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Wechsler v. Wechsler Respondent's Brief 1 Dckt. 44297

IN THE SUPREME COURT OF THE STATE OF IDAHO

SHARON WECHSLER, Plaintiff-Respondent, v. NORMAN J. WECHSLER, Defendant-Appellant.	Supreme Court Docket No. 44297-2016 Bannock County No. CV-2015-862

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Bannock

Honorable David C. Nye, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

"Tis against some mens' principle to pay interest, and seems against others interest to pay the principle." *Benjamin Franklin.* Appellant Norman Wechsler ("Debtor') is the Respondent Sharon Wechler's ("Creditor") former spouse. The two divorced ten (10) years ago in New York and now, a decade later, and on the other side of the country, Creditor is still attempting to collect what is rightfully hers. For years Creditor has "looked under rocks," examined leads found by private investigators, and chased Debtor around the country in attempt to obtain her share of the marital assets ordered to be paid to her. After a couple of years of Debtor falling off the map, Creditor once again caught up to Debtor, this time in Pocatello, Idaho of all places. Even after a New York Receiver was ordered to take control of Debtor's interests in various third-party entities he either controls or has interest therein, even after seizing his $1.8 million dollar home in Crested Butte, Colorado, even after garnishing over $80,000.00 from his bank accounts in Idaho, Debtor still refuses to satisfy the judgments entered against him by the New York court. In this case, Judge Nye was correct when he wrote, "The continuing refusal, constant delays, and evasive action, spanning almost 10 years, must stop. A judgment has been entered and must be fulfilled."

B. STATEMENT OF FACTS

On February 3, 2006, a Divorce Judgment involving Creditor and Debtor was entered in the office of the New York County Clerk. *R.*, p. 12. On May 27, 2014, a Judgment relating to the parties divorce was entered by the Supreme Court of the State of New York, County of New

York, in favor of Creditor and against Debtor in the amount of $9,468,008.98. *R.*, pp. 12-13. The May 27, 2014 Judgment was filed as a foreign judgment in Idaho on March 10, 2015, and is the judgment which Creditor has been attempting to collect upon in the proceedings which form the subject matter of this appeal. *R.*, pp. 8-15.

Preceding the entry of the May 27, 2014, Judgment, the Supreme Court of the State of New York, County of New York, entered other judgments in favor of Creditor and against Debtor on August 21, 2006, in the amount of $17,669,678.57, on January 5, 2007, in the amount of $1,007,029.92, and on September 2, 2008, in the amount of $3,196,072.27. *R.*, pp. 231-257. Those judgments have been filed as foreign judgments in Idaho; though, Creditor has yet to initiate collection proceedings in Idaho relative to these three (3) judgments.

In May 2013, the New York court determined Debtor "possesses direct and beneficial interests in certain assets, including being the sole member of CYB Master LLC, which is a holding company for several additional companies, including CYB Perm, LLC; CYB Rave, LLC; CYB Trym, LLC; CYB Morph, LLC; CYBio, LLC; C Partners or C Ventures, CYB IC, LLC; and CPS Holdings, and it also holds an interest in CPS Technologies, Corp. and stock in Intellicorp, Inc." *R.*, p. 55; *See also R.*, p. 77. (Chart depicting Debtor's relationship with these entities.); *See also R.*, p. 91, ¶ 6, Ex. 9, pp. 97-104 ("I am the sole member of CYB Master, LLC." Colorado Debtor Exam excerpts of Debtor describing his relationship with the above noted entities.); *See also R.*, 117, p. 14, lines 2-5 (Debtor admits he is President of Wechsler & Co.). The *Affidavit of Louis E. Black in Support of Motion to Compel* has attached therewith multiple documents obtained in post-judgment discovery that identify Debtor's interests in these

entities. *R.*, pp. 90-97, Ex. 6-8. Per the documents, the equity holdings as of August 18, 2010 were:

RAVE LLC

Wechsler & Company	32,367,112 Common Units	725 Preferred Units
CYB RAVE LLC	3,262,387 Common Units	1100 Preferred Units
Norman Wechsler	625,948 at 0.0998485/unit Warrants	

INTELLICORP

Wechsler & Co., Inc. 998,200.00 Equity/Shares $6,707,000.00 Loan/Notes $158,058.54 Interest

CYB IC LLC 200,000.00 Equity/Shares $1,218,000.00 Loan/Notes $17,926.37 Interest

PERMLIGHT PRODUCTS, INC.

Wechsler & Co., Inc.	95 Shares Series A Preferred 1750 Shares Series A-1 Preferred
CYB Perm LLC	1204 Shares Series A Preferred 715 Shares Series A-1 Preferred
Norman J. Wechsler	16 Shares Series A-1 Preferred

R., pp. 94-104.

Because of Debtor's interests in these entitites, the New York court determined the circumstances were sufficient to justify the appointment of a Receiver over Debtor's assets and CYB Master, LLC in order to sell, dispose of, or otherwise liquidate Debtor's assets or interests in these various entities. *R.*, pp. 55-59. The court further ordered, *Inter-Alia*, that the Receiver had authority "[t]o take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants." *R.*, p. 57. The New York court did not require the Receiver to post bond or give an undertaking of any type. *R.*, p. 60. Furthermore,

Creditor was ordered to pay the Receiver's fees and expenses to the extent they exceeded the Receivership Property available to make such payments. *R.*, p. 61.

As recently as January 2016, and as evidenced by the Docket Sheet in the Bankruptcy Petition of Wechsler & Co., petition No. 10-23719-rdd, in the U.S. Bankruptcy Court for the Southern District of New York (White Plains), Debtor, purporting to be acting as Manager of CYB Master, LLC was offering to exchange shares of CPS Technologies Corp. for Wechsler & Co.'s interests in Intellicorp, Inc., in spite of the New York Receivership order. *R.*, pp. 91-92, ¶ 7, pp. 105-109.

In March of 2012, Creditor attempted to collect on the above-noted $17 million dollar judgment by executing upon Debtor's real property located in Mt. Crested Butte, Colorado. *Augmented R.*, 15.04.16 *Aff. of Norman J. Wechsler in Supp. of Mot. To Quash or Dismiss Action on Foreign J.*, p. 2, ¶ 7. Creditor was able to obtain that property through a bid of $1,823,084.50. However, Creditor's Judgment remained unsatisfied. *Id.* All the while, litigation in the divorce continued in New York, and on May 27, 2014, the Judgment, which is the focus of this appeal, was entered by the New York court. *R.*, pp. 12-13. In the May 2014 New York litigation, Debtor was represented by counsel and represented to the New York court his address to be 17 Timberland Drive, Crested Butte, Colorado, even though that property was seized by Creditor in 2012. *R.*, p. 13. This was Debtor's last known address to Creditor at the time the Judgment was domesticated in Idaho. *Augmented R.*, 15.03.10 Aff. of Filing Foreign J., pp. 1-3.

After leaving Colorado, Debtor evidently moved to New Mexico. *R.*, pp. 116 (p. 9, lines 15-19), 188 ¶ 7. After living in New Mexico, Debtor then moved again – this time to Pocatello,

Idaho. *R.*, pp. 116 (p. 10, lines 10-20), 188 ¶ 7. In March 2015, Creditor obtained a Writ of Execution and garnished two of Debtor's bank accounts, yielding $81,507.08 collected by Creditor. *Augmented R.*, 15.03.17 *Order For Writ of Execution and Garnishment*, 15.07.01 *Amended Decision and Order on Claim of Exemption.* On September 16, 2015, Creditor conducted a Debtor's Exam of Debtor. *R.*, pp. 113-140. During this exam, Debtor admitted he keeps his personal business records in his house in Pocatello, Idaho. *R.*, p. 127, p. 54, lines 23-24. When Debtor was asked where the records for CYB Master, LLC were kept, he replied, "Hither and yon." *R.*, p. 129, p. 62, lines 5-6. He then stated some may be in his computer. *Id.* at 129, p. 62, lines 14-15. Debtor was asked if he caused any CYB entity to transfer any money or other property to any other individual or entity during the past three years. *R.*, pp. 132-134, pp. 71-79. He refused to answer and his counsel encouraged him to not answer. *Id.* When Debtor was asked about life insurance policies, he answered that information about those policies were on a computer in his home, owned by IntelliCorp, for which he is a director. *R.*, p. 135, p. 83, lines 1-10.

Upon conclusion of the Debtor's Exam, counsel for Creditor served upon Debtor a *Subpoena Duces Tecum*. *R.*, pp. 141-44. This subpoena commanded Debtor to produce materials relating to his assets, business and investment matters, including his financial interests in third party entities. *Id.* On October 14, 2015, counsel for Debtor wrote to counsel for Creditor and advised that Debtor would not be producing the information pertaining to Debtor's business or investment matters pertaining to third party entities, claiming Debtor "does not own or have a right to produce these documents." *R.*, p. 145. *See also R.*, p. 150.

