No. 23-11237
consolidated with
No. 24-10004

# In the United States Court of Appeals for the Fifth Circuit

SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff-Appellee,*

*v.*

TIMOTHY BARTON,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:22-CV-2118

**REPLY BRIEF OF APPELLANT TIMOTHY BARTON**

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The opening brief identified no fewer than ***eight*** errors in the District Court's seizure of entities not possessing property associated with this case. It further highlighted the District Court's failure to apply the proper legal standards when: (1) imposing a new receivership and a preliminary injunction, and (2) ratifying orders previously issued under the invalid receivership. In response, the Commission's brief merely restates the District Court's flawed reasoning and fails meaningfully to grapple with the Appellant's assignments of error to that reasoning.

The Commission would undoubtedly prefer a receivership framework that allows it, pre-trial, to seize the vast majority of a defendant's assets, regardless of the degree of relation those assets have to the underlying charges or the availability of less drastic remedies that would accomplish the same ends. And for good reason. That landscape allows the Commission to stack the deck in its favor from the very start of its civil cases and prevents litigants from being able to participate in the judicial process by effectively denying them the ability to retain legal counsel. This Court's precedents and fairness demand otherwise.

Throughout, the Commission seeks to shroud the District Court's opinion in clear error review. SEC Br. at 15, 20, 21, 29, 30. But the

Appellant carefully identified errors in determining the legal standards and in applying law to fact. Both categories of such asserted errors are reviewed *de novo*. *In re Nat'l Gypsum Co.*, 208 F.3d 498, 504 (5th Cir. 2000). And this Court's review should be particularly searching, even under an abuse of discretion standard, because the orders at issue involve the imposition of "drastic" and "extraordinary" equitable relief in the form of a receivership and preliminary injunction. *See Netsphere, Inc. v. Baron*, 703 F.3d 296, 305 (5th Cir. 2012); *Atchafalaya Basinkeeper v. United States Army Corps of Engineers*, 894 F.3d 692, 696 (5th Cir. 2018).

## I. The District Court Erred in Determining the Legal Principles that Guide Identifying Lender Assets and in Seizing Entities That Did Not Meaningfully Possess Them.

Appellant's opening brief identifies eight errors the District Court committed by permitting seizure of property unrelated to the subject matter of the litigation. Appellant's Br. at 18-42. For example, the District Court: (1) allowed seizure of entities that allegedly merely "benefited from" lender funds, regardless of how attenuated such a "benefit" actually was; (2) permitted small amounts of lender funds to infect multi-million dollar entities in such a manner as to purportedly justify their seizure; and (3) failed to require competent and reliable tracing evidence before allowing seizure. The Commission does not dispute that the District Court was guided by these principles, but instead argues that the principles were not legal error. In doing so, the Commission asks this Court to adopt an untenable legal standard at odds with this Court's insistence that a receivership be strictly limited to assets that are the subject matter of the litigation—in this case Chinese lender funds—and be imposed only where there are no less drastic measures to secure those assets. *Netsphere*, 703 F.3d at 305; *SEC v. Barton*, 79 F.4th 573, 578–79 (5th Cir. 2023) ("*Barton I*").

### A. The Commission's Unworkable and Inequitable "Any Benefit" Theory Has No Basis in Law.

As the Court made clear in *Barton I*, a "receivership's jurisdiction extends only over ***property*** subject to the underlying claims." 79 F.4th at 580 (emphasis added). Indeed, if $10,000 of "property subject to the underlying claims" flow through an entity holding tens of millions in assets, the Commission cannot reasonably seize and begin operating (and disposing of property in) that entity before trial. This District Court's endorsement of the Commission's overreaching and inequitable proposition—that a drop of subject matter funds taints an entire entity and subjects that entity to pretrial Government seizure and disposal—is reversible error.

The District Court erred by holding it was enough for an entity to have received or benefited at any time from alleged lender funds. That standard has no grounding in the law of this Circuit or any court in the country. Appellant's Br. at 21-23.

