No. 21-10219

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re James D. Dondero

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

On Petition for Writ of Mandamus to the United States District Court For the Northern District of Texas, Civil Action No. 3:21-CV-001320E
Honorable Ada Brown, District Judge

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. James Dondero
2. Highland Capital Management, L.P.
3. Pachulski Stang Ziehl & Jones, LLP
4. Hayward PLLC
5. James P. Seery, Jr.

STATEMENT REGARDING ORAL ARGUMENT

Respondent respectfully submits that, for the reasons that follow, the petition lacks any merit and oral argument is therefore unlikely to aid the Court in resolving the questions presented.

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1. Whether the District Court properly applied 28 U.S.C. § 1292(b) when it concluded that Petitioner's appeal of the Bankruptcy Court's Preliminary Injunction required leave of the District Court under 28 U.S.C. § 158(a)(3)?

2. Whether the District Court properly exercised its discretion under 28 U.S.C. § 1292(b) in determining that Petitioner's appeal of the Bankruptcy Court's Preliminary Injunction did not involve a controlling question of law and therefore leave to appeal should be denied?

3. Whether Petitioner failed to demonstrate that the District Court clearly and indisputably abused its discretion in denying leave to appeal the Bankruptcy Court's Preliminary Injunction?

SUMMARY OF THE ARGUMENT

Mandamus is not appropriate under the circumstances of this case because (i) the issue at hand is a matter within the District Court's discretion, and (ii) the District Court did not clearly and indisputably abuse its discretion in a usurpation of judicial power.

The District Court properly applied 28 U.S.C. § 1292(b) in concluding that Petitioner's appeal of the Bankruptcy Court's preliminary injunction required leave of court pursuant to 28 U.S.C. § 158(a)(3). Section 158(a) of the Bankruptcy Code governs appeals from bankruptcy courts and specifically provides that interlocutory orders require "leave of the court." 28 U.S.C. § 158(a)(3). The Bankruptcy's Court's preliminary injunction is interlocutory and the District Court correctly invoked section 1292(b) to determine whether Petitioner's appeal of the interlocutory order was warranted.

The District Court also properly exercised its discretion to deny Petitioner leave to appeal on the basis that the appeal did not involve a controlling question of law and therefore did not meet the strict standard set in section 1292(b). Because section 1292(b) requires that any appeal of a bankruptcy court's interlocutory order involve a "controlling question of law," the District Court did not act in a manner inconsistent with the statute, and therefore, did not "clearly and indisputably" abuse its discretion.

Finally, this Court does not possess appellate jurisdiction over the District Court's order denying Petitioner leave to appeal the Bankruptcy Court's preliminary injunction because the order is not "final" within the meaning of 28 U.S.C. 158(d)(1). Therefore, this Court must decline to dissolve or hear the merits of the appeal of the preliminary injunction.

A. Case Background

On October 16, 2019 (the "Petition Date"), the Debtor filed a voluntary petition for relief under chapter 11 of the United States Code (the "Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Delaware Court"), Case No. 19-12239 (CSS) (the "Highland Bankruptcy Case").

On October 29, 2019, the Official Committee of Unsecured Creditors was appointed by the U.S. trustee in Delaware.

On December 4, 2019, the Delaware Court entered an order transferring venue of the Highland Bankruptcy Case to this Court [Docket No. 186].

The Debtor continues to operate its business as a debtor-in-possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee or examiner has been appointed in this chapter 11 case.

On February 22, 2021, the Bankruptcy Court confirmed the Debtor's *Fifth Amended Plan of Reorganization of Highland Capital Management, L.P., (as Modified)*. [Docket No. 1943].

B. The TRO and Preliminary Injunction

In November 2020, Petitioner engaged in a series of wrongful acts, including making explicit and written threats to the Debtor's Chief Executive Officer and Chief Compliance Officer and directing employees of other entities that he owns and controls to impede the execution of certain securities transactions that he knew the CEO had authorized. [*See* Appx. at 1].[1]

Accordingly, on December 7, 2021, the Debtor commenced the Adversary Proceeding by filing its *Verified Original Complaint for Injunctive Relief against James Dondero*. (the "Complaint") (Appx. at 1). In its Complaint, the Debtor seeks permanent injunctive relief preventing Petitioner, the Debtor's former CEO, from interfering with the Debtor's operations, management of assets, and pursuit of a plan of reorganization. *See Id.*

On December 7, 2020, the Debtor filed its *Emergency Motion for a Temporary Restraining Order and Preliminary Injunction Against Mr. James Dondero*, seeking to temporarily and preliminarily enjoin Petitioner from, among other things, (i) interfering with, controlling, or influencing the Debtor's business, management, and disposition of assets, (ii) threatening or intimidating the Debtor or any of its agents or employees, and (iii) otherwise violating section 362(a) of the United States Bankruptcy Code (the "TRO Motion"). (Appx. at 16).

[1] "Appx." refers to the appendix filed concurrently with this Response.

