necessary to address the alternative determinations . . .
>
> Accordingly, what can be garnered from *Teton Mills* is that ***the Tenth Circuit regarded immunity determinations as contextual, requiring a fact-specific inquiry.*** The Tenth Circuit originally concluded that the District Court was required to arrive at a more complete set of facts in order to determine whether the receiver (Schlossberg) acted wrongfully and in excesses of the authority of the state court order. On remand, after conducting a factual inquiry, ***the District Court found that [the Receiver] was entitled to qualified immunity***. The District Court's finding that [the Receiver] was entitled to immunity was not addressed by the Tenth Circuit on the subsequent appeal.[114]

Next, in *Leonard*, the Ninth Circuit held that "a trustee wrongfully possessing property which is not an asset of the estate may be sued for damages arising out of his illegal occupation in a state court without leave of [the bankruptcy] court."[115] The facts of *Leonard* involved a building in which the debtor maintained personal property. The debtor had allegedly merely leased the building from an individual named Patterson. A receiver, who later became trustee (the "Trustee") over the debtor's estate, was initially unable to locate the debtor or Patterson, so the Trustee took possession of the building, posting notices regarding his name, possession, authority, and location (in the presence of a constable) and placed his own locks upon the doors. The Trustee later discovered a confusing trail of transfers and deeds pertaining to the building—one of which deeds showed another individual named Leonard as owner of the building. Still

[114] *J & S Props.*, 545 B.R. at 107 (emphasis added).

[115] *Leonard v. Vrooman*, 383 F.2d at 558. As noted earlier, *Leonard* (like *Teton Millwork*) involved an analysis of the ultra vires doctrine in the context of a *Barton* doctrine analysis.

later, the Trustee asked the bankruptcy court to permit him to sell the property, free and clear of the liens or claims of the various parties in the deed history—including Patterson and Leonard—and the bankruptcy court refused, holding the trustee never acquired any ownership in the property. One of the parties in the deed chain of title (Leonard) subsequently filed suit in a state court against the Trustee personally and against his surety. Leonard alleged that the damages sought resulted from the Trustee violating his duties as a trustee upon taking and retaining possession of Leonard's real property. At the Trustee's request, the bankruptcy court restrained prosecution of the state court suit but ultimately the Ninth Circuit reversed.[116]

The Ninth Circuit, after referring to the bankruptcy court's earlier findings that the Trustee never at any relevant time had any right, title, claim, or interest in the building (and also a finding that Leonard had all right, title, claim, and interest including the right to possession),[117] held that the bankruptcy court should not have restrained Leonard from proceeding with the state court action. Specifically, the Ninth Circuit stated that "a trustee wrongfully possessing property which is not an asset of the estate may be sued for damages arising out of his illegal occupation in a state court without leave of his appointing court."[118] While appearing sympathetic to the Trustee's concerns about the numerous confusing transfers of the building, the Ninth Circuit was critical of the manner in which the Trustee acted upon his suspicions, noting that it was a mistake "to break into and seize possession of the real property belonging to Leonard, when this property was not listed as an asset of the bankrupt's estate" and failing "to relinquish possession of the real property when he discovered that title was claimed by and recorded in the name of Leonard."[119]

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[116] *Id.* at 557-560.

[117] *Id.* at 561.

[118] *Id.* at 560. Again, this was in the context of a *Barton* doctrine analysis.

[119] *Id.*

The court further noted that: "[u]nder the circumstances here involved, the trustee initially could have and should have obtained a turnover order directing delivery to the trustee of the personalty which was an asset of the bankrupt estate."[120] Likewise, regarding the Trustee's suspicions regarding fraudulent or preferential transfers, "an action could have been brought by the trustee against those claiming title, to have the conveyance of title to them set aside."[121]

It is worth nothing that, in addition to the holdings in *Teton Millwork* and *Vrooman,* at least one other court (the Eleventh Circuit in the *Happy Hocker* case) has applied the ultra vires exception where there has been "the actual wrongful seizure of property by a trustee or receiver."[122] Like both the *Teton Millwork* and *Leonard* decisions, the *Happy Hocker* court was addressing the ultra vires exception within the context of applying the *Barton* doctrine, not substantively addressing the issue of ***qualified immunity*** within the context of a motion to dismiss under Rule 12(b)(6).[123]

4. Has Plaintiff Pleaded Facts That, if True, Present a Plausible Claim Against the Trustee? No.

a.) First—at Least With Regard to His First Three Claims—Baron asserts Third Party Damages Claims, Not Estate Loss Claims.