On December 8, 2015, in attempt to avoid seeking court intervention, counsel for Creditor wrote to counsel for Debtor, citing I.R.C.P. 34(a) and 45(b), and requested the documents and materials that are in Debtor's possession, custody or for which he has a legal right to obtain upon demand, be produced. *R.*, pp. 152-53. As noted above, Debtor testified in his Debtor Exam his various roles and involvement in third party entities and that he had documentation and property regarding such involvement, in his home. On January 7, 2016, counsel for Debtor responded to counsel for Creditor and advised he would not be producing the requested items, materials, and information. *R.*, pp. 154-55. In support of his refusal to turn over the requested documentation and materials, counsel for Debtor wrote, "[B]ecause Mr. Wechsler is the custodian of third party property does not extinguish the third party's rights, and turning such property over to you would be illegal and unethical." *Id.* at 155.

C. COURSE OF PROCEEDINGS BELOW

On March 28, 2016, Creditor filed her *Motion to Compel Responses to Debtor Exam Questions*. *R.*, pp. 64-66. In this motion, Creditor sought the court's order, commanding Debtor to answer certain questions pertaining to his financial interest in the third party entities he is affiliated with. Additionally, Creditor sought the court's order, commanding Debtor to provide complete answers and responses to Creditor's subpoena. Creditor simultaneously filed *Plaintiff's Memorandum in Support of Motion to Compel. R.*, pp. 75-89. The *Affidavit of Louis E. Black in Support of Motion to Compel* was also filed therewith. *R.*, pp. 90-109. Also on March 28, 2016, Creditor filed *Plaintiff's Motion to Appoint Ancillary Receiver*, *R.*, pp. 156-57, and her supporting *Memorandum of Law in Support of Plaintiff's Motion to Appoint Ancillary*

Receiver. *R*., pp. 67-74. The basis for this request was to have the court appoint an ancillary receiver to marshall assets and property of the Debtor located within the state of Idaho. *R*., p. 156.

In response to the filing of these pleadings, Debtor filed *Debtor's Motion to Strike Affidavit of Louis E. Black*, *R*., pp. 173-76, *Debtor's Motion to Strike Portions of Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to Appoint Ancillary Receiver*, *R*., pp. 177-180, *Declaration of Norman Wechsler*, *R*., pp. 187-92, and *Memorandum in Support of Response to Motion to Compel and Motion to Appoint Ancillary Receiver*, *R*., pp. 181-86. The thrust of Debtor's responses to Creditor's motions was that Creditor was inappropriately attempting to pierce the corporate veil and attempting to get Debtor to breach his fiduciary duties with the third party entities he is affiliated with. *See R*., pp.181-86.

On May 11, 2016, the court entered its *Decision on Motion to Compel, Motion to Appoint Receiver, and Motions to Strike*. *R*., pp. 195-205. In this decision, the court ordered Debtor to:

> present answers to questions asked during the debtor's exam in relation to the two corporate entities owned by him. Furthermore, Norman is ordered to produce all documents necessary for Sharon and the receiver to assess any and all assets that may be used to satisfy the debt. Persistent refusal will result in contempt charges. The continuing refusal, constant delays, and evasive action, spanning almost 10 years, must stop. A judgment has been entered and must be fulfilled.

R., p. 200.

The court then ordered David M. Smith be appointed as ancillary receiver to help Receiver Joseph B. Nelson of New York in his fiduciary duties over CYB Master, LLC. *Id*.

> An ancillary receiver is appointed by a court in a jurisdiction other than that which appointed the primary receiver. The ancillary receiver is not an agent of the primary receiver, but rather answers to the local appointing court and is directed to take possession of the debtor's property within the state, and if necessary, remit it to the court which had original jurisdiction in the matter.

Id. at 201.

The court then went on and addressed Debtor's motions to strike. Debtor was seeking the court's order to strike portions of Creditor's supporting memorandum, as well as portions of the *Affidavit of Louis E. Black in Support of Motion to Compel.* *R.*, p. 202. *See also R.*, pp. 173-80. The basis for Debtor's motions was that the affidavit contained hearsay and that Creditor's memorandum contains "redundant, immaterial, impertinent, or scandalous" material. *R.*, pp. 202-03. In its decision, the district court held that the information in the affidavit were emails that described Debtor's interests in the various third party entities and such information was submitted as part of the post-judgment discovery process; not to be used for trial. *R.*, p. 202. Regarding the motion to strike portions of Creditor's brief, the court wrote:

> [W]hile Norman points out that Sharon's brief contains "redundant, immaterial, impertinent, or scandalous" material, that is solely his opinion and nothing in the rules prohibits a party from writing what they deem to be necessary for their case, even if the other side disagrees. Nothing in Sharon's brief rises to the level of warranting being stricken. Similar to Black's affidavit, the memo will be given the weight to which it is entitled.

R., p. 203. On May 24, 2016, the court, pursuant to I.C. §8-601, entered its *Order Appointing Ancillary Receiver.* *R.*, pp. 206-210.

> The Ancillary Receiver is hereby appointed an officer of the Court and granted all of the powers authorized pursuant to Idaho Code §8-605, namely, the power, under the control of the Court, to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, collect

> debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize.
>
> . . .
>
> All parties to this action are ordered to cooperate with and assist the Ancillary Receiver in taking possession of the property described above. The past and/or present officers, directors, agents, members, managers, general partners, managing partners, trustees, attorneys, accountants, and employees of CYB Master LLC, any of the "Receivership Defendants" identified in the Order Appointing Receiver Pursuant to CPLR 5228, or any employee, officer, director, or agent of any second-tier or subsequent-tier entity, are ordered to turn over to the Ancillary Receiver forthwith all paper and electronic information belonging to and/or relating to CYB Master LLC, any of the "Receivership Defendants," and/or any second-tier or subsequent-tier entities or assets, in such manner as the Ancillary Receiver may specify.

R., pp. 208-09. ***After*** the Court's entry of this order, *Debtor filed his Objection and Response to Plaintiff's Proposed Order Appointing Ancillary Receiver. R.*, pp. 211-213.

On June 8, 2016, Creditor filed an *Ex Parte Motion for Writ of Assistance. R.*, 6/8/2016 p. 5. This motion sought the court's order directing the Bannock County Sheriff to assist the Ancillary Receiver in taking possession of assets and records belonging to CYB Master LLC, or any entity or asset in which CYB Master LLC may hold an interest of any kind that was believed to be held in Debtor's home located in Pocatello, Idaho. *Id.* On June 8, 2016, the court issued the *Writ of Assistance. Id. See also, Augmented R.*16.06.20, Ex. 1. On June 16, 2016, the Bannock County Sheriff, accompanyied by the Ancillary Receiver, served the *Writ of Assistance* on Debtor at his home. *Augmented R.*, 16.06.20. The Debtor refused to cooperate with the Ancillary Receiver or the Sheriff, and entry into his home was not made. Debtor refused to produce any documents or things in response to the Writ. *Id.*

On June 17, 2016, Debtor filed a *Notice of Appeal* of the court's *Decision on Motion to Compel, Motion to Appoint Receiver and Motions to Strike and the Order Appointing Ancillary Receiver. R.*, pp. 214-18.

On June 17, 2016, Debtor filed his *Motion for Stay of Enforcement of Orders*, accompanied by the *Affidavit of Norman Wechsler. Augmented R.*, 16.06.17. On June 24, 2016, Creditor filed her *Objection to Motion for Stay of Enforcement of Orders* and on June 29, 2016, the court entered its *Decision on Motion to Stay* and wrote, "This Motion is nothing more than another attempt by Wechsler to avoid his duties and waste the time and resources of the judicial system. In its discretion, the Court **DENIES** Wechsler's Motion to Stay the Orders." *Augmented R.,* 16.06.24, *R.*, pp. 221-22.

Due to Debtor's refusal to cooperate with the Sheriff or the Ancillary Receiver, on June 20, 2016, Creditor filed a *Motion for Contempt*, along with the *Affidavit of Ancillary Receiver in Support of Motion for Contempt. Augmented R.*, 16.06.20. Creditor alleged Debtor refused to cooperate with the Ancillary Receiver's attempt to obtain documents or computer files belonging to CYB Master LLC and thus sought court assistance due to Debtor's refusal to cooperate with the Ancillary Receiver as ordered in the May 24, 2016, *Order Appointing Ancillary Receiver. Id.*

On June 20, 2016, Debtor filed his *Objection to Plaintiff's Writ of Assistance*, alleging the Writ "grants unconstitutionally wide ranging seizure authority to the Bannock County Sheriff and the Receiver." *Augmented R.*, 16.06.20 Debtor then submitted an exemplar Writ, seeking the court to amend the issued Writ to match that of the exemplar. *Id.* On June 24, 2016, Debtor then filed his Amended Objection to Plaintiff's Writ of Assistance. *Augmented R.*, 16.06.24.