On December 10, 2020, the Bankruptcy Court held a hearing on the TRO Motion [Adv. Proc. Docket No. 13] (the "TRO Hearing") and issued the *Order Granting Debtor's Motion for a Temporary Restraining Order Against James Dondero* to prevent irreparable harm to the Debtor pending the Bankruptcy Court's adjudication of the Debtor's motion for a preliminary injunction. (the "TRO"). (Appx. at 83). The TRO temporarily enjoined and restrained Petitioner from:

> (2)(a) communicating (whether orally, in writing, or otherwise), directly or indirectly, with any Board[2] member unless [Petitioner's] counsel and counsel for the Debtor are included in any such communication;
>
> (b) making any express or implied threats of any nature against the Debtor or any of its directors, officers, employees, professionals, or agents;
>
> (c) communicating with any of the Debtor's employees, except as it specifically relates to shared services currently provided to affiliates owned or controlled by [Petitioner];
>
> (d) interfering with or otherwise impeding, directly or indirectly, the Debtor's business, including but not limited to the Debtor's decisions concerning its operations, management, treatment of claims, disposition of assets owned or controlled by the Debtor, and pursuit of the Plan or any alternative to the Plan;
>
> (e) otherwise violating section 362(a) of the Bankruptcy Code (collectively, (a)-(e) constitutes the "Prohibited Conduct"); and
>
> (3) causing, encouraging, or conspiring with (a) any entity owned or controlled by him, and/or (b) any person or entity acting on his behalf, from, directly or indirectly, engaging in any Prohibited Conduct.

[2] The phrase "the Board" refers to the Debtor's independent directors (the "Independent Directors") that were appointed to the board of Strand Advisors, Inc. ("Strand"), the Debtor's general partner.

Id.

The Bankruptcy Court expressly found that each provision was "not ambiguous at all" and "not unreasonable." (Appx. at 49-50).

On December 16, 2020, Petitioner filed his *Emergency Motion to Modify Temporary Restraining Order*, seeking modification of the TRO in certain respects. (Appx. at 86). Five days later, on December 23, 2020, Petitioner voluntarily withdrew his Motion to Modify. (Appx. at 93).

Over the next few weeks, Petitioner violated the TRO in numerous ways, including by wrongfully communicating with certain of the Debtor's employees, destroying or wrongfully using the Debtor's property, and interfering with the Debtor's business. On January 7, 2021, the Debtor filed its *Motion for an Order Requiring James Dondero to Show Cause Why He Should Not Be Held in Civil Contempt for Violating the TRO* (the "Contempt Motion"). (Appx. at 96). In its Contempt Motion, the Debtor seeks an order requiring Petitioner to show why he should not be held in contempt for violating the TRO by, among other things, (a) disposing of the Debtor's property in an attempt to evade discovery; (b) trespassing on the Debtor's property after the Debtor evicted him from its offices precisely because he was interfering with its business; (c) interfering with the Debtor's efforts to execute certain securities transactions; and (d) colluding with certain of the

Debtor's then-employees to act against the Debtor's interests. (*See id*.). The Contempt Motion is scheduled to be heard March 22, 2021.

On January 8, 2021, the Bankruptcy Court held an evidentiary hearing (the "PI Hearing") on the Debtor's motion for a preliminary injunction (the "PI Motion"). *See* Preliminary Injunction Hearing Transcript. (Appx. at 31). At the conclusion of the PI Hearing, the Bankruptcy Court entered an order granting the PI Motion. (the "PI Order"). (Appx. at 309). In finding that preliminary injunctive relief was warranted, the Bankruptcy Court considered overwhelming evidence, including, *inter alia*, (a) Petitioner's own sworn testimony that enabled the Bankruptcy Court to assess his credibility, (b) documentary evidence, such as emails, text messages, and other communications proving that Petitioner (i) threatened the Debtor and its employees, (ii) colluded with (now) former employees of the Debtor -- including former in-house counsel, Scott Ellington and Isaac Leventon -- in order to coordinate legal strategy against the Debtor, (iii) trespassed into the Debtor's offices after being evicted for his threatening and disruptive behavior, and (iv) interfered with the Debtor's operations by impeding certain securities transactions and the disposition of the Debtor's assets. (*See, e.g.*, Appx. at 34, 112-115, 273). The PI Order included the same restraints as the TRO, with certain additions enjoining Petitioner from:

(2) engaging in any Prohibited Conduct (as defined in the TRO).

> (3) causing, encouraging, or conspiring with (a) any entity owned or controlled by him and/or (b) any person or entity acting with him or on his behalf, to, directly or indirectly, engage in any Prohibited Conduct.
>
> (4) communicating (in person, telephonically, by e-mail, text message or otherwise) with Scott Ellington and/or Isaac Leventon, unless otherwise ordered by the [Bankruptcy] Court.
>
> (5) physically entering, or virtually entering through the Debtor's computer, email, or information systems, the Debtor's offices located at Crescent Court in Dallas Texas, or any other offices or facilities owned or leased by the Debtor, regardless of any agreements, subleases, or otherwise, held by the Debtor's affiliates or entities owned or controlled by [Petitioner], without the prior written permission of Debtor's counsel made to [Petitioner's] counsel. If [Petitioner] enters the Debtor's office or other facilities or systems without such permission, such entrance will constitute trespass.

(Appx. at 311-13).