As a reminder, Baron has asserted the following causes of action in his Complaint: (a) ***breach of contract***, as to the Bankruptcy Trustee, for his alleged breach of the GSA; (b) ***fraud***,

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[120] *Id.* at 560-61.

[121] *Id.* at 561.

[122] *Welt v. MJO Holding Corp. (In re Happy Hocker Pawn Shop)*, 212 Fed. Appx. 811, 815-18 (11th Cir. 2006) (unpublished) (in noting that the question of whether an ultra vires act was committed was not in dispute based upon an earlier agreed order entered by the bankruptcy court (which provided that bankruptcy trustee had no right to take possession of non-estate assets), the Eleventh Circuit held that the bankruptcy court did not have subject matter jurisdiction to resolve claims against bankruptcy trustee and that such claims should be adjudicated in state court).

[123] *See also* footnote 104, *supra*.

as to the Bankruptcy Trustee and the Munsch Law Firm, for their alleged misrepresentations to Baron in connection with the aforementioned GSA; (c) ***malicious prosecution***, as to the Bankruptcy Trustee and the Munsch Law Firm, relating to their request to Retired District Judge Royal Furgeson that he impose the Receivership—in an allegedly malicious way and allegedly through false representations; and (d) ***gross negligence***, for the Bankruptcy Trustee's alleged neglect of his duties in administering the case, including failure to minimize administrative expenses and, again, moving for the Receivership. Baron is seeking monetary damages ***for himself*** in excess of $1,000,000—alleging that he "was caused to suffer and incur ruinous damages".[124]

The bankruptcy court concludes that—at least with respect to the first three claims—Baron is not asserting Estate Loss Claims. He is asserting Third Party Damages Claims: breach of contract ***as to Baron***; fraud ***as to Baron***; and malicious prosecution ***as to Baron***. While Baron is a former equity owner of the Debtor, Ondova, and is a potential beneficiary to the bankruptcy estate, with regard to the first three claims, Baron is suing for alleged torts or bad acts of the Bankruptcy Trustee that caused ***Baron*** alleged personal loss. Baron makes clear that he is seeking damages for himself for the "ruinous damages" he has incurred. Baron asserts that ***he*** has been damaged in the sum of the money paid by Baron under the GSA, the millions of dollars of attorney's fees wrongfully charged by the Bankruptcy Trustee and the Munsch Law Firm, and the fees and expenses paid by the Receiver out of Baron's assets and the assets of Novo Point and Quantec. Additionally, Baron argues that ***he*** has been damaged by the loss of ability to control and profit from the assets wrongfully placed in the Receivership (which assets were allegedly lying in a state of neglect, wasting and accruing tax liability). Further, Baron argues

[124] *See* Plaintiff's Complaint, ¶ 50-51.

that ***he*** suffered a substantial loss of profits by the denial of access to the lucrative companies wrongfully seized.[125] Since Baron is asserting Third Party Damages Claim with regard to these first three claims, immunity doctrines are applicable.

b.) Applicability of Immunity Doctrines to the Bankruptcy Trustee.

As discussed, under controlling jurisprudence, a bankruptcy trustee is entitled to ***absolute immunity*** when acting pursuant to a court order.[126] And under prevailing jurisprudence from other circuits, a bankruptcy trustee is generally entitled to ***qualified immunity*** even when not acting pursuant to a court order—as long as he was acting in his official capacity in the discharge of his duties.

It is clear that most of the actions of the Bankruptcy Trustee in the case at bar occurred as a result of court orders. For example, the seizures of property involved here about which Baron complains so vociferously, were all done pursuant to the Receivership Order (and, notably, by the Receiver, not the Bankruptcy Trustee). As noted earlier, Baron spent two years following the issuance of the Receivership Order appealing it and numerous related orders entered by the District Court. Exactly eleven appeals to the Fifth Circuit were taken and one petition for mandamus was filed regarding the Receivership Order and related orders that were entered in the Netsphere DC Case.[127] This bankruptcy court also takes judicial notice that, between the date the Bankruptcy Trustee was appointed in the Ondova Bankruptcy Case and the date of the filing of this Adversary Proceeding, the bankruptcy court entered approximately ***147 orders*** in the

[125] *See* Plaintiff's Complaint, ¶ 50.