The Commission cites no law to the contrary. Instead, it falls back on the reference to a corporation having benefitted from lender funds in this Court's prior opinion in this case. SEC Br. at 25-26. But neither this Court nor the Appellant when arguing before this Court suggested that showing a benefit from lender funds of any amount would be enough to seize a company. Instead, it was a description of the many things that the Commission never bothered to show, convincing the District Court to seize all the Defendant's assets with no tracing analysis whatsoever.[1]

[1] The reference to benefit appears only once in the Appellant's briefing, describing how far away from any concept of tracing the Commission's showing was. Brief of Appellant at 41, *SEC v. Barton*, No. 22-11132, 2023 WL 319124, at *41 (5th Cir. Jan. 10, 2023) (noting that "[t]here is no evidence in the record that the special-purpose corporation holding the Appellant's residence had ever received or otherwise benefited from any lender funds").

In any event, the manner of the District Court's implementation of this incorrect standard is plain legal error. The District Court held that, if there were any benefit or any temporary receipt of funds, no matter how slight, the District Court had no choice but to seize the asset. **ROA.14784**. Such were this Court's marching orders. *Id.*

Instead, this Court held: "Should the district court decide that a new receivership is justified on remand, it *can only extend* over entities that received or benefitted from assets traceable to Barton's alleged" wrongdoing. *Barton I*, 79 F.4th at 580 (emphasis added). "Can only extend" are words restricting action, not commanding it. And it is plain error for a district court to incorrectly determine it lacks discretion.

### B. The District Court Failed to Require the Commission to Trace the Subject Lender Funds Before Allowing Seizure of Unrelated Properties.

The District Court allowed seizure of scores of far flung companies despite the absence of any actual evidence tracing lender funds to these properties. And the Commission has no meaningful response to the identified legal errors made by the District Court.

First, the errors identified in Appellant's opening brief led to untenable results. The most extreme culmination of the District Court's errors was the District Court's green lighting of the seizure of apartment complexes worth tens of millions of dollars each, operating under companies entitled D4DS, LLC, D4FR, LLC, D4IN, LLC (Texas), and D4OP, LLC.[2] They were financed not by the Chinese lenders but by Department of Housing and Urban Development loans and a third-party mezzanine financing facility having nothing to do with this case.

The Commission's effort to support this seizure is entirely without merit. The Commission leans on its "benefits" thesis, all the way, ignoring that the receivership remedy can only extend to the property in question in the litigation, not to consequential damages. *See Netsphere*, 703 F.3d at 306. Even on its own terms, the Commission is incorrect to suggest that these projects did benefit by using unrelated properties the Commission claims received subject lender funds as collateral for securing the Department of Housing and Urban Development loans that

[2] In his amicus brief, the receiver—apparently attempting to suggest that the apartment complexes are actually worth very little—falsely claims that Appellant "ignores the competing claim of ownership asserted by Southern Property Capital." Receiver's Amicus Brief at 16. Barton is well aware of Southern Property's claims and, as the Receiver glaringly fails to mention, Southern Property has been extremely active at the District Court level in arguing that the apartment complexes at issue did *not* in fact receive subject lender funds and, as such, have no business being placed into this receivership. **ROA.10955-983.**

financed the construction of these buildings. SEC Br. at 30; Receiver's Amicus Brief at 16. Department loan applications required Mr. Barton to list other properties with which he was associated to identify any conflicts of interest and ensure that federal funds are distributed equitably, not to secure lending as identified collateral. After all, the HUD loans were non-recourse loans. **ROA.11069-133**; **ROA.11157-69**; **ROA.11173-225**; **ROA.11275-339**; **ROA.11387-11444**. If the apartment complex projects failed, HUD would not be entitled to seize the assets identified in the documents cited by the Commission; its remedies were limited to the project financed itself. *Id.*