Petitioner was directed to attend all future hearings in this Bankruptcy Case after the evidence established that Petitioner had failed to read the TRO, learn its basic terms, and or make any attempt to understand its scope. *See id.*; Appx. at 272. The Order specified that its terms would "remain in effect until the date that any plan of reorganization or liquidation resolving the Debtor's case becomes effective, unless otherwise ordered by the [Bankruptcy] Court."[3] (Appx. at 238-39).

Ultimately, the Bankruptcy Court found that preliminary injunctive relief: (1) is "necessary to avoid immediate and irreparable harm to the Debtor's estate and

[3] The Order further specified that Petitioner was not prohibited from "communicating with the committee of unsecured creditors (the "UCC") and its professionals regarding a pot plan." (Appx. at 312).

reorganization process; (2) the Debtor is likely to succeed on the merits of its underlying claim for injunctive relief; (3) the balance of the equities tip in the Debtor's favor; and (4) such relief serves the public interest." (Appx. at 312).

C. The District Court Denies Petitioner's Motion for Leave to Appeal the Preliminary Injunction

Petitioner subsequently sought leave to appeal the PI Order to the District Court. (Appx. at 323) (the "Motion"). In his Motion, Petitioner argued that the PI Order: (i) prevents him from exercising his "legal rights" in connection with the Debtor's Plan, (ii) restricts his "First Amendment rights" by preventing him from communicating with the Debtor's current and former employees, and (iii) is "overbroad, "unclear" and "vague," as to the acts to be restrained. (*See id.*). Petitioner also asserted that he was entitled to appeal the Preliminary Injunction as of "right" under 28 U.S.C. § 158(a) and 28 U.S.C. § 1292(a). The Debtor opposed the Motion, (Appx. at 334), and Petitioner filed a reply in further support thereof. (Appx. at 337).

On February 11, 2021, the District Court denied Petitioner's Motion (the "Order"), holding that 11 U.S.C. § 158(a) "plainly gives district courts discretion over whether to accept appeals from interlocutory bankruptcy court orders, expressly requiring leave of the district court to appeal an interlocutory bankruptcy court order." (Appx. at 348-50) (citing 11 U.S.C. § 158(a)(3)). Bankruptcy Code section 158(a)(3) provides, in pertinent part, that:

> **(a)** The district courts of the United States shall have jurisdiction to hear appeals**…**
>
> **(3)** with leave of the court, from other interlocutory orders and decrees; of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.

28 U.S.C. § 158(a)(3).

The Court explained that while "[s]ection 158(a)(3) does not provide a standard for determining when to grant leave[,]" district courts have "generally looked to the standard that applies for circuit court review of interlocutory district court orders, which is found in 28 U.S.C. § 1292." (Appx. at 349-50). The Court next stated that the Fifth Circuit has left open the issue of "whether to apply section 1292(a) or 1292(b) when the interlocutory order is a preliminary injunction." (*Id*.). Section 1292(a) governs a court of appeals' jurisdiction to hear an appeal of an interlocutory order of a district court granting an injunction. It provides, in relevant part:

> **(a)** Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> **(1)** Interlocutory orders of the district courts of the United States … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

28 U.S.C. § 1292(a)(1).

The Court explained that, by contrast, under section 1292(b), "an interlocutory order is appealable when it involves 'a controlling question of law as to which there

is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" (Appx. at 350) (citing 28 U.S.C. § 1292(b)). Section 1292(b) specifically states, in relevant part:

> **(b)** When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order …

28 U.S.C. § 1292(b). Thus, to be appealable under this provision, the interlocutory order must: (1) involve a controlling issue of law, and (2) present a question upon which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

The Court determined that because "[s]ection 158(a) plainly gives district courts discretion over whether to accept appeals from interlocutory bankruptcy court orders, '[i]t would make little sense for the bankruptcy appeals statute to group preliminary injunctions with other interlocutory orders but intend for 'leave to appeal' these injunctions to be granted as of right.'" (internal quotations omitted) (Appx. at 350). The Court concluded that "any interlocutory order appeal under section 158(a) requires leave of the district court" and that such an appeal must meet the requirements set out in section 1292(b). The Court reasoned that applying

section 1292(b) to all interlocutory appeals of bankruptcy court orders is "more faithful to the plain language of section 158(a)(3)." (*Id.*).

Applying the standard set forth under section 1292(b), the District Court found that an appeal of the PI Order would require "a fact-intensive analysis, not consideration of a pure question of law." (Appx. at 351). Accordingly, the District Court held that because Petitioner did not "sufficiently demonstrate[] the bankruptcy court order involves a controlling question of law," he did not satisfy the standard set forth in section 1292(b). For this reason alone, the District Court exercised its discretion and denied the Motion. (*Id.*).

D. Petitioner Seeks a Writ of Mandamus

Petitioner now seeks the extraordinary relief of mandamus, requesting that this Court: (i) dissolve the Preliminary Injunction, or alternatively, (ii) direct the District Court to hear the merits of his appeal of the Preliminary Injunction. (Petition). In support thereof, Petitioner contends that: (i) the Preliminary Injunction is "overbroad, ambiguous, and not clear and specific," (Petition at 11-18), and (ii) the District Court erred in denying Petitioner's Motion for leave to appeal because he allegedly had a "statutory right" to appeal under 28 U.S.C. § 1292(a). (*id.* at 18-21). For the reasons that follow, mandamus relief is not warranted.