[126] *Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981).

[127] *See* Plaintiff's Complaint, ¶ 32.

Ondova Bankruptcy Case.[128] This case has not involved a situation where there was a "rogue" bankruptcy trustee acting without court orders or without court and creditor supervision. Even when the Bankruptcy Trustee was not acting pursuant to a specific court order per se, all of his actions were in in connection with his official duties. They were trustee acts. ***This Adversary Proceeding is all about the manner in which the Trustee carried out his job duties and how, according to Baron, it harmed Baron***. As noted earlier, a bankruptcy trustee is appointed to take charge of the debtor's estate, collect assets, bring suit on the debtor's claims against other persons, defend actions against the estate, and otherwise administer the estate.[129] ***Showing that a bankruptcy trustee's actions were potentially wrongful or improper does not equate to acting outside his authority or except him from quasi-judicial immunity.*** It is the ***type*** of conduct that triggers immunity. If the Bankruptcy Trustee's acts were entirely foreign to the duties of a trustee—for example, if the Bankruptcy Trustee had punched Baron in the face or ran over him with a car—clearly, immunity would ***not*** apply. These would not be "trustee acts" performed in his official capacity or in the discharge of his duties

Baron has not alleged facts demonstrating that the Bankruptcy Trustee committed acts that were foreign to the duty of a trustee or that exceeded the scope of his authority. All of the facts alleged by Baron involve the Bankruptcy Trustee's acts committed as part of administering the Ondova bankruptcy estate. Whether 100% legally proper or not, the Bankruptcy Trustee was acting in the role statutorily defined for administering and preserving an estate. To use the wording of the Supreme Court in *Mosser*,[130] the Bankruptcy Trustee here provided periodic

[128] Some of these Orders were entered pursuant to motions filed by parties other than the Bankruptcy Trustee.

[129] *McKenzie,* 716 F.3d at 416 (citing to 11 U.S.C. § 704).

[130] *Mosser v. Darrow*, 341 U.S. 267 (1951).

reporting to the bankruptcy court and sought orders from the bankruptcy court frequently. The Bankruptcy Trustee was always acting under the supervision and subject to orders of the bankruptcy court.[131] Even if the Fifth Circuit, which has never spoken about the "ultra vires" exception to qualified immunity for trustees, would recognize that there is such an exception, it is clear that the exception only applies when a trustee seizes non-estate property ***without court order or supervision*** or, at a minimum, is acting fully outside of the authority of the bankruptcy court (such as operating the business of a debtor without court authority). Again, with regard to the Receivership that is at the heart of Baron's Complaint, the Bankruptcy Trustee obtained court orders with regard to that and it was the Receiver—not the Bankruptcy Trustee—who actually seized Baron's property (or property of Baron affiliates). With regard to the GSA that is likewise at the heart of Baron's Complaint, there were bankruptcy court orders and numerous evidentiary court hearings and status conferences held before, during, and after the GSA's execution. It is inconceivable that any of the Bankruptcy Trustee's acts complained of by Baron could be deemed ultra vires or outside the scope of his authority. The bankruptcy court concludes that—assuming everything Baron has pleaded is true—absolute or qualified immunity shields the Bankruptcy Trustee from any personal liability to Baron. Baron did not allege facts demonstrating that the Bankruptcy Trustee exceeded the scope of his authority. Baron did not set forth a facially plausible claim that the Bankruptcy Trustee is not entitled to immunity.

C. Based Upon the Court's Determination That the Bankruptcy Trustee is Entitled to Absolute or Qualified Immunity—at Least as to the First Three Baron Claims—What Liability Remains as to the Munsch Law Firm? None.

Having determined that—at least as to the first three Baron claims—the Bankruptcy

[131] *Boullion v. McClanahan*, 639 F.2d at 213.

Trustee is entitled to at least qualified judicial immunity (and, where there were court orders, absolute immunity) and that those claims against him should be dismissed, the bankruptcy court next analyzes whether the Munsch Law Firm is nonetheless somehow liable.

1. Derivative Immunity.

First, case law in other circuits has held that "[a]s a matter of law, ***counsel*** for trustee, court appointed officers who represent the estate, are ***the functional equivalent of a trustee***, [when] they act at the direction of the trustee and for the purpose of administering the estate or protecting its assets."[132] Thus, under this line of reasoning, any immunity that was held to exist for the Bankruptcy Trustee would extend derivatively to the Munsch Law Firm, to the extent they were acting at his direction and for the purpose of administering the estate or protecting its assets. The Plaintiff has not put forth any facts evidencing that the Munsch Law Firm was deviating or not taking direction from the Bankruptcy Trustee, so the court finds that it is likewise entitled to derived qualified immunity.