The Commission further claims that the HUD-projects "benefited from" lender funds because Barton's employees working on the HUD projects, at some points in time, worked out of offices which had utilities paid for by entities that received subject lender funds. SEC Br. at 31. And the Appellant's main operating entity transferred money, temporarily and in error, to the apartment complex companies, only to have it returned within a month but nonetheless "benefitting" it. SEC Br. at 30-31. But a "benefit" theory so flexible is nothing but an inequitable invitation to seize everything associated with a defendant, as central company employees probably help every aspect of a corporate family's life at the margins. Even if such a minimal and marginal "benefit" to apartment buildings worth tens of millions of dollars were received, the District Court was still required to adopt less drastic remedies to recover any value of that benefit, something that could be accomplished by a small lien or request for reimbursement rather than a complete seizure. *Barton I*, 79 F.4th at 578; *Netsphere*, 703 F.3d at 305. The Commission argues that, because many of the entities were "single-asset entities," the District Court properly authorized their entire seizure. But the proper approach under *Barton I* and *Netsphere* would have been to impose a lien on the sale of the property, allowing the lenders to recover the funds upon sale, rather than seize entire multi-million dollar properties over the temporary transfer of a few thousand dollars.

Most importantly, all of this reasoning carries forward another fundamental District Court error—that every dollar the main operating entity spent was lender funds—without tracing those funds through accepted accounting methods. *See* Appellant's Br. at 35-37. And the District Court erroneously believed it had no discretion to forego seizure of this business, no matter how small the benefit in comparison to the scale of the business.[3] *See* Appellant's Br. at 42. This combination of legal errors, which are not meaningfully contested by the Commission, led to the improper seizure of these apartment complexes and the receivership should be immediately vacated at least as to those far removed corporations.

Second, contrary to the Commission's arguments, SEC Br. at 27-28, the District Court erred by not demanding expert testimony to trace funds through the corporations in question to their final destination. The tracing did not just require "basic math to calculate and summarize the results." SEC Br. at 27. They required instead the work of an expert accountant, to apply accounting principles and to trace any lender funds through a payment to another corporation to their final destination. The Commission in some ways concedes this is required, continuing to refer

[3] The Commission's suggestion that the District Court exercised discretion by seizing only "54 of the 82 entities proposed by the Commission" is undermined by the District Court's own reasoning. As explained in Appellant's opening brief, the entities excluded from the receivership were managing members that did not themselves hold any assets. Appellant's Br. at 13.

to its witness attesting to its tracing effort as its "accountant," SEC Br. at 27, 28 n.5, even though she is not a licensed CPA. **ROA.15388**.

On this score, the Commission's arguments are irreconcilable. On the one hand, it is arguing that the commingling is so complicated it cannot be sorted out. SEC Br. at 3, 8, 43. On the other, it is arguing that the tracing is so simple even a non-expert can do it. Importantly, this Court in *Barton I* expressly rejected the Commission's argument that "extensive commingling of funds among companies" can subject an entity to seizure through a receivership "even if [the Commission] ha[s] not yet traced the funds to that entity." 79 F.4th at 580. It was simply not an option for the Commission to throw its hands up, cry "commingling," and not bring in an expert to trace the actual funds. *Id.*

This Court's decision in *United States v. Davis*, 53 F.4th 833 (5th Cir. 2022) does not support the Commission. As Barton made clear, the factual circumstances present in *Davis*, which involved a single entity's bank accounts with the allegedly misappropriated Veteran's Administration funds at issue accounting for more than 99 percent of the account, were not even remotely analogous to the situation here, where there were multiple complex financial transactions across dozens of entities and accounts. *Id.* at 848-89.

Like the Commission's attempt at tracing, the receiver's proffered tracing analysis, which the Commission relied on for the vast majority of its request for the new receivership at issue, was not supported by expert testimony. In fact, the receiver's tracing analysis submitted to the Court as addendums to its declaration and status report filed prior to the October 2023 hearing did not even identify *who* prepared its tracing analysis. **ROA.10235-413**. It only became clear to Barton (and presumably to the District Court) at the October 2023 hearing that the receiver's outside accounting firm prepared its tracing analysis. Though, it remains unclear to this day who exactly at that accounting firm prepared the analysis, as the Commission's witness from the receiver's outside accounting firm only indicated that his "team" prepared it and that he played some supervisory role. Barton certainly had no opportunity to examine the true preparer of the majority of the tracing relied upon by the Commission for its receivership request. In short, the Commission made no showing, as to either of its witnesses, as to the method that was relied upon to trace the complex transactions at issues, or the witnesses' qualifications to do so.