ARGUMENT

A. STANDARD OF REVIEW

A writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary cases." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (internal quotations omitted). Thus, "[t]he power to issue the writ is discretionary and is sparingly exercised." *United States v. U.S. Dist. Court, S. Dist. of Texas*, 506 F.2d 383, 384 (5th Cir. 1974). "It is not to be used as a substitute for an appeal, or to control the decision of the trial court in discretionary matters." *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977); *see also In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990) (noting that mandamus relief "is charily used and is not a substitute for an appeal."). "Only a showing of 'exceptional circumstances amounting to a judicial usurpation of power' or 'a clear abuse of discretion' will justify granting a mandamus petition." *Depuy*, 870 F.3d at 350 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004).

"As the writ is one of the most potent weapons in the judicial arsenal, three conditions must be satisfied before it may issue." *In re LeBlanc*, 559 Fed. Appx. 389, 392 (5th Cir. 2014) (internal quotations omitted). First, the petitioner must demonstrate a "clear and indisputable right to the writ." *Cheney*, 542 U.S. at 380. Second, the petitioner must have "no other adequate means" to attain the relief they desire. *Id.* "Third, even if the first two prerequisites have been met, the issuing court,

in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id. at* 381.

The party seeking the writ bears the burden of showing that its right to issuance of the writ is "clear and indisputable." *See In re EEOC*, 709 F.2d 392, 395 (5th Cir. 1983). Petitioner fails to satisfy this burden.

B. A WRIT OF MANDAMUS IS NOT WARRANTED

The extraordinary remedy of a writ of mandamus is not warranted here.

1. Petitioner Does Not Have a "Clear and Indisputable" Right to Mandamus Relief

Petitioner cannot demonstrate that he has a "clear and indisputable" right to mandamus relief. Satisfying this condition "require[s] more than showing that the district court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion." *Depuy*, 870 F.3d at 350 (internal quotations omitted). Rather, a petitioner must demonstrate a "clear abuse[ ] of discretion that produce[s] patently erroneous results" or that "there has been a usurpation of judicial power." *Id*. In other words, Petitioner "must show not only that the district court erred, but that it *clearly and indisputably erred*." *In re Occidental Petroleum Corp.*, 217 F.3d 293, 295 (5th Cir. 2000) (emphasis in original).

"If a matter is within the district court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'" *LeBlanc*, 559 Fed. Appx. at 392 (internal quotations omitted); *see also United States v. Comeaux*, 954 F.2d 255, 261

(5th Cir. 1992) (mandamus relief is not appropriate when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction" and that "[s]uch use of the writ would 'thwart the congressional policy against piecemeal appeal.'") (internal citations omitted). In such cases, a "clear and indisputable right" to mandamus relief will arise "only if the district court has clearly abused its discretion, such that it amounts to a judicial usurpation of power." *In re Gee*, 941 F.3d 153, 159 (5th Cir. 2019) (internal quotations omitted). For the reasons that follow, the District Court did not abuse its discretion at all, let alone to such an extent that it amounts to a judicial usurpation of power.

i. The District Court Did Not "Clearly and Indisputably" Err in Applying 28 U.S.C. § 1292(b)

Petitioner fails to show that he has a "clear and indisputable" right to appeal the PI Order because the District Court's denial of his appeal was a proper exercise of its discretion. Specifically, Petitioner maintains that the District Court erroneously denied leave to appeal the PI Order under 28 U.S.C. § 1292(b) because it "was required to accept and consider the appeal from the Bankruptcy Court's injunctive order under 28 U.S.C. § 1292(a)." (Petition at 19). Petitioner is plainly wrong.

As the District Court stated, appeals from bankruptcy court orders are governed by 28 U.S.C. § 158, which requires "*leave of court"* for an appeal of a bankruptcy court's interlocutory order. 28 U.S.C. § 158(a)(3); *see also* FED. R.

BANKR. P. 8004(a)(b) ("To appeal from an interlocutory order or decree of a bankruptcy court under 28 U.S.C. § 158(a)(3)," a party must file a motion for leave to appeal). District Courts have adopted the test set forth in 28 U.S.C. 1292(b) to determine whether to grant leave of appeal of such interlocutory orders. *See Matter of Ichinose*, 946 F.2d 1169, 1177 (5th Cir. 1991).

The District Court's conclusion that section 158(a) provides it with discretion to hear appeals of bankruptcy court orders granting or denying preliminary injunctions is consistent with courts throughout the country. *See, e.g.*, *In re Goldberg*, 16 C 6993, 2016 WL 6070364, at *3 (N.D. Ill. Oct. 17, 2016) (declining to exercise jurisdiction to hear appeal of bankruptcy court's grant of preliminary injunction under section 1292(b)); *In re Rood*, 426 B.R. 538, 548 (D. Md. 2010) ("Because the order granting the preliminary injunction is interlocutory, the [Appellants] could appeal from it only upon obtaining leave of the court."); *In re First Republic Grp. Realty, LLC*, No. M47(SAS), 2010 WL 882986, at *1 (S.D.N.Y. Mar. 2, 2010) ("While the Second Circuit has not expressly determined whether 1292(a)(1) or 1292(b) should apply in these circumstances . . . district courts in this circuit have continued to apply 1292(b) to all interlocutory orders including preliminary injunctions, and the Second Circuit has impliedly sanctioned that approach"); *In re Carvalho*, AP 16-10001, 2017 WL 6276131, at *2 (D.D.C.