2. Protection Against Suit of a Non-Client Under the Texas Attorney Immunity Doctrine.

More importantly, the Fifth Circuit in *Troice*[133] recently held that attorneys are entitled to immunity under Texas law from suit by ***non-clients***, unless the attorney's conduct does not involve the provision of legal services or is entirely foreign to the duties of an attorney. *Troice* involved allegations against an attorney (and a law firm) based on their actions in representing an investment fund. The non-client plaintiffs (investors in the fund) raised claims based under the Texas Securities Act, common law fraud, and conspiracy. In response, the attorney-defendants

[132] *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1241 (6th Cir. 1993) (emphasis added).

[133] *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 344 (5th Cir. 2016).

moved to dismiss based on attorney immunity under Texas law.[134] In denying the motion to dismiss, the trial court explained that the plaintiffs had sufficiently pleaded an exception to attorney immunity under Texas law based on allegations of fraud.[135] The Fifth Circuit reversed on appeal explaining that the Texas Supreme Court's recent decision in *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 484 (Tex. 2015*),* clarified that "simply claiming that an attorney's conduct was fraudulent" alone is not enough for a non-client plaintiff to overcome attorney immunity.[136] Here, the Plaintiff has made no allegations that the Munsch Law Firm's actions did not involve the provision of legal services to the Bankruptcy Trustee or were entirely foreign to their duties as an attorney. Thus, to the extent that the Munsch Law Firm is not derivatively covered under the Bankruptcy Trustee's qualified immunity defense, they would be covered under the Texas attorney immunity defense.

D. Liberty Mutual: The Fourth Claim of Baron of "Gross Negligence" and Possible Liability Under the Bond.

Finally, the court now turns to Baron's gross negligence claim made on the bond issued by Liberty Mutual, in favor of the United States, to insure against any breaches by the Bankruptcy Trustee of his official duties.

Preliminarily, Liberty Mutual issued a surety bond (the "Bond") on or about October 5, 2009, in connection with the Ondova Bankruptcy Case, Bond No. 016039129.[137] It should be noted that federal law requires bankruptcy trustees to obtain surety bonds issued in the United

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[134] *Id.* at 344 (5th Cir. 2016).

[135] *Id.* at 345.

[136] *Id.* at 350.

[137] *See* DE # 129 in the Bankruptcy Case. Five Riders to the Bond were executed and filed of record in the Bankruptcy Court increasing the coverage on the bond at various times. *See* DE ## 153, 160, 488, 655, and 1108 in the Bankruptcy Case.

States to secure the trustee's "faithful performance" of his official duties.[138] Consistent with federal law, the Bond at issue in this Adversary Proceeding provides that "DANIEL J. SHERMAN of DALLAS, TX, as principal and LIBERTY MUTUAL INSURANCE COMPANY, as surety bind ourselves to the UNITED STATES OF AMERICA . . . for the faithful performance by the undersigned principal of his official duties as TRUSTEE of the above-named debtor."[139] Federal law generally governs all federal bonds.[140] A "surety corporation providing a surety bond under section 9304 [of Title 31] . . . may be sued in a court of the United States having jurisdiction of civil actions on surety bonds."[141] Bonds such as the one at issue in this Adversary Proceeding are sometimes referred to as "faithful performance bonds"—in that they are "given by federal officers to ensure their faithful performance of their federal duties."[142] They are also sometimes referred to a fidelity bonds.[143] In any event, the Fifth Circuit in the *Schooler* case clarified what is implicit in section 322(c) of the Bankruptcy Code—that there are ***two distinct forms of liability*** that a bankruptcy trustee may face: ***personal liability*** or ***liability on the bond***.[144]

[138] 11 U.S.C.A. § 322(a) (West, Westlaw through P.L. 114-254).

[139] *See* DE # 129 in the Bankruptcy Case.

[140] *Schooler v. Liberty Mutual Ins. Co. (In re Schooler)*, 725 F.3d 498, 506 (5th Cir. 2013); *see* also 31 U.S.C.A. §§ 9301-9309 (West, Westlaw through P.L. 114-254).