Second, the District Court erred by not demanding the use of the accounting records of the relevant entities. Appellant's Br. at 32-33. The Commission misrepresents the testimony of Barton's expert to suggest that he "conceded that [accounting] records could not actually establish the flow of funds among Barton-controlled entities." SEC Br. at 28. Rather, Barton's expert acknowledged that "determining *how* Mr. Barton recorded or his companies recorded transactions" would not on its own establish whether funds were commingled. **ROA.15447** (emphasis added). This is not the same as suggesting that a properly qualified expert, with the necessary background and experience, would be unable to use these records to trace the funds.

Third, the District Court erred by allowing the illegally appointed receiver to provide the evidence in support of the scope. Appellant's Br. at 38-40. The Commission provided asset tracing analyses for only approximately two dozen of the more than 80 Barton-related companies at issue. Appellant's Br. at 38 (citing **Supp. App. 005-010**). Rather than conducting its own investigation and tracing analysis to support placement of entities into the new receivership, the Commission explicitly and almost entirely relied on the illegally appointed receiver's tracing analysis, which was submitted to the District Court in September 2023, after issuance of the Court's vacatur order and in advance of the October 2023 hearing. **ROA.10235-413**. The District Court's acceptance of the unlawful receiver's tracing analysis—as a stand in for the Commission's own—as a justification for placing entities into the new receivership was contrary to this Court's requirements set forth in *Netsphere* and *Barton*.

It is no rejoinder that "[i]t was the receiver's job [and, therefore, not the Commission's] to trace investor funds under the first receivership order." SEC Br. at 29.

The Commission's preferred approach of letting the receiver do the heavy lifting of the required tracing has a significant "chicken before egg" problem. Per this Court's directive in *Barton*, for the District Court to identify and place specific entities into a receivership, it must be presented with, in a receivership request, an adequate tracing analysis.

Therefore, it cannot be the "receiver's job" to provide tracing for purposes of imposing a receivership.[4]

## II. The District Court Committed Several Reversible Errors When Imposing the Current Receivership.

This Court correctly vacated the previous receivership imposed by the District Court at the Commission's request. *Barton I*, 79 F.4th 573. On remand, the District Court assigned the standards for imposing a receiver the wrong legal content. Its decision should be reversed.

### A. The Commission Failed to Establish Clear Necessity for a Receivership and to Consider Less Drastic Remedies.

It is the Commission's burden to establish the receivership's clear necessity, Appellant's Br. at 38, and that requires it to show a significant and imminent risk of asset flight that cannot be controlled by other means.

The Commission's effort to construct a risk of asset flight should be rejected. SEC Br. 13-14. It is primarily directed at claims of ***historical*** company spending, not any actual risk of future asset flight. The

[4] And the Commission should not be permitted to benefit from the proverbial "fruit of the poisonous tree," by relying almost exclusively on tracing conducted by an illegally-appointed receiver with illegal access to the Appellant's property.

Commission repeats that "Barton [] used investor funds to, for example, 'purchase a plane,' 'make payments on his personal credit card,' and pay for 'meals, car payments, educational expenses, airplane repair expenses, payments to [his] ex-wife and children, and mortgage payments on the residence [he] lived in.'" SEC Br. at 13. The airplane was no final destination for JMJ funds, let along lender funds, as the undisputed evidence is that JMJ Development put down a $300,000 deposit for the plane (which was nearly immediately refunded when the plane was financed). And it was no personal extravagance, as the small plane, on the few times it left the ground, was used for specific business projects in hard-to-reach locales. Appellant's Br. at 56.

Nor is it enough to claim that company paid credit cards in the owner's name. The evidence showed that those credit cards were used for business expenses and any personal expenses were tracked on the company's books for recovery from the Appellant himself. **ROA.15397-400; ROA.15429-30**. And neither the Commission nor the District Court made any effort to determine the extent to which any of the credit card expenses were personal, even though the data was in the company's accounting records. *Id.* In this regard, the Commission's headline number of $5.6 million in credit card bills does not reveal the lengthy time period over which this happened or make any effort to determine what portion, if any, of these payments were both for non-business expenses and not recovered from the Appellant. *See* SEC Br. at 16.