Apr. 7, 2017) (applying section 1292(b) to determine whether to grant leave to appeal bankruptcy court's order denying preliminary injunction).

In arguing that a bankruptcy court's interlocutory order is appealable as of "statutory right," Petitioner conflates section 1292(a) and section 1292(b). Section 1292(a) governs appellate jurisdiction of appeals from interlocutory orders issued by *district courts*. 28 U.S.C. § 1292(a)(1). By contrast, section 158(a) expressly requires "leave of court" for appeals of interlocutory orders of bankruptcy courts to the district courts. 28 U.S.C. 158(a)(3). *See, e.g., In re First All. Mortg. Co.*, 264 B.R. 634, 644 (C.D. Cal. 2001) (stating that while under 28 U.S.C. § 1292(a)(1) orders of district courts granting or denying injunctions, including preliminary injunctions, may be appealed to the court of appeals as of right, "[t]here does not appear to be a similar provision for bankruptcy court orders regarding injunctions," and that a "bankruptcy court's order of preliminary injunction is an interlocutory order" appealable "only by leave of the reviewing court" under 28 U.S.C. § 158(a)(3)); *Quigley Co., Inc. v. A.C. Coleman (In re Quigley Co., Inc.)*, 323 B.R. 70, 75 (S.D.N.Y. 2005) (holding that "[a]s an interlocutory order, the Preliminary Injunction will only be reviewed on its merits if the Court grants the [appellant] leave to appeal."); *Mirzai Kolbe Foods, Inc. (In re Mirzai)*, 271 B.R. 647, 651 n.4 (C.D. Cal. 2001) (noting that while orders of district courts granting or denying injunctions may be appealed to the court of appeals as of right under 28 U.S.C. § 1292(a)(1),

there is no similar provision for bankruptcy court orders regarding injunctions); *Rood*, 426 B.R. at 547 (rejecting appellants' reliance on section 1292(a) regarding appeal of preliminary injunction, noting that the "order at issue here, *i.e.*, from a bankruptcy court to a district court, is governed by a different section, namely 28 U.S.C. § 158, and appellants could therefore only appeal preliminary injunction by obtaining leave of court) (emphasis added); *In re Kassover*, 343 F.3d 91, 95 (2d Cir. 2003) (where "Congress has expressly vested discretion in district courts to decline to hear the appeal" under section 158(a)(3) of bankruptcy court's preliminary injunction, the district court "has lawfully declined to hear the merits" of the appeal).

The District Court's application of section 1292(b) in denying leave to appeal the Bankruptcy Court's PI Order is thus consistent with the express meaning of section 158(a), and courts throughout the country that have held "requiring leave in all instances" complies with the face of the statute. *Goldberg*, 2016 WL 6070364, at *3. Accordingly, the District Court did not "clearly and indisputably" err in applying section 1292(b) to deny leave to appeal.

Petitioner cites to three circuit cases in support of his contention that "section 1292(a) permits the immediate appeal of bankruptcy court injunction orders to the district courts as a matter of right." (Petition at 19). Petitioner misconstrues the holdings of these cases. For instance, in *Lindsey v. Pinnacle Nat'l Bank*, 726 F.3d 857, 860 (6th Cir. 2013), the court held that it had no jurisdiction to hear an appeal

of an interlocutory order issued by a bankruptcy court, noting that while section 1292 "permits the immediate appeal of injunction orders, including those arising in all manners of situations in a bankruptcy proceeding[,]" parties appealing interlocutory orders of bankruptcy courts "already have a right to one round of appellate review through § 158(a)(3), which allows *district courts* to take appeals of interlocutory orders '*with leave of the court*' and without certification." *Id*. (emphasis added).

In *In re Prof'l Ins. Mgmt.* 285 F.3d 268 (3d Cir. 2002), the Third Circuit did not hold, as Petitioner asserts, that a bankruptcy court injunction "must be treated as an appealable interlocutory order" by the district court under section 1292(a). Rather, the Third Circuit "agreed with the conclusion" of the district court to treat the bankruptcy court's injunctive order as an appealable order under 28 U.S.C. § 158(a), not because it was interlocutory, but because it was "final." *Id*. at 281-82. The Third Circuit also acknowledged that "district courts may grant leave to appeal from interlocutory orders" under 28 U.S.C. section 158(a). *Id.* at 278-79.