[141] *Schooler*, 725 F.3d at 506; 31 U.S.C.A § 9304 (West, Westlaw through P.L. 114-254).

[142] *Schooler*, 725 F.3d at 506 (and citations therein).

[143] *See* 3 COLLIER ON BANKRUPTCY 322-4 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016).

[144] *Schooler*, 725 F.3d at 506 (noting that section 322(c) of the Bankruptcy Code states that "[a] trustee is not liable personally or on such trustee's bond in favor of the United States for any penalty or forfeiture incurred by the debtor" and, thus, this implicitly suggests the two distinct forms of trustee liability).

Elaborating further on how bond liability works, 31 U.S.C. § 9307(a)(1) generally authorizes claims to be brought against a surety of a federal bond such as the one at issue here.[145] The provisions of Bankruptcy Rule 2010(a) provide an explanation for why Baron filed his Complaint with the Plaintiff described as follows: ***"JEFFREY BARON, INDIVIDUALLY, AND ON BEHALF OF THE UNITED STATES OF AMERICA."***[146] Federal Rule of Bankruptcy Procedure 2010(b) provides that "[a] proceeding on the trustee's bond may be brought by any party in interest ***in the name of the United States*** for the use of the entity injured by the breach of the condition."[147] To be clear, while Bankruptcy Rule 2010(b) is a bit confusing in its wording—by stating that actions may be brought "by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition"—these bonds are typically considered to protect the United States Trustee against losses caused by their private bankruptcy trustees and, specifically, to "indemnify the ***estate*** for any loss that might be sustained as a result of the misfeasance or malfeasance of the trustee."[148] In fact, the language of former Official Form 25 (abrogated in 1991) stated that a surety was bound to pay any loss resulting ***to the estate*** from failure of the trustee to (a) obey any order of the court in relation to the trust, (b) truly and faithfully account for all monies, assets, and effects of the estate coming

[145] 31 U.S.C.A § 9307 (West, Westlaw through P.L. 114-254).

[146] *See* DE #1 in the AP.

[147] FED. R. BANKR. PRO. 2010(a) (emphasis added).

[148] *See* 3 COLLIER ON BANKRUPTCY 322-4 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016) (emphasis added). *See also Schooler*, 725 F.3d at 502, 506 (unsecured creditor of former Chapter 7 debtors' estate permitted to bring proceeding against Chapter 7 trustee's surety bond, complaining that trustee failed to faithfully perform his duties by failing to act in the face of debtors dissipating inherited assets); *Flavor Dry, Inv. v. Lines (In re O'Connell Co.)*, 82 B.R. 118, 120 (N.D. Cal. 1988) (surety bond did not cover trustee's liability for a breach of contract and conversion judgment obtained by jilted purchaser of bankruptcy estate assets—although bankruptcy trustee had personal liability).

into the trustee's hands and possession, or (c) faithfully perform his official duties.[149] While bonds may be worded slightly differently, from case to case, one court found: "[t]he surety's obligation arises only if the trustee fails to obey the Bankruptcy Court's orders or fails to account faithfully and truly for all monies and assets of the bankruptcy estate."[150]

Finally, as has been alluded to earlier, the standard in the Fifth Circuit for measuring any misfeasance or malfeasance of a bankruptcy trustee is at least ***gross negligence***—as opposed to mere negligence.[151]

While Baron's Complaint is not as artfully drafted as it might have been, distilled to its essence, it is seeking first—with regard to the first three claims—to hold the Bankruptcy Trustee and his counsel ***personally liable*** to Baron for breach of the GSA, fraud in connection with the GSA, and malicious prosecution relating to the Receivership Order. The bankruptcy court has earlier determined that these are essentially ***Third Party Damages Claims*** (even though Baron is a shareholder and potential beneficiary of the bankruptcy estate). But, second—with regard to Baron's fourth claim—he is seeking to impose liability ***under the Bond*** for the Bankruptcy Trustee's following alleged acts or omissions that are alleged to have constituted gross negligence: (1) the Bankruptcy Trustee "had an obligation under the GSA and under 11 U.S.C. § 1106, to promptly resolve the Ondova Chapter 11 case, pay the legitimate claims of the Administrative, Priority and Unsecured Creditors through a confirmed plan of reorganization"; (2) the Bankruptcy Trustee was "obligated under the GSA to promptly resolve the Netsphere DC

[149] *See* 3 COLLIER ON BANKRUPTCY 322-4 (Alan R. Resnick and Henry J. Sommer, eds., 16th Ed. 2016) (emphasis added).