More importantly, neither the Commission nor the District Court explained why these payments are at imminent risk of continuing into the future after the filing of the Commission's lawsuit and the indictment. The District Court turned to $225,000 in expenditures from JMJ during the three weeks between the filing of the Commission's case and the imposition of the receiver. **ROA.14774**. But those expenditures were not flight, but were actual business expenses including retaining lawyers to defend the company that was now a defendant in a Commission case and to advance real estate projects. *Id.*

In any event, if expenditures were a problem, the District Court failed to consider the less drastic remedy of *prohibiting those expenditures* through an injunction or imposing a monitor who would have to approve them.

The Commission argues that, under a monitorship or an injunction, it would be up to the Appellant to determine whether an expenditure were prohibited. SEC Br. at 18. But that is not how these measures work. They do not require the exercise of judgment: Transactions can be barred over a certain dollar amount without court or monitor approval and sales or encumbrances of real estate could be barred. No financial institution or title company would allow a transaction to proceed under a preliminary injunction without proper approval. And it is error for the District Court to assume that the Appellant would violate such an injunction.

The Commission goes on to repeat the District Court, saying that "a monitor couldn't stay litigation or foreclosures or even investigate or trace assets." SEC Br. at 18 (citing **ROA.23-11237.14775**). A monitor might not be able to do those things, but the District Court undoubtedly can through its own injunction staying litigation outside a receivership. Appellant's Br. at 62. And the Commission does nothing to rebut this point.

Ultimately, the Commission argues that these less drastic measures are insufficient because the receiver is needed to "investigate or trace assets." SEC Br. at 18, 20. But that is not a reason for a receivership; it is a requirement for imposing one, work for the

Commission to have done before seeking the "drastic" remedy of a receiver. *Barton I*, 79 F.4th at 578.

And the less drastic measures of a transaction injunction, a monitor, or even a lien to recover alleged lender funds is clearly called for in the many cases where the Commission is alleging a corporation with significant amount of assets received a small amount of lender funds or benefit. *See e.g.*, Appellant's Br. at 61. The District Court erred, however, by claiming it lacked discretion to impose anything other than a receivership, once it determined that a company received the slightest whiff of benefit from lender assets. **ROA.14784-85**; Appellant's Br. at 40-42. That was error on tracing grounds. *Barton I*, 79 F.4th at 580. And that was error under the requirement to impose a less drastic measure than a receivership if any is adequate. *Id.* at 579-80.

The Commission's claim that this reasonable alternative "overlooks that the entities placed in the receivership required protection from liens, lawsuits, and foreclosures regardless of the amount of investor funds received[,]" SEC Br. at 30, misunderstands the District Court's equitable powers. Federal district courts have various powers to enjoin actions that would otherwise dissipate the assets held in entities engaged in ongoing litigation. And, critically, the Commission's defense of its actions with regard to entities that received small amounts of subject lender funds ignores the greater issue. That is, once placed into the receivership, it is the Commission's and this receiver's established policy to liquidate entities' assets, regardless of the amount of subject lender funds that entity allegedly received (potentially as little as zero, as would be the case for entities the Commission claims merely benefited from lender funds).

### B. The Commission Failed to Establish That the Benefits of a Receivership Outweighed its Burdens.

The imposition of a receivership was not in the best interest of the estate for the simple reason that it immediately stalled or scuttled lucrative real estate deals that would have generated significant funds for Barton's entities. Compounding that problem, the District Court appointed a receiver with essentially no real estate experience, resulting in little or no progression of those real estate projects. This stalled progress on key projects directly purchased with subject lender funds. Appellant's Br. at 63-64. Examination of the receiver at the October 2023 hearing uncovered that the receiver had essentially given up on these projects and was likewise unaware of what recovery could be garnered from the progression of certain other properties. **ROA.15318-20**. The

Commission's efforts to resuscitate the Receiver's testimony is contrary to the record. Rather, he testified that he had "not found a way to move the development forward at this time" and did not "know that it can actively move forward." **ROA.15320**.

On the other hand, as Barton's brief outlined with specificity, the imposition of a receivership has resulted in an immense burden to Barton. Appellant's Br. at 63-64. Not least of which, Barton has been frozen out of nearly any resources with which he can mount a legal defense in the immediate matter or parallel criminal matter. The Commission pays lip service to these serious burdens, simply reciting the District Court's findings verbatim, which themselves were scant. Barton requested that the District Court set aside a portion of the seized assets to allow him to pay his defense costs, **ROA.11581**, and the District Court's failure to do so (or to even address the request) was reversible error to which the Commission has no response.