This amended objection sought to strike the proposed exemplar writ submitted in his original objection to the Writ. *Id.*

As previously discussed above, on June 29, 2016, the court issued its decision, denying Debtor's motion to stay the enforcement of the court's orders. In response to that order, on July 7, 2016, Debtor submitted his *Motion for Stay of Enforcement of Orders* to this Court. *Augmented R.*, 16.07.07. Following the filing of Creditor's response to this motion, on August 1, 2016, this Court entered its *Order Denying Motion for Stay of Enforcement of Orders*. *R.*, p. 223.

On July 18, 2016, a hearing was held on Creditor's Motion for Contempt. *R.*, p. 258. During that hearing, Debtor denied the motion and the court read Debtor his rights on the Motion for Contempt. *Id.* Debtor's Motion for Stay was still then pending before this Court; thus a trial date was not set.[1] *Id.* Also, Debtor raised an allegation of a conflict of interest between the Ancillary Receiver and Creditor's counsel, due to Creditor's counsel filing the Motion for Contempt on behalf of the Ancillary Receiver and the Ancillary Receiver being paid by the Creditor. *Id.* The court then ordered the parties to submit briefing on this allegation. *Id.* On July 25, 2016, Debtor filed his *Statement of Affirmative Defenses Pursuant to I.R.C.P. 75* in regards to the contempt allegation. *Augmented R.*, 16.07.25.

[1] As of the date of filing of this brief, Creditor's *Motion for Contempt* has yet to be heard by the District Court. A hearing was scheduled in November 2016 but was re-scheduled due to the automatic stay that arose following Debtor's filing of his *Second Amended Notice of Appeal*. The hearing was then scheduled in December, 2016; however the Ancillary Receiver did not make it to the hearing and a new hearing was scheduled for January 12, 2017.

On July 13, 2016, Debtor filed his *Amended Notice of Appeal. R.*, p. 225-57. The *Amended Notice of Appeal* was filed pursuant to this Courts issuance of a *Notice of Defect* issued, July 12, 2016, advising the decision being appealed was not appealable pursuant to I.A.R. 11(a)(7).

On August 2, 2016, Creditor filed Plaintiff's *Response Memorandum to Defendant's Motion Re. Receiver Conflict of Interest. Augmented R.* 16.08.02. On August 5, 2016, Debtor filed his *Reply to Plaintiff's Response Memorandum to Defendant's Court Ordered Briefing Regarding Receiver Conflict of Interest. Augmented R.*, 16.08.05. On October 3, 2016, the Court entered its *Decision Re: Conflict of Interest.* In its decision, the court held that Creditor was required by its May 24, 2016, order to pay the Ancillary Receiver and then seek reimbursement from assets seized, if available and appropriate. *Id.* at 3. Such a requirement as ordered by the court, especially in light of the fact that Creditor is the party who requested the Ancillary Receiver in this matter and therefore has a slightly more significant role in moving forward, does not create an inherent conflict of interest. *Id.*

The Court then addressed the allegation of the conflict of interest due to Creditor filing the Motion for Contempt on behalf of the Ancillary Receiver. *Id.* at 4. In its analysis the court pointed out that the Ancillary Receiver had attempted to act on his court ordered obligations by going to Debtor's home, but Debtor refused to allow him to fulfill his duties as ordered. *Id.* It was due to Debtor's refusal to allow the Ancillary Receiver to perform his duties that the need arose for court involvement. *Id.* The court clarified that counsel for Creditor does not represent the Ancillary Receiver, the Ancillary Receiver was appointed by the court, and "sometimes legal

and procedural matters must be undertaken in their behalf. If such arises, the receiver should not be expected to go out and retain private counsel in order to effectuate the orders of the Court." *Id.* "While it may have been better to come directly to the Court, because the Court *can* initiate contempt charges, the manner the receiver undertook does not preclude action or create a conflict of interest. . . . The fact that [Creditor's] attorney filed charges based on *knowledge from the receiver on behalf of his client* regarding the incident does not mean that Plaintiff's attorney represents the receiver." *Id.* at 4-5. "Neither the payment structure in place, nor the filing of contempt charges in behalf of Plaintiff based upon knowledge presented by the receiver create a conflict of interest that is irreparable." *Id.* at 5.

Following the issuance of this decision by the court, on November 7, 2016, Debtor filed his *Second Amended Notice of Appeal.*

II. ISSUES PRESENTED ON APPEAL

The following are the issues on appeal as identified in Debtor's Second Amended Notice of Appeal:

1. The District Court erred when it ordered Appellant to remit property and information belonging to a third party as a result of an improper motion to compel by [Respondent].

2. It was inappropriate for the District Court to appoint an ancillary receiver in this case. The appointment was made without statutory authority and was inappropriate because all rights and authority over CYB Master were appointed to Joseph B. Nelson, CPA of the accounting firm of Berdon LLP, New York, New York.

3. The District Court's orders of May 11, 2016 and May 24, 2016, as well as the dependent *Writ of Assistance,* violated Appellant's fundamental rights, including, but not limited to, his rights to privacy under the Fourth and Fourteenth Amendments, Fifth Amendment rights to due process and First Amendment Right to freedom of speech.

4. Debtor was entitled to his attorney fees under I.R.C.P. 37(a)(4), as the *Motion to Compel* (CR 64-66) was filed improperly.

5. It was inappropriate for the District Court to appoint an ancillary receiver in this case without bond?

6. The District Court erred when it considered hearsay, unsubstantiated and scandalous information without foundation in its *Orders* of May 11 (CR 195-205) and May 24, 2016 (CR 206-210).

7. The District Court erred in its *Decision Re: Conflict of Interest,* entered on October 3, 2016, in finding that a conflict did not exist as the result of Respondent paying counsel to represent the Ancillary Receiver, communicating directly with the receiver ex-parte, and paying the Ancillary Receiver directly.

8. In all of its decisions in this case, the District Court failed to perceive or recognize the issues as discretionary as required by Idaho case law.

III. ADDITIONAL ISSUES PRESENTED ON APPEAL

1. Whether Creditor is entitled to an award of her attorney fees on appeal pursuant to I.A.R. 11.2 and I.A.R. 41?

IV. STANDARD OF REVIEW

"The Court exercises free review over matters of law regarding filing of a foreign judgment pursuant to Idaho Code § 10-1301, et. seq." *Int'l Real Estate Solutions, Inc. v. Arave*, 340 P.3d 465, 468 (2014). The standard of review for questions of law is one of free review. *Ransom v. Topaz*, 143 Idaho 641, 644, 152 P.3d 2, 5 (2006). "The control of discovery is within the discretion of the trial court." *Jacobson v. State Farm Mut.*, 136 Idaho 171, 173, 30 P.3d 949, 951 (2001).

V. ARGUMENT

A. WHETHER THE DISTRICT COURT WAS CORRECT IN COMPELLING DEBTOR TO RESPOND TO DEBTOR EXAM QUESTIONS?

The district court properly granted the Creditor's motion to compel the Debtor to answer debtor exam questions regarding his corporations, Wechsler and Company and CYB Masters, LLC and their subsidiaries, as well as questions concerning his interest in the companies and what assets can be used to satisfy the debt that he owes. Consequently, the district court did not abuse its discretion regarding this matter.

First, the issue of whether a motion to compel is the appropriate remedy as compared to a motion for contempt when a debtor does not comply with a debtor's exam pursuant to Rule 69 was not raised in the debtor's briefing below (*R.*, pp. 181- 186), but was only briefly mentioned at oral argument, without supporting authority, in front of the district court. *Reporter's Transcript on Appeal,* 04-25-16, p. 25, ll. 14-17. ("This is - - if there is such an action that they would have any authority to bring, it would be a motion for contempt because he would be in contempt of an order. It would not be a motion to compel."). Consequently, the Creditor did not

have an opportunity to properly research and respond to this issue at the district court level, and therefore it was not properly raised below. No supporting authority was presented to the court, and should not be considered on appeal. See *Leader v. Reiner*, 143 Idaho 635, 637, 151 P.3d 831, 833 (2007) ("The longstanding rule of this Court is that we will not consider issues that are raised for the first time on appeal.").