[150] *O'Connell*, 82 B.R. at 120.

[151] *Smyth*, 207 F.3d at 762.

Case through the filing of a joint stipulation of dismissal with prejudice"; (3) the Bankruptcy Trustee "failed to set an administrative claims bar date . . . to close the gate on any further administrative claims"; (4) the Bankruptcy Trustee "actively solicited the filing in the Ondova bankruptcy of the claims of attorneys who were not even creditors of Ondova"; (5) the Bankruptcy Trustee "failed to object to the Pronske Substantial Contribution Claim"; and (6) the Bankruptcy Trustee "filed an application to have an equity receiver appointed over Jeffrey Baron and his assets, and then proceeded to dissipate the remaining funds in the Ondova Bankruptcy Estate in attorneys fees defending the appointment of a receiver."[152] This gross negligence claim—seeking payment under the Bond—perhaps could be described as an ***Estate Loss Claim***, although Baron requests damages for himself personally.

The bankruptcy court concludes that these facts, as pleaded (and assuming they are true), fail to state a claim for gross negligence. The facts fail to allege that the Bankruptcy Trustee failed to obey the Bankruptcy Court's orders or failed to account faithfully and truly for all monies and assets of the bankruptcy estate. The facts fail to articulate a failure to faithfully perform statutory and fiduciary duties on the part of the Bankruptcy Trustee.

The Fifth Circuit, in stating that a heightened gross negligence standard applies to bankruptcy trustees, utilized the following definition for gross negligence:

> The intentional failure to perform a manifest duty in reckless disregard of the consequences. . . . It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected.[153]

[152] *See* Plaintiff's Complaint, ¶¶ 46-47.

[153] *Smyth*, 207 F.3d at 762 (citing Black's Law Dictionary at 1033 (6th ed. 1990)).

As stated earlier, a Chapter 7 trustee's duties are set forth in section 704 of the Bankruptcy Code (including such things as collecting and liquidating property of the estate) and a Chapter 11 trustee's duties are set forth in section 1106 of the Bankruptcy Code (including such things as investigating the debtor and its business, perhaps filing a plan of reorganization, and perhaps operating the business of the debtor). There are additional duties imposed upon trustees by the United States Trustee's office, pursuant to 28 U.S.C. § 586(a)(3)(A)(i), as well as reporting obligations pursuant to 18 U.S.C. § 3057(a). And, of course, as a matter of common law, a trustee has fiduciary duties to the beneficiaries of the bankruptcy estate beyond his statutory duties[154]—including, primarily, the duties of care, loyalty, and obedience.[155] The allegations set forth by Baron—that the Bankruptcy Trustee failed to promptly resolve the Ondova Bankruptcy Case and pay the legitimate claims of creditors through a confirmed plan of reorganization; failed to file a joint stipulation of dismissal in the Netsphere DC Case; failed to set an administrative claims bar date as timely as Baron thinks he should have; failed to object to certain lawyers' claims; and improperly sought a receiver over Baron—hardly seem to state a claim for: (a) disobeying court orders; (b) failing to account for monies or assets of the bankruptcy estate; or (c) intentional failing to perform statutory duties or indifference to legal or fiduciary duties of an aggravated character. Construing the allegations of Baron in the light most favorable to him, the Bankruptcy Trustee, at worst, may have demonstrated less-than-perfect litigation judgment at times and may have failed to act with the swiftest possible speed. But the Complaint utterly fails to state a claim under the Bond, which, according to most authorities,

[154] *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985); *United Pac. Ins. Co. v. McClelland (In re Troy Dodson Constr. Co.)*, 993 F.2d 1211, 1216 (5th Cir. 1993).