Finally, *United Airlines, Inc., v. U.S. Bank N.A.*, 406 F.3d 918 (7th Cir. 2005) is inapposite to the present case. There, the bankruptcy court issued a TRO against trustees forbidding them from repossessing aircrafts when debtor-airline asserted that they violated the Sherman Act. The court "did not explain" why the debtor's contention was "strong enough to support injunctive reief[.]" *Id.* at 922. While the court "promised to explore the subject more fully" at a hearing on the merits of the

preliminary injunction, it never actually scheduled the hearing. *Id.* at 922-23. Instead, it conditioned any hearing on the merits of the preliminary injunction "until the trustees cough up the privileged documents." *Id.* at 923. When the trustees failed to produce the documents, the court also declared them "in contempt." *Id.* at 923. In other words, the trustees were subject to an indefinite TRO, without "any prospect of" of either a hearing on the merits of the preliminary injunction or appellate review until they complied with discovery requests. Based on this unique set of facts, the court held that it would hear the merits of the trustees' appeal specifically because "the issues are legal." *Id.* at 924. Here, by contrast, Petitioner was not subject to an indefinite TRO but was instead afforded a hearing on the merits of the Preliminary Injunction. Petitioner thus fails to demonstrate that the District Court "clearly and indisputably" erred in invoking section 1292(b), rather than section 1292(a).[4]

Accordingly, because it was within the District Court's discretion to deny Petitioner's appeal of the PI Order, Petitioner does not have the required "clear and indisputable" right to the writ. *See Kmart Corp. v. Aronds*, 123 F.3d 297, 300 (5th

[4] Although Petitioner cites three district court cases in which the court invoked section 1292(a) to appeals of preliminary injunctions of the bankruptcy court to district courts – *see In re Reserve Prod., Inc.*, 190 B.R. 287, 290 (E.D. Tex. 1995) (allowing an appeal of a preliminary injunction under section 1292(a), simply noting that the "wiser exercise of discretion" is to apply § 1292(a)); *In re Midstate Mortg. Inv'rs Group, LP*, CIVA 06-2581(FLW), 2006 WL 3308585 (D.N.J. Nov. 6, 2006) (same); *In re Reliance Acceptance Group, Inc.*, 235 B.R. 548, 553 (D. Del. 1999) (same) – these cases are outliers. *See First Owners' Ass'n of Forty Six Hundred v. Gordon Properties, LLC*, 470 B.R. 364, 372 (E.D. Va. 2012) (noting that some district courts have looked to section 1292(a) to determine whether a district court should hear an interlocutory appeal "with less frequency than they have looked to § 1292(b)").

Cir. 1997) (finding that petitioner failed to meet the "very high mandamus threshold" where the district's court decision being challenged was "within its discretion," noting that where "a matter is within the district court's discretion, the litigant's right to a particular result cannot be 'clear and indisputable.'"); *LeBlanc*, 559 Fed. at 392 (finding petitioner did not have "clear and indisputable" right to mandamus relief where "district courts have broad discretion in" determining issue being challenged). For this reason alone, mandamus relief is not appropriate.

ii. The District Court's Discretionary Denial of Appeal Under Section 1292(b) Did Not Amount to a Usurpation of Power Resulting in Patently Erroneous Results

Petitioner further contends that "[e]ven if the Preliminary Injunction is not appealable as of right under section 1292(a), leave to appeal should have been granted under section 1292(b)." (Petition at 21). In support of his argument, Petitioner argues that the District Court abused its discretion by finding he did not satisfy the requirements under the statute. For the same reasons discussed *supra*, Petitioner's contention that the District Court erred in ruling on a matter within its discretion is simply not the type of argument contemplated by mandamus relief. *See Comeaux*, 954 F.2d at 261 (declining mandamus relief where district court's decision "was the type of discretionary decision for which mandamus is generally not used"); *In re Estelle*, 516 F.2d 480, 483 (5th Cir. 1975) ("[E]ven were we to hold that … the trial court had abused its discretion … the petitioner would not

automatically be entitled to the extraordinary writ he seeks," noting that a "writ may not be used to regulate the trial court's judgment in matters properly left to its sound discretion.").

To that end, mandamus is especially not appropriate to compel a district court to hear an appeal under section 1292(b). *See In re Ford Motor Co., Bridgestone/Firestone N. Am. Tire, LLC*, 344 F.3d 648, 654 (7th Cir. 2003) (noting that a district court's refusal to certify under section 1292(b) "is the end of the matter" in determining mandamus relief, and explaining "[t]he whole point of § 1292(b) is to create a dual gatekeeper system for interlocutory appeals: both the district court and the court of appeals must agree that the case is a proper candidate for immediate review before the normal rule requiring a final judgment will be overridden."). Indeed, "if someone disappointed in the district court's refusal to certify a case under § 1292(b) has only to go to the court of appeals for a writ of mandamus requiring such a certification, there will be only one gatekeeper, and the statutory system will not operate as designed." *Id.; see also Arthur Young & Co. v. U. S. Dist. Court*, 549 F.2d 686, 698 (9th Cir. 1977) ("We hold that mandamus to direct the district judge to exercise his discretion to certify the question is not an appropriate remedy."). Petitioner must show that the District Court "*clearly and indisputably*" abused its discretion in such a manner that it

amounted to a "usurpation of power" or "clearly erroneous result." *Depuy*, 870 F.3d at 350. Petitioner cannot meet this very high burden.