The Commission does not argue that a remedy less than vacatur of the receiver order is appropriate if error is found here. The Court should accept this at face value and refuse to indulge in belated efforts to suggest lesser remedies, as the Commission raised in the most recent appeal.

## III. The District Court Erred by Failing to Require the Commission to Establish the Prerequisites for Preliminary Injunction.

"A preliminary injunction is an extraordinary equitable remedy that is never awarded as of right." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024). Since the District Court's ruling, the Supreme Court has made clear that the Government is not entitled to a relaxed standard in obtaining a preliminary injunction. Instead, the District Court needed to demand a serious showing, from the Commission, of all four traditional factors for a preliminary injunction: (1) that parties will suffer irreparable injury in the absence of the injunction; (2) probable success on the merits; (3) a balance of hardships that tips in the movant's favor; and (4) that a preliminary injunction is in the public interest. *Id.* ("[A]bsent a clear command from Congress, courts must adhere to the traditional four-factor test."). The District Court did not.

The Commission seeks to avoid this Court's application of the Supreme Court's *Starbuck*'s decision by arguing that, "[b]ecause the district court engaged in [an] analysis [akin to the traditional four factor test for a preliminary injunction], it is of no consequence whether *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570 (2024), could be read to require courts to apply the traditional four-factor test in determining whether to issue preliminary injunctions in Commission enforcement actions."

Contrary to the Commission's arguments (SEC Br. at 42 n.6), the *entirety* of the District Court's "engagement" with the traditional four-factor test came in a single footnote to its Preliminary Injunction Order. **ROA.14823**. The District Court's footnote provides no analysis whatsoever, summarily determining that certain prerequisite factors were satisfied. Instead, and as the Commission's brief concedes, SEC Br. at 42, the District Court relied almost exclusively on *First Financial* to impose the preliminary injunction in this matter.

The District Court never seriously applied the traditional four-part test, and that was error. To the extent it summarily held that any of the factors were satisfied, without explanation and contrary to the facts of this case, the District Court further erred. *See Gurmankin v. Costanzo,* 626 F.2d 1115, 1119 (3d Cir. 1980) ("Meaningful appellate review of the exercise of discretion requires consideration of the basis on which the trial court acted.").

## IV. The Commission Failed to Establish That the Syndicated Loan Agreements at Issue Are Securities.

The Commission's argument that the District Court "correctly concluded that the Commission had sufficiently demonstrated that the loan agreements are securities" is curious given the fact that the District Court ***made no such finding***. Instead, the District Court failed entirely to address Barton's argument that the loan agreements at issue are not securities. This alone is reversible error. *See* Appellant's Br. at 70.

On the merits, the Commission's claim that the loan agreements are securities (and repeated references to the subject lenders as "investors") is undermined by the agreements themselves and the Commission's own allegations in this case. As the Commission concedes, SEC Br. at 39, the Commission's jurisdiction over securities does not enable it to turn ordinary or syndicated loans into securities. *See Kirschner v. JP Morgan Chase Bank, N.A.*, 79 F.4th 290, 304 (2d Cir. 2023) ("[O]nly 'notes issued in an investment context' are 'securities.' By contrast, notes 'issued in a commercial . . . context' are not." (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990))).

The Commission argues that "[t]he loan agreements are dissimilar to short-term notes secured by a lien on a small business because 'the seller's purpose [was] to raise money for the general use of a business enterprise or to finance substantial investments . . . ." SEC Br. at 39. This argument is flawed for several reasons. First, the Commission provides no explanation as to how the loans can be "dissimilar to short-term notes secured by a lien on a small business" when they were, in fact, short-term (one year with a one-year extension) loans that were secured by a lien on a small business. Appellant's Br. at 72. And if the Commission agrees that the purpose of the loans was to raise money for the general use of a business enterprise, it should dismiss its fraud claims because general use is what the Commission alleges to be the fraud here. Finally, as to the Commission's claim about financing "substantial investments," each loan agreement was made to bridge a few million dollars in costs to purchase land. This was not an agreement for tens or hundreds of millions of dollars.