[155] Elizabeth H. McCullough, *Bankruptcy Trustee Liability: Is there a Method in the Madness?*, 15 LEWIS & CLARK L. REV. 153 (2011) (and authorities cited therein).

necessitates a showing of failure to obey court orders or failure to account for estate assets. And the Complaint utterly fails to state a claim that the Bankruptcy Trustee intentionally failed to perform statutory or common law trustee duties in reckless disregard of the consequences. In fact, the Bankruptcy Trustee argues quite persuasively that the Fifth Circuit's ruling on December 18, 2012, overturning the Receivership Order, precludes such a conclusion. Specifically, in addressing Baron's argument that the Bankruptcy Trustee pursued the Receivership over Baron with improper purpose, the Fifth Circuit stated that he "fails to convince" and that "there was no malice or wrongful purpose, and only an effort to conserve property" for unpaid attorney's fees and to control Baron's vexatious litigation tactics.[156] This court tends to agree that the criteria for claim preclusion are probably met for purposes of Baron's allegation that the seeking of the Receivership Order constituted gross negligence or a breach of the Bankruptcy Trustee's official duties.[157] Moreover, the bankruptcy court would be remiss if it failed to note that it threatened to recommend to the District Court that it appoint a Receiver over Baron shortly ***before*** the Bankruptcy Trustee actually himself moved for one.[158]

In summary, Baron has failed to make a plausible claim for gross negligence and liability under the Bond.

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[156] *See Netsphere, Inc. v. Baron*, 703 F.3d 296, 313 (5th Cir. 2012).

[157] *See Duffie v. United States*, 600 F.3d 362, 372 (5th Cir. 2010), *cert. denied*, 562 U.S. 897 (setting forth required elements for claim preclusion).

[158] *See* Baron Appendix 6 (October 2010 Report and Recommendation, p.8) in support of Baron's Response, DE # 43 in the AP.

V. Conclusion

In conclusion, the bankruptcy court respectfully recommends to the District Court that Baron's Complaint be **DISMISSED**, pursuant to Rule 12(b)(6), for failure to allege facts that plausibly state a basis for relief against each of the Defendants. To recap:

1. With regard to Baron's ***breach of contract*** claim as to the Bankruptcy Trustee, for the Bankruptcy Trustee's alleged breaches of the GSA, this is essentially a ***Third Party Damages Claim*** in which Baron is seeking to impose ***personal liability*** against the Bankruptcy Trustee and Baron is seeking ***personal damages*** for himself. The Bankruptcy Trustee obtained approximately 147 orders during the Ondova Bankruptcy Case, as well as dozens of orders from the District Court in the Receivership proceeding (many of which were the subject of appeals and further rulings by the Fifth Circuit). Most of the Bankruptcy Trustee's actions that are the subject of the breach of contract claim were taken pursuant to court orders, or at least under the watchful supervision of the bankruptcy court and District Court. Thus, absolute immunity would likely preclude the breach of contract claim. But, to the extent absolute immunity does not apply, qualified immunity would apply, since all acts complained of were acts taken by the Bankruptcy Trustee in his role as trustee (a quasi-judicial officer, with derived immunity), and did not involve any seizures of property by him or other acts outside the scope of the Bankruptcy Trustee's authority. The Bankruptcy Trustee was at all times acting as a bankruptcy trustee.

2. With regard to Baron's ***fraud*** claim as to the Bankruptcy Trustee and the Munsch Law Firm, for alleged fraud or misrepresentations in connection with the GSA, this is essentially a ***Third Party Damages Claim*** in which Baron is seeking to impose ***personal liability*** against the Bankruptcy Trustee and the Munsch Law Firm and Baron is seeking ***personal damages*** for himself. As alluded to above, the Bankruptcy Trustee obtained approximately 147 orders during

the Ondova Bankruptcy Case, as well as dozens of orders from the District Court in the Receivership proceeding (many of which were the subject of appeals and further rulings by the Fifth Circuit). Most of the Bankruptcy Trustee's actions that are the subject of the fraud claim were pursuant to court orders, or at least under the watchful supervision of the bankruptcy court and District Court. Thus, absolute immunity would likely preclude the fraud claim. But, to the extent absolute immunity does not apply, qualified immunity would apply, since all acts complained of were acts taken by the Bankruptcy Trustee in his role as trustee (a quasi-judicial officer, with derived immunity), and did not involve any seizures of property by him or other acts outside the scope of the Bankruptcy Trustee's authority.[159] Meanwhile, the Munsch Law Firm, in providing legal services to the Bankruptcy Trustee, enjoys ***derived immunity*** on this fraud claim. The Munsch Law Firm is also protected from the claims of Baron, as a non-client, by the ***Texas attorney immunity doctrine***.