Second, the Debtor's contention that a post-judgment debtor's examination under Rule 69 is not discovery governed by Rule 26 and is not subject to a motion to compel under Rule 37 is not supported by law or fact. See *Appellant's Opening Brief*, p. 7. Idaho Rule of Civil Procedure 69 provides the methods that may be used to collect on a judgment, which includes the "Obtaining of Discovery." I.R.C.P. 69(c) provides as follows:

> (c) **Obtaining discovery.** In aid of the judgment or execution, the judgment creditor or successor in interest whose interest appears of record **may obtain discovery from any person,** including the judgment debtor, **as provided in these rules** and **may examine any person,** including the judgment debtor, **in the manner provided by these rules.**

(Emphasis added). The examination of the judgment debtor, referred to colloquially as a "debtor examination" is clearly included as "discovery" by Rule 69. The Rule also directs that the examination of the judgment debtor is to be conducted "as provided by these rules," as is the discovery. There is no other direction in the Idaho Rules of Civil Procedure regarding a debtor examination other than what is in Rule 69. Therefore, Rule 69's direction for an examination of any person, including the judgment debtor, "in the manner provided by these rules" must refer to depositions by oral examination as provided in I.R.C.P. 30. Indeed, even the Debtor admits in his briefing that "[T]his process [A Rule 69 debtor's exam] is generally referred to as a deposition,

as governed by I.R.C.P. 30." See *Appellant's Opening Brief*, p. 9. However, the Debtor also argues that a Rule 69 debtor's exam is not discovery as governed by Rule 26 and Rule 37, despite the fact that a "deposition upon oral examination" is the first method of discovery listed under Rule 26(a)(1). A Rule 69 debtor's examination is a deposition governed by Rule 26 and Rule 30 and a motion to compel may therefore be applied under Rule 37.

Debtor concedes that a Rule 69 debtor's exam is a deposition governed by Rule 30. See *Appellant's Opening Brief*, p. 9. During an oral examination under Rule 30, a "person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court or to present a motion under Rule 30(d)(4)." I.R.C.P. 30(d)(1). Attorney for the Debtor, however, objected and instructed his client not to respond without asserting a privilege, enforcing a limitation ordered by the court, or moving to terminate the deposition under I.R.CP. 30(d)(4)(A). *See* Transcript of September 16, 2015, Debtors Examination at *R.*, pp. 113-140. Idaho Rule of Civil Procedure 36(d)(4) provides that "the deponent... may move to terminate or limit it [the deposition] on the grounds that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses or oppresses the deponent." Pursuant to I.R.C.P 30(d)(4)(B), the deponent may then suspend the deposition to obtain a protective order under Rule 26(c). During the oral examination, the Debtor and his counsel refused to answer many relevant questions on the grounds that that the questions asked were regarding the assets or operations of corporate entities that are not parties to the action – even though the information was within the Debtor's personal knowledge and even when it involved actions that the Debtor may have personally taken or directed. *See* Transcript of

September 16, 2015 Debtors Examination at *R.*, pp. 113-140. However, this was not an objection that allowed the Debtor to refuse to answer under I.R.C.P. 30(d)(1). Moreover, the Debtor did not obtain a protective order under Rules 30(d)(4)(A) and 26.

Consequently, because the Debtor refused to answer relevant questions, without appropriate objections or a protective order during an oral examination, a motion to compel under Rule 37 was appropriate. Rule 37 provides that a motion to compel discovery may be made if "a deponent fails to answer a question asked under Rule 30 or 31." I.R.C.P. 37(a)(3)(A)(i). Rule 37 also provides that an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond. The following table shows references to the Debtor's exam transcript where the Debtor failed to answer questions within his knowledge about the operations or assets of CYB master, or any of its subsidiaries of Wechsler & Co., or of the target companies. (Pages and lines refer to the Transcript pages. The Transcript can be found in the Record at pp. 113-140).

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p.28: l.7	pp. 29-31	pp. 31-33	p.36 l.5	p.41: l.8
p.42: l.6	p.54: l.7	p. 59: l. 9	p. 67: l. 7	p.71: l.17
p.72: l.15	p.73: l. 17	p.75: l.4	p.76: l.8	p.77: l.9
p.79: l.1	p.79: l.25	p.100: l.20	p. 101: l. 13	p.102: l.4

A quick skim of the debtor's examination transcript makes it obvious that Debtor was also evasive or gave incomplete answers throughout the examination. As seen above, pursuant

to the Idaho Rules of Civil Procedure, a Rule 37 Motion to Compel was appropriate in response to the Debtor's refusal to answer questions during his oral examination as a judgment debtor. While a motion for contempt is one available remedy for a judgement debtor's refusal to answer examination questions, it is not the only one. Rule 69 clearly defines a debtor's examination as discovery to be governed under Rule 26 and Rule 30 discovery rules and procedures, which allow a court to grant a motion to compel when the deponent/judgment debtor does not comply.

Furthermore, the Debtor's contention that there was no meet and confer between the parties, and therefore the district judge's grant of the motion to compel was error, is not supported by fact or law. See *Appellant's Opening Brief*, pp. 9-10. As seen in the debtor examination transcript, referenced in the table above, the Creditor posed her questions to the Debtor through a debtor's examination/deposition. At advice of counsel, the Debtor refused to answer and was evasive throughout the deposition. Counsel for the two parties discussed at great length, both on and off the record, the appropriateness of the questions and the Debtor's objections to them. The Debtor continued to refuse to answer them. Certainly this was a discussion between the parties that qualified as a meet and confer inasmuch as the parties were attempting to resolve the issues without involving the court.

Next, in an effort to acquire the relevant information without involving the court, the Creditor served a Subpoena D*uces Tecum* on the Debtor for documents in Defendant's possession concerning the various corporate entities. *R.*, pp. 141-44. In an October 14, 2015, letter, counsel for Debtor again refused to produce the documents, claiming, again that the

Debtor "does not own or have a right to produce these documents." *R.*, p. 145. *See also R.*, p. 150.

In an effort to avoid seeking court intervention, on December 8, 2015, Creditor's counsel wrote to Debtor's counsel and attempted to narrow the requests:

> As you are aware, discovery in post judgment proceedings is allowed in aid of the judgment or execution. Pursuant to I.R.C.P. 45(b) as well as I.R.C.P. 34(a) the person to whom the request is directed (Norman J. Wechsler) shall produce or permit inspection and copying of the books, papers, documents, and/or electronically stored information which are in the possession, custody or control of the party upon whom the request is served. Of course the rules also allow the party to whom the request is served upon to allow the requesting party entry upon the property of whom the request is served for the purpose of inspecting the designated object or property. As I am sure you are aware, the law is pointedly clear that the production requirements include producing documents that are under your client's control. Mr. Wechsler is required to produce the documents, tangible things and/or electronically stored information that is in his possession, custody or for which he has a legal right to obtain upon demand.

Creditor's counsel then requested that Debtor respond to only two of the six items to which he had previously objected. Creditor explained why, in light of the law, a response was required:

> In his debtor's exam, Mr. Wechsler testified regarding his various roles and involvement in these companies. We are specifically requesting any and all documents, tangible materials and/or electronic data that is in his possession, custody or control or which he has a legal right to obtain upon demand. ...
>
> In his debtor's examination, Mr. Wechsler testified that he is a director of Intellicorp and that the computer in his home is owned by Intellicorp. Mr. Wechsler also testified that he keeps some of his personal business records on the computer. Because he is in possession, custody or control of this computer for which he has a legal right to access, including the data and information located thereon, we are requesting he provide to us all information located thereon pertaining to his business records, financial affairs or assets in any way. We are

> requesting this information be provided to us via thumb-drive (flash drive), CD or to permit us access to the computer for the purpose of inspecting the computer to investigate the financial information located thereon pertaining to Mr. Wechsler.

R., pp. 152-53. Counsel for Debtor responded on January 7, 2016, arguing without citation to rule, statute, or precedent that the Debtor was not obligated to turn over information or documents in his possession about a corporate entity that he controls. *R.*, pp. 154-55.

The above letters and correspondence were also valid meet and confer efforts, and the district court's grant of the Creditor's motion to compel was both correct and within the court's discretion.

Debtor's contention that he did not receive a notice of deposition before the Rule 69 debtor's examination is also misleading and not supported by the facts. *See* Appellant's Opening Brief, p. 9. On September 2, 2015,Creditor did file a *Motion for Order for Examination of* Defendant, pursuant to Idaho Code § 11-501 ("Order for Examination of Defendant" or Idaho's "Debtor Exam" statute). On September 2, 2015 the district judge signed an Amended Order for Debtor's exam, which was sent to Debtor's counsel of record. *R.*, pp. 42-43.

Finally, Debtor's argument that a subpoena duces tecum is also not discovery, and may not be enforced by a Rule 37 motion to compel is not supported by law. *See* Appellant's Opening Brief, p. 8. A Rule 45 subpoena *duces tecum* is simply another method to obtain discovery documents. If a party fails to comply without justifiable cause, all remedies may be taken against him, including a motion to compel. Indeed Rule 45 contemplates that a motion to compel may be sought by the opposing party for lack of compliance. See I.R.C.P. 45(e)(1)(D).

The district court did not abuse its discretion in granting the Creditor's motion to compel. The rules of discovery, including those for depositions and subpoenas clearly apply to debtor examinations and post-judgment proceedings. Consequently, the Court should affirm the district court's May 11, 2016, decision, granting Creditor's Motion to Compel.