As noted in Barton's opening brief, the lender funds were provided under short-term loan agreements with fixed interest rates, and they were secured by a lien on a small business. Appellant's Br. at 72. There was no mechanism in the agreements through which the lenders would be compensated based on the performance of the relevant entities. And contrary to the Commission's argument that "ultimately over 100 investors invested[,]" SEC Br. at 40, the Commission alleges in its Complaint that the lenders each contributed funds towards an individual, discrete real estate development project. **ROA.70**. And the Commission more or less concedes that the lenders' purpose was to find an excuse to put money into the United States and then to move it to another U.S. bank account. As the *Kirschner* court observed, lender purpose matters significantly in this analysis. 79 F.4th at 305–06.

Essentially, the Commission argues that these funds were short-term loans when needed to support its fraud argument, but it claims that the funds were securities when it needed to establish its own jurisdiction. This is the danger inherent in the District Court's failure to address the issue. The Commission cannot have it both ways. If the lenders have a problem with the borrower exceeding the limited terms of the loan documents (which is the gravamen of the Commission's Complaint), they should take it up through civil litigation (which they did, unsuccessfully) or with other federal or state law enforcement agencies of general jurisdiction.

## V. The District Court Failed to Impose Reasonable Terms for the Scope of the Receivership.

The injury to Appellant created by the District Court's authorization of yet another unlawful receivership was compounded by the unrestrained authority that the District Court granted the receiver. Although the Appellant urged that any receivership focus on asset preservation and management until trial, the District Court ignored the Appellant's proposal entirely. Appellant's Br. at 83. This was reversible error.

Appellant's proposal that the receivership be limited to asset preservation and management is entirely consistent with preserving the status quo in advance of trial. See Appellant's Br. at 80. In response, the Commission merely argues that "there is no prohibition against a receiver selling receivership assets prejudgment." SEC Br. at 34. The Commission's apparent position that a receiver can liquidate entirely the assets that it is at least nominally tasked with protecting is legally unsupportable. And requiring that the receiver check first with the District Court on a few fee simple property sales has provided no protection from abuse. Rather, the District Court has been an unalloyed green light allowing the receiver to liquidate assets upon request.

As noted above, the District Court enabled the receiver to seize the Appellant's funds and use that money to conduct investigations on the Commission's behalf, effectively requiring the Appellant to subsidize the federal government's investigation of him. This was inequitable, inappropriate, and the District Court should have implemented reasonable limitations to avoid this entirely foreseeable consequence.

The District Court further erred by failing to address Appellant's request for receivership estate resources to fund his defense. The Commission does not meaningfully contest that the District Court should have set aside some portion of funds for the Appellant's defense. Nor can it, given the extensive case law imposing exactly such a requirement. *See* Appellant's Br. at 77-78. Instead, the Commission merely argues that Appellant failed to request "a specific amount for that purpose." SEC Br. at 34. But the Appellant's request was for the District Court to set aside any amount of funds for his defense, and this request was ignored.

Finally, the Commission's efforts to justify actions taken under the prior, admittedly illegal receivership are meritless. The Commission mischaracterizes this Court's holding in *Netsphere* to suggest that the Court vacated the receivership while holding that everything the vacated receiver did was permissible. SEC Br. at 49-50. Rather, the Court merely noted that certain orders "that were in place prior to the release of [the Court's] opinion remain[ed] in place." *In re Baron*, 593 F. App'x 356, 358–59 (5th Cir. 2014). This was hardly the broad post hoc ratification that the Commission urges the Court take with respect to the instant orders. SEC Br. at 49.

## VI. The Court Has Jurisdiction to Hear Barton's Appeal of the District Court's "Orders" Reviving Previous Ones this Court Already Disposed Of.