3. With regard to Baron's ***malicious prosecution*** claim as to the Bankruptcy Trustee and the Munsch Law Firm, for seeking the Receivership over Baron, this is (once again) essentially a ***Third Party Damages Claim*** in which Baron is seeking to impose ***personal liability*** against the Bankruptcy Trustee and the Munsch Law Firm and Baron is seeking ***personal damages*** for himself. As alluded to above, the Bankruptcy Trustee obtained approximately 147 orders during the Ondova Bankruptcy Case, as well as dozens of orders from the District Court in the Receivership proceeding (many of which were the subject of appeals and further rulings by the Fifth Circuit). Most of the Bankruptcy Trustee's actions that are the subject of the

[159] With respect to the Plaintiff's fraud claim, the Bankruptcy Trustee and the Munsch Law Firm also argued that the Plaintiff cannot plausibly aver the predicate facts, because Baron contractually disclaimed fraud as part of the broad releases in the GSA. This argument appears to be very credible. *See* Bankruptcy Trustee's Appendix A (GSA), ¶ 15. Because the immunity that is applicable here fully disposes of the fraud claim, the bankruptcy court sees no need to fully address this argument.

malicious prosecution claim were pursuant to court orders, or at least under the watchful supervision of the bankruptcy court and District Court. Thus, absolute immunity would likely preclude the malicious prosecution claim. But, to the extent absolute immunity does not apply, qualified immunity would apply, since all acts complained of were acts taken by the Bankruptcy Trustee in his role as trustee (a quasi-judicial officer, with derived immunity), and did not involve any seizures by him of property or other acts outside the scope of the Bankruptcy Trustee's authority. Meanwhile, the Munsch Law Firm, in providing legal services to the Bankruptcy Trustee, enjoys ***derived immunity*** on this malicious prosecution claim. The Munsch Law Firm is also protected from the claims of Baron, as a non-client, by the ***Texas attorney immunity doctrine***.

4. With regard to Baron's ***gross negligence*** claim as to the Bankruptcy Trustee and Liberty Mutual, this is (construing the allegations in the light most favorable to Baron) essentially an ***Estate Loss Claim*** in which Baron is seeking to impose ***personal liability*** against the Bankruptcy Trustee and also is making a ***claim under the Bond*** against Liberty Mutual (asking that Baron be considered the party injured, to be paid under the Bond). Baron's allegations do not plausibly state a claim for gross negligence and do not trigger liability under the Bond. Not only did most of the Bankruptcy Trustee's acts occur pursuant to court orders and under the watchful supervision of the bankruptcy court, but the facts articulated do not demonstrate a failure by the Bankruptcy Trustee to exercise statutory or fiduciary duties in reckless disregard of the consequences and do not constitute acts or omissions of an aggravated character—as opposed to (at most) mere negligence.

As noted early on, to the extent that a party-in-interest or the court is dissatisfied with a bankruptcy trustee's actions in a bankruptcy case, there are plenty of mechanisms available to

address the situation, short of a lawsuit. First, he can object to motions (which Baron frequently did, by the way). Second, there is certainly the opportunity to object to a bankruptcy trustee's compensation or his counsel's fees, pursuant to Bankruptcy Code sections 326 and 330 of the Bankruptcy Code (again, Baron has done that). There is certainly the opportunity that any litigant has to move for "Rule 11" sanctions, when appropriate, pursuant to Bankruptcy Rule 9011. Moreover, section 324 of the Bankruptcy Code provides a mechanism to even remove a bankruptcy trustee. A lawsuit against a bankruptcy trustee is sometimes a viable option—but usually not. In any event, this Adversary Proceeding—as pleaded—is not a viable option here. Thus, dismissal is appropriate.[160]

*****END OF REPORT AND RECOMMENDATION*****

[160] The bankruptcy court notes that, at the end of Baron's Response to the Motions to Dismiss (page 38), DE # 48 in the AP, Baron asks for leave to amend his Complaint—rather than face dismissal. Baron never filed a separate motion to amend, and never requested amendment of his Complaint during oral argument. This Adversary Proceeding has been pending approximately 28 months (although abated at one point for 16 months). The live Complaint is 20 pages in length. The court believes that Baron has stated his best case and cannot improve upon it or supplement the allegations as pleaded. The bankruptcy court, therefore, concludes that Baron cannot set forth additional allegations that exist to state a claim upon which relief can be granted and that further attempts to amend would be futile. Accordingly—giving Baron every benefit of the doubt that a proper request to amend Complaint has been made—the bankruptcy court believes it is ***not*** appropriate to allow further amendment of the Complaint.