B. WHETHER THE DISTRICT COURT'S APPOINTMENT OF AN ANCILLARY RECEIVER WAS PROPER?

Debtor's response brief to the district court presented no argument and cited no authority that stands for the proposition that the district court lacked, authority to appoint an ancillary receiver. *See R.*, pp. 181-86. "It is by now a well established rule in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal." *Balser v. Kootenai County Bd. Of Comm'rs*, 110 Idaho 37, 40, 714 P.2d 6, 9 (1986). *See also, Masters v. State*, 105 Idaho 197, 668 P.2d 73 (1983)(an appellant is held to the theories on which a cause was tried in the lower court and may not raise additional or new theories on appeal); *International Business Machines Corp. v. Lawhorn*, 106 Idaho 194, 677 P.2d 507 (Ct. App. 1984)(even if issue was arguably raised in the lower tribunal under liberal interpretation of pleadings, if not supported by any factual showing or by submission of legal authority, it was not presented for lower court's decision and would not be considered on appeal.). Because Debtor failed to argue and/or support the argument in his briefing to the district court that the court was without authority to appoint an ancillary receiver, he is not entitled to raise the argument on appeal and this Court should not

address it. Nonetheless, in the event the Court feels the issue was properly raised before the district court, Creditor presents the following argument in support of the district court's decision.

The district court acted in accordance with Idaho law when it appointed the ancillary receiver in this matter. Idaho Code § 8-601 provides that a receiver may be appointed "by the court in which an action is pending or has passed to judgment, or by the judge thereof:

> 1. In an action ... by a creditor to subject any property or fund to his claim
> ...
> 3. After judgment to carry the judgment into effect.
>
> 4. After judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.
>
> ...
>
> 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

Idaho Code §8-601 (Michie 2016). "The power to appoint a receiver is very largely in the discretion of the trial court, and an appellate court will not interfere with the exercise of such discretion except in cases of palpable abuse." *Northwestern & Pac. Hypotheek v. Dalton*, 44 Idaho 120, 124, 256 P. 93, 95 (1927).

The concept of appointing a local or ancillary receiver to assist a receiver who has been appointed by a foreign court, is well established in courts of equity. "In granting an ancillary receivership the court ordinarily looks at nothing except the pendency of a proceeding in the parent district, the appointment there of a receiver, and the presence of assets in the district where the application is made." *In Re Hayes*, 192 F. 1018 (Dist. Ct. S.D. New York, 1912). *See*

also, Meyers v. Moody, 693 F.2d 1196, 1205 (U.S. Ct. App. 5th Cir., 1982)(Ancillary Receiver utilized as well.) *See also generally* Ralph E. Clark, *A Treatise on the Law and Practice of Receivers, 3rd Ed.,* Section 318. An ancillary receiver is appointed by a court in a jurisdiction other than that appointing the primary receiver. The ancillary receiver is not the agent or deputy of the primary receiver. The ancillary receiver answers to the local court which made the appointment, and is directed to take possession of the debtor's property and, at the order of the local court, remit it to the court with original jurisdiction over the matter. *Clark on Receivers, § 318.*

Accordingly, appointment of an ancillary receiver is authorized by Idaho Code § 8-601(6), *supra.* Because the appointment of the ancillary receiver is based on an action filed locally – in this case, the filing of a foreign judgment – it is generally considered that the appropriate person to request appointment of an ancillary receiver is the original plaintiff, not the primary receiver. *Clark on Receivers, § 320.1.*

In this instance, Debtor's principal assets are two holding companies: a New York corporation, Wechsler & Co., which is currently in Chapter 11 bankruptcy; and a Delaware limited liability company, CYB Master LLC. These entities directly or indirectly own significant interests in four small corporations which may have significant value. Virtually the entirety of Debtor's significant net worth is tied up in these two holding companies and their debt and equity stakes in the four corporations. However, Debtor, though previously ordered by the New York court to relinquish control of the entities' property, materials, and information he

possesses, has refused and continues to refuse to turn over said property, materials, and information.

Per the Record herein, the equity holdings of Debtor and/or the entities he controls or has an interest in as of August 18, 2010, were:

RAVE LLC

Wechsler & Company	32,367,112 Common Units	725 Preferred Units
CYB RAVE LLC	3,262,387 Common Units	1100 Preferred Units
Norman Wechsler	625,948 at 0.0998485/unit Warrants	

INTELLICORP

Wechsler & Co., Inc. 998,200.00 Equity/Shares $6,707,000.00 Loan/Notes $158,058.54 Interest

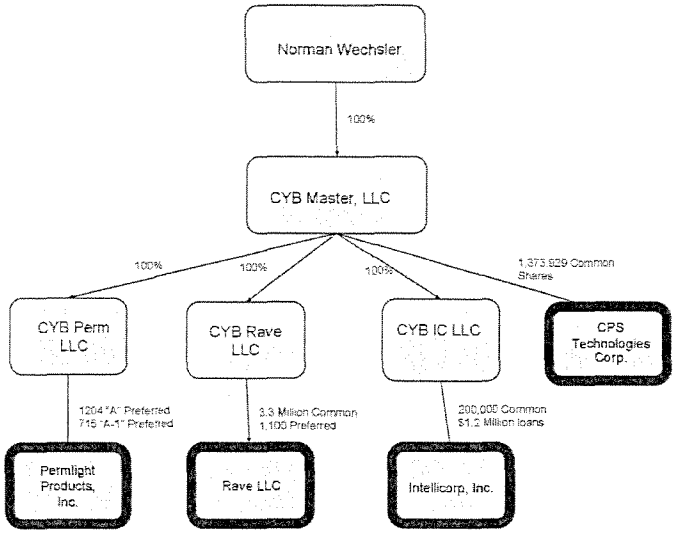
CYB IC LLC 200,000.00 Equity/Shares $1,218,000.00 Loan/Notes $17,926.37 Interest

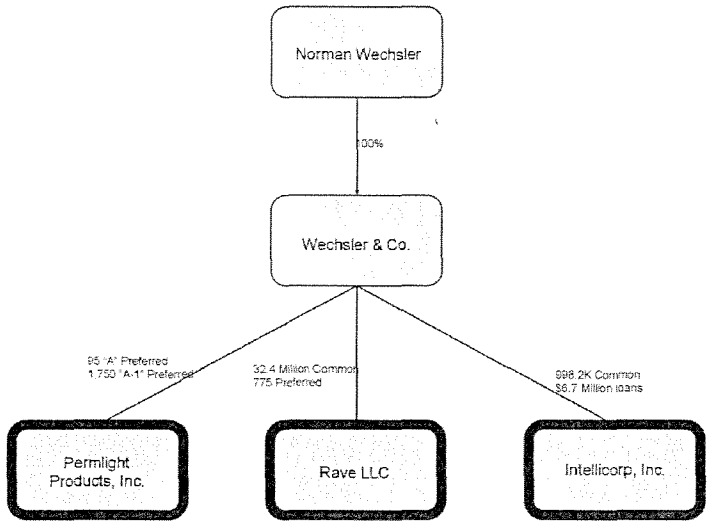
PERMLIGHT PRODUCTS, INC.

Wechsler & Co., Inc.	95 Shares Series A Preferred 1750 Shares Series A-1 Preferred
CYB Perm LLC	1204 Shares Series A Preferred 715 Shares Series A-1 Preferred
Norman J. Wechsler	16 Shares Series A-1 Preferred

R., pp. 94-104.

Charts detailing these interests are set forth below for the court's convenience:





R., p. 77.

In May 2013, the New York Supreme Court issued its order appointing Joseph B. Nelson, CPA, of the accounting firm of Berdon LLP, New York, NY as receiver for Debtor's interests in CYB Master LLC. Although the Receiver is, by court order, the sole member of CYB Master

LLC, the facts squarely establish that Debtor resides in Idaho and has property within his control and possession that he was previously ordered to turn over to the primary New York receiver, but has not and continues to refuse to do so. Debtor maintains in his home in Pocatello the business records of CYB Master and of the related limited liability companies it controls. He has in his possession documents, computer files, bank records, and other assets that should be handed over to the receiver. In addition, the Debtor has access to bank accounts that are part of the Receivership Estate.

It is clear the District Court had authority to appoint an ancillary receiver under the circumstances presented here. The Idaho receivership statutes confer authority on the court to appoint a receiver to receive and take charge of notes, accounts, certificates of the capital stock of corporations and choses in action, and other personal property, where the necessity and occasion for such appointment is shown. *Utah Association of Credit Men v. Budge,* 16 Idaho 751, 754-56 (1909). Creditor is attempting to satisfy a judgment. Execution has been returned unsatisfied, and Debtor refuses to apply his property in satisfaction of the judgment, even though he appears to control property sufficient to do so. The district court's appointment of an ancillary receiver was proper.