The Commission's jurisdictional argument is merely a restatement of arguments that this Court has previously considered and rejected.[5] Importantly, this Court vacated on rehearing an earlier ruling accepting the Commission's arguments, once the binding reasoning of this Court's precedential decision in *A Manufacturing* was reemphasized. *See SEC v. Barton*, No. 23-10516 (ECF No. 56-1) (Oct. 12, 2023); *see also* SEC Br. at

[5] The Commission argues in a footnote that Barton's sale of Amerigold Suites is moot because the sale cannot or will not close while the appeal is pending. SEC Br. 48-49, n.9. But the Commission does not suggest that the receiver has abandoned sale of the property and instead states the exact opposite: The receiver is seeking to sell the property to another buyer. *Id.* This is hardly an example in which voluntary cessation would warrant a finding that the appeal is moot. *See United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1387-88 (5th Cir. 1980).

45. Notably, the Commission engages in no attempt to defend the substance of the orders.

The Commission relies on a mischaracterization of this Court's holding in *Netsphere* to argue that *United States v. "A" Manufacturing Co., Inc.*, 541 F.2d 504 (5th Cir. 1976), is not binding, but the Court's discussion of *"A" Manufacturing* was limited to criticism of a broader holding that everything a receiver does is subject to immediate appeal. *Netsphere, Inc. v. Baron*, 799 F.3d 327, 333 (5th Cir. 2015). The *Netsphere* Court did not say that *"A" Manufacturing* was not binding or inconsistent with prior precedent *with regard to its narrow holding with respect to sale orders.*

In its brief, the Commission cites *Acheron Capital, Ltd. v. Mukamal as Trustee of Mutual Benefits Keep Policy Trust*, 22 F.4th 979, 993 (11th Cir. 2022) for the proposition that "significant tension" exists between *Netsphere* and "*A" Manufacturing.* However, the Eleventh Circuit in *Acheron* found that "if *'A' Manufacturing* is construed as holding only that section 1292(a)(2) permits review of orders 'directing the sale . . . of property,' the decision could at least arguably be read as not entirely irreconcilable." 22 F.4th at 993 (internal citation omitted).

## VII. Reassignment on Remand is Warranted Now More Than Ever.

The Commission claims that Appellant "offers little more than mere disagreement with certain of the district court's decisions in support of his request" for reassignment on remand. That is incorrect. Contrary to the Commission's view, the record and Appellant's principal brief clearly outline that, indeed, this is a case of the District Court "fail[ing] to carry out the mandate of the court of appeals on remand." *Cooper Tire & Rubber Co. v. Farese*, 248 F. App'x 555, 561 (5th Cir. 2007).

Moreover, the Court need not look any further than the receiver's amicus brief, filed with the Court on July 30, to see the clear and open hostility and animus with which the receiver (which, as he himself has reiterated time and again, and does so again in his amicus brief, "serves as the District Court's agent" and acts on its behalf) views and treats Barton and his counsel. This shocking and, frankly, unbecoming submission alleges various times that Barton and his counsel are liars, *see e.g.*, Receiver's Amicus Brief at 1, 3, 4, 6, 17, 19, 20, and even infers that Barton is a "swindle[r]" and a "fool." *Id.* at 3.

The District Court's clear prejudice against Barton from the beginning of these proceedings, and the tone and accusatory nature of the

Receiver's amicus brief, again, explicitly acting as an agent of the District Court, encapsulates the circumstances and highlights the need for reassignment on remand "to preserve the appearance of justice." *Fort Bend Cnty. v. United States Army Corps of Eng'rs*, 59 F.4th 180, 202 (5th Cir. 2023) (cleaned up). The District Court has erred from the beginning by allowing the Receiver to be all things: An agent of the Court and a party advocating an outcome. The District Court has repeatedly demonstrated a commitment to seizing all of Barton's assets, regardless of the legal protections that this Court has imposed, and there is a substantial, if not guaranteed, risk that the District Court would do so again if given the opportunity. For this reason, reassignment is warranted.

## **CONCLUSION**

For the reasons set forth in Appellant's principal brief and herein, the Court should vacate the receivership and preliminary injunction orders, reverse the sale order approvals, and grant other relief requested in Barton's principal brief.

Respectfully submitted,

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Date: September 11, 2024

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I hereby certify that on September 11, 2024, this document was filed and served in PDF format using the United States Court of Appeals for the Fifth Circuit's CM/ECF system upon all counsel of record, as follows:

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