Here, in exercising its discretion to deny Petitioner's appeal, "nothing even remotely approaching a 'usurpation' is reflected here." *See Overton v. City of Austin*, 748 F.2d 941, 952 (5th Cir. 1984). As the District Court correctly stated, section 1292(b) provides that an interlocutory order of the bankruptcy court is appealable only when it consists of three elements. "(1) a controlling issue of law must be involved; (2) the question must be one where there is substantial ground for difference of opinion; and (3) an immediate appeal must materially advance the ultimate termination of the litigation." *Ichinose*, 946 F.2d at 1177; *see also Panda Energy Int'l, Inc. v. Factory Mut. Ins.*, 3:10-CV-003-K, 2011 WL 610016, at *4 (N.D. Tex. Feb. 14, 2011) (same). "Every ground in § 1292(b) must be met in order for the interlocutory appeal to be considered; these are not factors to be weighed and balanced." *Panda Energy*, 2011 WL 610016, at *4. Ultimately, interlocutory appeals of bankruptcy courts are strongly disfavored and should be granted only under these "exceptional" circumstances. *See Red River Energy, Inc.*, 415 B.R. 280, 284 (Bankr.S.D.Tex. 2009), 415 B.R. at 284.

In determining that Petitioner failed to meet the requirements of section 1292(b) because "a review of the preliminary injunction in this case would involve a fact-intensive analysis, not consideration of a pure question of law," the District

Court acted in a manner consistent with section 1292(b). *See, e.g., Smith v. AET Inc., Ltd.*, Nos. C-07-123, 2007 WL 1644060, at *6 (S.D. Tex. 2007) (denying leave to appeal bankruptcy court's order where issue at hand is "heavily fact-based" in an adversary proceeding that is "grounded in factual issues" and therefore, not "appropriate for interlocutory review under the standard set forth in 28 U.S.C. § 1292(b)") (citing *McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1259 (11th Cir.2004) (section 1292 certification should be reserved "for situations in which the court of appeals can rule on a pure, controlling question of law without having to delve beyond the surface of the record in order to determine the facts")); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970) (noting that "question[s] of fact or matter[s] for the discretion of the trial court" are not appropriate issues for interlocutory appeals); *Clark–Dietz, & Associates-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (holding that "fact-review" issues are inappropriate for section 1292 review, and "even those that are legal may be foreclosed by the fact findings of the district court."). Petitioner's contention that his appeal involves a "controlling question of law" because the litigation is "based on the Debtor's request for a preliminary, and eventually, a permanent injunction," (Petition at 23), is thus without merit.

Petitioner's remaining contentions that his appeal involved a "substantial difference of opinion," (Petition at 23), and would "avoid protracted and expensive

litigation," (*id.* at 24) are equally frivolous. *See, e.g. In re Hallwood Energy, L.P.*, BR 09–31253–SGJ–11, 2013 WL 524418, at *3 (N.D. Tex.2013) (noting that there exists a substantial ground for difference of opinion only where "a trial court rules in a manner which appears contrary to the rulings of all Courts of Appeals which have reached the issue, if the circuits are in dispute on the question and the Court of Appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented.") (internal quotations omitted). Substantial grounds for difference of opinion of do *not* exist under section 1292(b) merely because Petitioner claims the bankruptcy court ruled incorrectly. *See Panda Energy*, 2011 WL 610016, at *4.

Accordingly, Petitioner fails to show that the District Court's discretionary denial of Petitioner's Motion for Leave to appeal the PI Order under section 1292(b) constituted a "clear abuse" of discretion or a "usurpation of judicial power." *See In re Gibson*, 423 Fed. Appx. 385, 390 (5th Cir. 2011) ("Petitioners have not demonstrated a usurpation of judicial power or a clear abuse of discretion by the district court" where the "district court did not act in a manner inconsistent with" the statute in question, noting that a "writ of mandamus will issue to correct only a *clear* abuse of discretion") (emphasis added); *Plekowski*, 557 F.2d at 1220 (denying mandamus relief where petitioner failed to show that district court "erroneously" applied statute and that any legal errors are "egregious.").

For the foregoing reasons, Petitioner has failed to show a "clear and indisputable right" to the extraordinary remedy of a writ of mandamus. For this reason alone, mandamus relief is not warranted.

2. Petitioner Has Not Shown He Has No Other Adequate Means to Attain Relief

Petitioner also fails to demonstrate that he has "no other adequate means" to obtain relief. To satisfy this element, Petitioner must show that a "clear and indisputable" error is "irremediable on ordinary appeal, thereby justifying the emergency relief in the form of mandamus." *Occidental*, 217 F.3d at 295. "That is a high bar: The appeals process provides an adequate remedy in almost all cases, even where defendants face the prospect of an expensive trial." *Depuy.*, 870 F.3d at 352; *see also Overton*, 748 F.2d at 957 ("If review is available by appeal, mandamus will not lie."). Petitioner maintains that mandamus is his "only available remedy" on the grounds that the District Court "erroneously" denied him leave to appeal the PI Order under 28 U.S.C. § 1292(b). (*See* Petition at 18-21). For the reasons discussed above, this argument fails; the District Court did not clearly and indisputably err in denying Petitioner leave to appeal under section 1292(b), and there is thus no "clear and indisputable" error to correct.