1. Payment of ancillary receiver's fees and costs.

Similarly, the court did not commit error when it ordered, as did the New York court, that Creditor pay the ancillary receiver's fees, costs, and expenses. "The district court appointing the receiver has discretion over who will pay the costs of the receiver." *SEC v. Elliott,* 953 F.2d 1560, 1576 (U.S. Ct. App. 11th Cir., 1992). "Some courts have held that the receiver's right to

payment is created by the creditor's implied consent or acquiescence in the receivership proceedings. Perhaps it is more accurate to say there is an implied understanding that the court which appointed him and whose officer he is will protect his right to be paid for his services, to be reimbursed for his proper costs and expenses. Or simply, those who benefit from a receivership should pay for that benefit." *Id.* (internal citations omitted.) See also, *U.S. v. Guess*, 2005 U.S. Dist. LEXIS 14237, 12, 13 (U.S. Dist. Ct. S. Dist. CA, 2005).

In the New York order appointing the Receiver, with regard to payment of his fees, the court ordered, "Plaintiff (sic) Sharon Wechsler shall be responsible for paying the Receiver's fees and expenses to the extent they exceed the Receivership Property available to make such payments." *R.*, p. 61. Similarly, the Idaho court held, "All compensation shall be paid by the Plaintiff, who may seek leave from this Court or from the New York Court to recover those expenses from property obtained from the Defendant." *R.*, pp. 209-10.

Creditor sought the appointment of a local, Ancillary Receiver. The court appointed the Ancillary Receiver as its "arm," to assist in the locating, seizing and documenting the property, materials, computer files, and information in Debtor's possession in his home in Pocatello, Idaho as they relate to CYB Master LLC. The court's order requiring Creditor to pay the fees and expenses of the Ancillary Receiver was a usual and customary exercise of the court's discretion and the court was well within its bounds to impose such an order. The Creditor was seeking the appointment; the ancillary receiver has a right to be compensated, and the court's ordering payment by Creditor, which may be recovered from property obtained from Debtor, was a proper exercise of discretion.

2. Appointment of ancillary receiver to serve without bond.

A receiver serving without bond is a discretionary matter determined by the trial court. "To determine whether the district court abused its discretion, this Court evaluates whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with relevant legal standards; and (3) reached its decision by an exercise of reason." *Slaven v. Slaven*, 2016 Ida. LEXIS 337, *6 (2016). Similar to the New York court, the district court in this matter appropriately exercised its discretion through sound reasoning and application of law and did not require the Ancillary Receiver serve pursuant to the posting of a bond. Idaho Code § 8-604 allows the court to exercise its discretion relative to the posting of a bond. This statute provides, "Before entering upon his duties the receiver must be sworn to perform them faithfully, and with one (1) or more sureties, approved by the court or judge, execute an undertaking, to such person and in such sum as the court or judge *may* direct. . . ." Idaho Code § 8-604 (Michie 2016). Said otherwise, the court may direct a sum certain for a bond, or none at all. The exercise of this discretion to not require the posting of a bond by a receiver is common and solely within the discretion of the court. See *SEC v. Bivona*, 2016 U.S. Dist. LEXIS 142002 *24, (U.S. Dist. Ct. N. Dist. CA, San Francisco Div., 2016), *Ruppersberger v. Ramos*, 2015 U.S. Dist. LEXIS 99106 *8 (U.S. Dist. Ct. Dist. HA, 2015). The court in this case did not error when it properly exercised its discretion and followed the lead of the New York court and appointed the Ancillary Receiver to serve without bond.

C. WHETHER THE COURT'S ORDERS AND WRITS PROTECTED DEBTOR'S CONSTITUTIONAL RIGHTS?

First, the Debtor raised the constitutional issues of the First, Fourth, Fifth and Fourteenth Amendment rights for the first time in his *Objection and Response to Plaintiff's Proposed Order Appointing Ancilliary Receiver*, filed May 24, 2016 – ***after*** the district court had already issued the May 11, 2016, and May 24, 2016, orders that are the subject of this appeal. *R.*, p. 212. Debtor did not file a motion for reconsideration or seek alternative relief. The Debtor did not raise constitutional issues in his briefing or oral argument to the court below, and consequently, the district court did not consider or decide any constitutional issues. Accordingly, this Court should not consider these issues for the first time on appeal. See *Murray v. Spalding*, 141 Idaho 99, 101-02, 106 P.3d 425, 427-28 (2005) (holding that appellate court will not consider issues raised for the first time on appeal, but also noting exception that "constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in the case."). Further, there are no subsequent proceedings in this case – judgment has been obtained and Creditor is simply seeking to execute on such judgment. Therefore, the constitutional issues raised by the Debtor on appeal should not be considered by this Court.

However, if this Court proceeds to address the Debtor's arguments, then the Court should affirm the district court's orders because the Debtor's arguments that the district court's orders and writs violated his constitutional rights are not supported by fact or law.

1. **The Fourth and Fourteen Amendments' prohibition against unlawful search and seizure does not apply.**

The Debtor's Fourth and Fourteenth Amendment rights protecting against unlawful and unreasonable searches and seizures are not applicable to the present, post-judgment enforcement of a civil order. The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

However, the Fourth Amendment is applicable to a debtor only where (1) the actor is acting as an instrument or agent of the government; and (2) the debtor has a legitimate privacy interest with respect to the property. *In Re Kerlo*, 311 B.R. 256, 263 (Bankr. C.D. Cal. 2004).

Under the first prong, the Fourth Amendment generally does not protect against unreasonable intrusions by private parties. *In re Kerlo*, 311 B.R. 256, 263 (Bankr. C.D. Cal. 2004), citing *Burdeau v. McDowell*, 256 U.S. 465, 475, 65 L. Ed. 1048, 41 S. Ct. 574 (1921). The Fourth Amendment does apply, however, "to the conduct of private parties acting as instruments or agents of the government." *In re Kerlo*, 311 B.R. 256, 263 (Bankr. C.D. Cal. 2004), citing *Coolidge v. New Hampshire*, 403 U.S. 443, 487, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971). To "determine whether a private individual is acting as a governmental instrument or agent for Fourth Amendment purposes" the following two-part test is applied: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the private party

intended to assist law enforcement efforts or further his own ends." *In re Kerlo*, 311 B.R. 256, 263 (Bankr. C.D. Cal. 2004), citing *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994).

To satisfy the second prong, a person claiming a violation of the Fourth Amendment must show that a defendant "acted with the intent to assist the government in its investigatory or administrative purpose, and not for an independent purpose." *In re Kerlo*, 311 B.R. 256, 264-65 (Bankr. C.D. Cal. 2004), citing *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 924 (9th Cir. 2001). In several instances, the Ninth Circuit has refused to apply the Fourth Amendment because of a legitimate independent motivation of the private party that engaged in the challenged conduct. *In re Kerlo*, 311 B.R. 256, 264 (Bankr. C.D. Cal. 2004), citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982) (search of the defendant's residence by a private party for the purpose of recovering stolen property); *United States v. Chukwubike*, 956 F.2d 209, 212-13 (9th Cir. 1992) (intrusive medical procedures used by a physician in order to protect the defendant's health and safety); *United States v. Gomez*, 614 F.2d 643, 645 (9th Cir. 1979) (search of misplaced luggage by an airline employee for the purpose of identifying the owner).

Finally, "the involvement of government officials does not necessarily transform private conduct into a government search or seizure." *In re Kerlo*, 311 B.R. 256, 264 (Bankr. C.D. Cal. 2004), citing *Chukwubike*, 956 F.2d at 212-13. "[E]specially...where the purpose of the government presence is to ensure the safety of the private party and not to "reap the benefits" of the search or seizure." *In re Kerlo*, 311 B.R. 256, 264 (Bankr. C.D. Cal. 2004), citing *Miller*, 688 F.2d at 658.

Pursuant to the above principles in the *Kerlo* case, the bankruptcy court determined that the Fourth Amendment prohibition against unlawful search and seizures did not apply to a bankruptcy trustee that was charged with assembling and liquidating the assets of an estate for the benefit of creditors. 311 B.R. 256, (BAnkr. C.D. Cal. 2004). The *Kerlo* Court held that "[t]rustees in bankruptcy are not law enforcement officials" and "[a]lthough trustees may seek the assistance of governmental officials in carrying out their statutory and fiduciary duties and orders of the court, they do not act to assist the government in its investigatory or administrative activities." Rather, trustees in bankruptcy cases, "act independently under their statutory mandate in the Bankruptcy Code." *Id.*; *See also, In re Bodeker*, No. 12-60137-7, 2013 Bankr. LEXIS 2336, at *34-35 (U.S. Bankr. D. Mont. June 7, 2013) (A trustee searched a plaintiff's home "to further her own ends and for a legitimate independent motivation, i.e., to satisfy her trustee duties...."). A trustee may seek out assistance from a law enforcement officer to assist her in "carrying out her statutory and fiduciary duties to creditors of the estate." ." *In re Kerlo*, 311 B.R. 256, 265 (Bankr. C.D. Cal. 2004). Therefore, the "trustee has a legitimate, statutory, independent reason for enforcing the Orders." *Id.*; See also *In re Bodeker*, No. 12-60137-7, 2013 Bankr. LEXIS 2336, at *34-35 (U.S. Bankr. D. Mont. June 7, 2013) ("The involvement of the deputy sheriff on civil standby did not transform [a trustee's] private conduct into a government search or seizure").[2]

[2] See *Spacone v. Burke(In re Truck-A-Way)*, 300 B.R. 31, 38 (E.D. Cal. 2003) for contrary authority applying the Fourth Amendment to a bankruptcy trustee's actions to search a home to gather assets of an estate. However, as *Kerlo* notes, *Truck-a-Way* relies on *Taunt v. Barman (In re Barman)*, 252 B.R. 403, 413 (Bankr. E.D. Mich. 2000)

Similar to the case in *Kerlo*, in the present case, the receiver has an independent duty and interest in gathering the assets of the judgement-debtor and all documents and other items that will lead to the assets of the judgment debtor to satisfy court-ordered judgments and distribute those assets to the rightful creditors. Although the Ancillary Receiver in this case was assisted by a Bannock County Sheriff, it did not turn the Ancillary Receiver's actions into government actions. The deputy was there only to guarantee the safety of the Ancillary Receiver. However, the Ancillary Receiver was acting independently of the government, and was not assisting the government in its investigatory or administrative duties. The government reaped no benefit by the receiver's actions. Consequently, because the receiver was a private actor, the Debtor's Fourth Amendment rights could not have been violated because the Fourth Amendment did not apply.

The Fourth Amendment additionally did not apply to the Debtor's documents and things because the Debtor did not have a legitimate expectation of privacy in those items. "To invoke the Fourth Amendment protections, a person must show a legitimate expectation of privacy." *In re Kerlo*, 311 B.R. 256, 265-66 (Bankr. C.D. Cal. 2004), citing *Smith v. Maryland*, 442 U.S. 735, 740, 61 L. Ed. 2d 220, 99 S. Ct. 2577 (1979). "A legitimate expectation of privacy requires both (a) a subjective expectation of privacy, and (2) an objectively reasonable expectation of privacy." *Id.* Courts apply the following four-factor test to decide whether a person has a legitimate expectation of privacy:

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without considering at all the Fourth Amendment principles on this matter previously determined by the Ninth Circuit and discussed in the Creditor's brief above.

> (1) whether the person has a proprietary or possessory interest in the place searched or property to be seized, (2) whether the person has the right to exclude others from the premises, (3) whether the person has taken normal precautions to maintain his or her privacy, and (4) whether the person is legitimately on the premises.

In re Kerlo, 311 B.R. 256, 265-66 (Bankr. C.D. Cal. 2004), citing *United States v. Cella*, 568 F.2d 1266, 1280 (9th Cir. 1977). *Kerlo* held that a debtor has a "significantly reduced expectation of privacy in their "houses, papers, and effects" because of the requirement of substantial and detailed disclosures in a bankruptcy proceeding. Additionally, *In re Bodeker*, No. 12-60137-7, 2013 Bankr. LEXIS 2336, at *46 (U.S. Bankr. D. Mont. June 7, 2013), the bankruptcy court held that a debtor's "failure to disclose the gold and silver and other assets in his bankruptcy schedules significantly reduced his expectation of privacy in his residence..." Consequently, "under the totality of the circumstances..., even if a defendant could demonstrate a subjective expectation of privacy in the residence or specific property seized, 'this expectation of privacy is not one that society is prepared to recognize as legitimate' because the defendant should have disclosed the property in his bankruptcy proceedings." *Id.*, citing *United States of America v. Burke*, 2009 U.S. Dist. LEXIS 4762, 2009 WL 173829*10 (E.D. Cal.). The *Bodeker* Court finally explained that "it is therefore troubling that the defendant seeks to assert a legitimate expectation of privacy in documents that he was required by law to expose to the public." *Id.*

Similar to the *Kerlo* and *Bodeker* cases, the Debtor in the present case does not have a legitimate expectation of privacy in his papers and documents related to his financial interests, including the interests he has in Wechsler & Company and CYB Masters, LLC. The Debtor has a

reduced expectation of privacy in his papers and effects because of the requirement to answer truthfully during a debtor's examination. Additionally, the Debtor failed to disclose his interests in the above-named companies, despite being ordered by the court to do so. Consequently society is not prepared to recognize the Debtor's claimed expectation of privacy in this instance.

Because the Ancillary Receiver was not a state actor or an agent of a state actor when he attempted to execute on the writ of assistance in this matter and also because the Debtor did not have a legitimate expectation of privacy, the Debtor's Fourth Amendment rights against unlawful search and seizure were not violated. This Court should confirm the district court's Order to Compel, Order Granting Ancilliary Receiver, and Order for Granting Writ of Assistance.

2. The Debtor's Fifth and Fourteenth Amendments' due process rights were not violated in this post-judgment proceeding.

The Debtor's due process rights also were not violated. The Debtor contends that the Writ of Assistance was unlawful because he was not given notice of it or a hearing. However, the Writ of Assistance was issued as a **post-judgment execution** matter. The Debtor has already had a hearing and the opportunity to be heard, which resulted in the judgments against him. If every debtor were given notice that his property was going to be garnished, levied against, or executed on, then it would make collection on a judgment nearly impossible. In *Wyshak v. Wyshak*, a California appellate court explained:

> In the early case of *Endicott-Johnson Corp. v. Encyclopedia Press* (1924) 266 U.S. 285, 288 [69 L.Ed. 288, 291-292, 45 S.Ct. 61], **the United States Supreme Court considered the issue of whether post-judgment garnishment procedure, available to a judgment creditor without further notice of hearing**

> **to a judgment debtor, was violative of due process of law. The Endicott court held that due process did not require that notice and opportunity for hearing be afforded a judgment debtor before post-judgment garnishment was effectuated. Endicott has not been overruled.**

70 Cal. App. 3d 384, 388, 138 Cal. Rptr. 811, 813 (1977) (Internal citations Omitted. Emphasis added). *Wyshak* also held that it knew "of no authority holding that, after judgment, due process of law requires that additional opportunities for notice and hearing must be offered a judgment debtor... before execution may be levied." *Id.*; See also, *Brill v. Brill*, 905 So. 2d 948, 953 (Fla. Dist. Ct. App. 2005) (Distinguishing between pre-judgment and post-judgment garnishment to hold that "due process does not require 'prior notice to a judgment debtor and a hearing before a writ of garnishment).

The Debtor's arguments that he was not given due process before the issuance of the Writ of Assistance simply lacks merit. The Debtor was given all the process that he was due before the original judgments were issued. He then had an additional opportunity to be heard at the hearing on the motion to compel. The district court properly granted the Creditor's motion to compel. The Debtor has cited to no authority that would afford him additional process before the Debtor was entitled to execute on the judgments or enforce the motion to compel through a court-ordered Writ of Assistance.

3. The Debtor's First Amendment rights have not been violated.

The First Amendment does not apply to the present case, and indeed, the Debtor has cited to no authority in support of his First Amendment claim. (See Appellant's Opening Brief, p. 28). Debtor argues that because the Creditor has requested the Debtor's passwords and emails, the

Debtor's political and personal opinions will be chilled. However, Debtor has already been ordered and given opportunity to produce his relevant, business documents. His failure to comply with court orders certainly reduces his First Amendment rights in the same manner that it reduces his Fourth Amendment rights. He can also seek a protective order to protect non-relevant information that goes to his political and personal opinions. He should not be allowed to continue hiding relevant business documents for the mere reason that they may be stored with or among non-relevant documents that go to his political or personal opinions.

Debtor's argument that the receiver might obtain documents that are subject to attorney-client privilege and would therefore also chill his speech goes to the matter of privilege rather than matters regarding constitutional rights. Again, the Debtor has had ample opportunity to produce his records pertaining to his interests in the above-discussed businesses. If he had complied with his duties and court orders, he could have easily retained privileged information. Second, the Debtor has had sufficient opportunity to seek a protective order to protect privileged information that might also be stored electronically or in hard-copy form with other non-privileged documents but has chosen not to do this as well. The Debtor should not be permitted to hide behind the First Amendment or privileges to withhold other relevant, and court-ordered documents from production to the Creditor.

D. WHETHER THE DISTRICT COURT CORRECTLY DENIED DEBTOR THE AWARD OF ATTORNEY FEES UNDER I.R.C.P. 37(A)(5)(B)?

A motion to compel was the proper remedy and was properly granted by the district court in response to Debtor's failure to answer relevant questions at the debtor examination and to

produce documents responsive to the subpoena served upon him. The Creditor did pursue discovery – through a debtor's exam under Rule 69, which as stated in rule 69 is governed "by these rules" – and not solely by Idaho Code, Chapter 11. A debtor's exam is a deposition governed by Rule 30 – as conceded by the Debtor in his brief. See *Appellant's Brief*, p. 9. "I.R.C.P. 69 explicitly allows for examination of the judgment debtor. This process is generally referred to as a deposition and is governed by I.R.C.P. 30". A deposition is the first discovery method listed under Rule 26. Failure to comply with discovery is enforceable pursuant to a Rule 37 motion to compel. The Debtor is not entitled to attorney fees under Rule 37(a)(5)(B) because the district court properly exercised his discretion in granting the Creditor's motion.

E. WHETHER THE DISTRICT COURT PROPERLY DENIED THE DEBTOR'S MOTIONS TO STRIKE.

The district court did not improperly consider hearsay, unsubstantiated and scandalous information without foundation in its May 11th and May 24th orders, and consequently the district court properly denied the Debtor's motions to strike. Debtor particularly objected to the *Affidavit of Louis E. Black in Support of Motion to Compel*, contending that because Mr. Black did not receive or send the letters, emails, and documents attached to his affidavit, they were hearsay and lacked foundation. The Debtor conceded that "in the discovery process, not all requested material is required to be admissible." See *Appellant's Brief*, p. 25. However, the Debtor then contended that the district court improperly considered Mr. Black's affidavit and the documents attached thereto because the matters being considered in the Court's May 11th and May 24th orders were not discovery matters. *Id.* As shown in the Creditor's brief, *supra*, this argument is

not supported by law or facts. A debtor's examination is discovery governed by the Rules of Civil Procedure as stated in I.R.C.P. 69. A deposition is discovery and is the proper subject of a motion to compel if the deponent fails to answer examination questions. Consequently, Mr. Black's affidavit was filed in support of the Creditor's motion to compel and in pursuit of discovery. In denying the Debtor's motion, the district judge explained: "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." I.R.C.P. 26(b)(1). *R.*, p. 202. Therefore, the district court properly explained that the Debtor's Rule 56(e) and Rule 12(f) motions lacked merit because the district court did not consider the evidence as it applied to trial, and because "Black's affidavit was given to aid in the discovery process." *R.*, p. 203.

Next, the district court did not abuse its discretion in denying the Debtor's motion to strike portions of the memorandum. As the district court emphasized, because a party disagrees with the facts or law that is in the opposing party's brief does not make it "redundant, immaterial, impertinent, or scandalous" material. *Id.* The Debtor provided no valid argument or authority as to why his motion to strike the memorandum should be granted, and the district court properly denied his motion.

Finally, a judge's decision to grant a motion to compel responses in a debtor's examination as a creditor attempts to conduct discovery in a post-judgment proceeding and the district court's refusal to grant Debtor's frivolous motions to stay do not demonstrate emotion or a lack of reason. Rather, the court's decision simply reflects the court would not tolerate the Debtor's continued efforts to avoid collection of his debt.

F. WHETHER THE COURT CORRECTLY HELD THERE WAS NOT A CONFLICT OF INTEREST BETWEEN CREDITOR AND ANCILLARY RECEIVER?

As addressed hereinabove, the district court was well within its authority and exercised its reasoned discretion appropriately when it appointed the ancillary receiver in this case. In that Order the district court commanded, "All parties to this action are ordered to cooperate with and assist the Ancillary Receiver in taking possession of the property described above." *R.*, p. 209. On June 16, 2016 the ancillary receiver, accompanied by the Bannock County Sheriff, attempted to obtain the court ordered property of the Debtor or that property that was within his possession and/or control belonging to CYB Master LLC or the other third party entities related thereto, at Debtor's home.

The Debtor did not give the Ancillary Receiver any of the Court ordered documents, materials or objects and Debtor refused to allow the Ancillary Receiver to enter his home. *Augmented R.*, 16.06.20 *Affidavit of Ancillary Receiver in Support of Motion for Contempt,* ¶¶ *4-5.* On June 20, 2016 Plaintiff filed her Motion for Contempt and a Ex Parte Motion to Shorten Time, *Augmented R.*, 16.06.20 *Motion for Contempt, Ex Parte Motion to Shorten Time.* In the caption of those documents it reads that they identify counsel for Creditor to also be counsel for Ancillary Receiver, David M. Smith. *Id.* In the body of the *Motion for Contempt* as well as the *Ex Parte Motion to Shorten Time* it also states that the Ancillary Receiver is represented by counsel for Plaintiff. These pleadings misidentify Creditor's counsel's role in this matter as they relate to the Ancillary Receiver.

As previously stated, the court ordered the parties to cooperate with the Ancillary Receiver. The ancillary receiver alleged the Debtor refused to cooperate with the Ancillary Receiver through his alleged refusal to provide documentation, materials and other objects to the Ancillary Receiver on June 16, 2016. In that the court docket was silent as to Debtor self-reporting his alleged refusal to cooperate with the Ancillary Receiver, Creditor's counsel, pursuant to the Court's order for all parties to cooperate, filed the Motion for Contempt and the related documents submitted therewith.

Debtor argued to the court that a conflict of interest exists between Creditor's counsel and the Ancillary Receiver because the Creditor is paying the Ancillary Receiver and that the Ancillary Receiver is being represented by Creditor's counsel in this case. Creditor's counsel does not represent the Ancillary Receiver in this matter, nor has a Notice of Appearance pursuant to I.R.C.P. 4.1 been entered by Creditor's counsel on behalf of the Ancillary Receiver. The Ancillary Receiver is in this case through court order as an officer of the court and is required to answer to the court. *See generally R.*, p. 201. The Motion for Contempt and the associated documents submitted therewith were filed by Creditor's counsel as a means of providing notice to the court, only, of Debtor's alleged failure to comply with the court's order.

The issue regarding the Creditor's payment of fees and expenses has already been addressed hereinabove. Regarding Debtor's claim of conflict due to alleged representation by Creditor's counsel, the court did not commit error when it held:

> Counsel for Plaintiff does not represent the receiver in this action nor does the law firm of Racine Olsen Nye Budge & Bailey, Chartered represent him or his accounting firm in their appointment in this case. Counsel represent Plaintiff.

> Plaintiff requested an ancillary receiver to aid in the collection of a valid judgment she has against Defendant.
>
> While it is true that a receiver is not represented by either attorney in a case in which he or she has been appointed, sometimes legal and procedural matters must be undertaken in their behalf. If such arises, the receiver should not be expected to go out and retain private counsel in order to effectuate the orders of the Court.
>
> In this case, the so called "representation" only occurred as a result of Defendant's alleged contempt. The receiver would not have needed any representation but for Defendant's conduct. While it may have been better to come directly to the Court, because the Court *can* initiate contempt charges, the manner the receiver undertook does not preclude action or create a conflict of interest. Contempt was alleged. Defendant is certainly not going to file such charges. The fact that Plaintiff's attorney filed charges based on *knowledge from the receiver on behalf of his client* regarding the incident does not mean that Plaintiff's attorney represents the receiver. As such, no conflict of interest exists in relation to representation.

Decision Re: Conflict of Interest, Oct. 3, 2016, pp. 4-5.

Accordingly, the court's decision was well reasoned and correct. The court did not commit error in denying Debtor's allegation that a conflict existed between counsel for Creditor and the ancillary receiver.

G. WHETHER CREDITOR IS ENTITLED TO ATTORNEY FEES ON APPEAL?

Creditor is entitled to her attorney fees in defending against this appeal. Attorney fees are granted on appeal when the appellate court is "left with an abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation." *Berkshire Invs., LLC v. Taylor*, 153 Idaho 73, 87, 278 P.3d 943, 957 (2012). The Debtor's arguments in support of its appeal are not well grounded in fact or warranted by existing law. Debtor has sought this appeal with the sole purpose to cause Creditor to incur additional legal fees and to prolong this litigation

process so as to enable him to continue to evade collection of the judgments against him. *See I.A.R. 11.2, I.A.R. 41.* See also, *Jim & Maryann Plane Family Trust v. Skinner*, 2015 Ida. LEXIS 11, 20, 342 P.3d 639, 648 (2015) (Client and counsel both held responsible for payment of attorney fees on appeal since they advanced arguments that are without basis in law or fact.) Consequently, the Court should grant Creditor her attorney fees in this appeal.

VI. CONCLUSION

Pursuant to the foregoing, Creditor respectfully requests the Court affirm the district court's May 11, 2016 *Decision on Motion to Compel, Motion to Appoint Receiver and Motions to Strike*; May 24, 2016 *Order Appointing Ancillary Receiver*; and October 3, 2016 *Decision Re: Conflict of Interest.*

RESPECTFULLY SUBMITTED this 6th day of January, 2017.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: _____
STEPHEN J. MUHONEN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of January, 2017, I served a true and correct copy of the foregoing document to the following person(s) as follows:

Bron Rammell Jason Brown MAY RAMMELL & THOMPSON, CHTD. 216 W. Whitman P. O. Box 370 Pocatello, Idaho 83204-0370	■ U.S. Mail, postage prepaid □ Hand Delivery □ Overnight Mail □ Facsimile ■ Email – bron@mrtlaw.net jason@mrtlaw.net

STEPHEN J. MUHONEN