Moreover, Petitioner's complaints regarding the terms of the Preliminary Injunction (*see* Petition at 11-18) are simply not the type which warrant the extraordinary remedy of mandamus. Any purported error in the PI Order is not, on

its own, ground for mandamus. *See Occidental*, 217 F.3d at 295, n.7 (noting that *"*[o]rdinarily even a clear error in an interlocutory ruling is not a ground for the extraordinary remedy of mandamus.") (internal quotations omitted); *Overton*, 748 F.2d at 958 ("That 'hardship may result from delay and perhaps unnecessary trial,' or that a ruling may 'give rise to a myriad of legal and practical problems as well as inconvenience,' is not alone a sufficient reason to invoke mandamus to control the interlocutory rulings of the trial court, even though they may be clearly wrong.").

Notwithstanding the above, Petitioner's generalized contentions that the Preliminary Injunction is "overbroad, vague, ambiguous," (*see* Petition at 11), are without merit. For instance, Petitioner's assertion that the Preliminary Injunction is "not clear definite and specific because it does not list specific acts that are to be restrained," (*Id.* at 12-13), is belied by the explicit language of the PI Order. As described above, the PI Order clearly describes the Prohibited Conduct, the other restrictions and mandates imposed by the PI Order, and the timeframe within which the PI Order will remain in effect. (*See* Appx. at 311-313). Petitioner's contention that the Preliminary Injunction restricts his "First Amendment rights" is equally frivolous and should be summarily rejected by the Court. [5]

[5] Petitioner has not cited any relevant case to support the notion that the PI Order rises to the level of a First Amendment issue. *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175 (1968) is inapplicable (*See* Motion to Expedite ¶ 22); that case dealt with whether the issuance of an *ex parte* injunction restraining members of a political party from holding rallies was incompatible with the First Amendment. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) dealt with an injunction against abortion protestors, and whether it served "governmental interests."

3. Mandamus Relief is Not Appropriate Under the Circumstances

Finally, this is not an appropriate case for the extraordinary remedy of mandamus. As discussed, "supervisory control of the district courts through mandamus is not warranted when the petitioner simply claims the district court has ruled incorrectly on a matter within its discretion." *Comeaux*, 954 F.2d at 261.

Petitioner failed to show that in applying section 1292(b), the District Court abused its discretion at all, let alone to such an extent that it constituted a clear usurpation of judicial power. He also failed to show that the District Court clearly abused its discretion under section 1292(b) in determining that Petitioner did not meet the requirements under this provision. For these reasons alone, the extraordinary remedy of ordering the District Court to hear the appeal is not warranted. *See Ford*, 344 F.3d at 655 (denying mandamus request to order the district court to certify something under section 1292(b) where "district court did not abuse her discretion so gravely as to warrant the exercise of our mandamus powers to force a difference result"); *Arthur*, 549 F.2d 686 (denying mandamus directing the district judge to exercise his discretion to certify the question because it is "not an appropriate remedy" where the district judge determined, in its discretion, "that the order for which review is sought meets the criteria of 28 U.S.C. § 1292(b)").

Although Petitioner is frustrated with the terms of the PI Order, the District Court did not rule on the ultimate merits of this issue; it simply declined to hear the merits of this interlocutory ruling. There is no reason why Petitioner cannot litigate these issues at trial on the merits. *See Plekowski*, 557 F.2d at 1220 ("[W]e apprehend no reason why the legal errors, if they be errors, raised by plaintiff cannot be considered on appellate review in the usual course of litigation", noting that while "plaintiff has been frustrated by the proceedings thus far in the prosecution of his case," there is nothing "extraordinary" warranting mandamus); *Overton*, 748 F.2d 956 ("The district court has not denied either proposed consent decree, but merely has deferred ruling pending a hearing", further noting "[s]hould the requested relief ultimately be denied, any error in such denial may be reviewed on appeal.").

In sum, the District Court's denial of Petitioner's Motion for Leave to appeal the PI Order under section 1292(b) was a matter squarely within its discretion, and any errors complained of do not warrant the extraordinary remedy of mandamus. *See Overton*, 748 F.2d 956 (mandamus not appropriate where district court's decision was within its sound discretion, and any legal and or practical problems or inconvenience caused to petitioner is not alone a sufficient reason to invoke mandamus to control interlocutory rulings of trial court).

C. This Court Does Not Possess Appellate Jurisdiction

Finally, Petitioner requests that if this Court determines that mandamus is not warranted, it should treat his Petition as an "ordinary appeal" under 28 U.S.C. § 1292(a) and dissolve the injunction. (Petition at 25). Petitioner's request should be denied.

This Court does not possess appellate jurisdiction over either (i) the Bankruptcy Court's interlocutory PI Order or (ii) the District Court's Order denying Petitioner's Motion for leave to appeal. Under 28 U.S.C. § 158(d)(1), courts of appeals have jurisdiction over "all final decisions, judgments, orders and decrees" issued by the district court. The District Court's denial of Petitioner's Motion for leave to appeal is not a final order. *See In re Holloway*, 370 Fed. Appx. 490, 493 (5th Cir. 2010) (dismissing appeal of interlocutory order where district court did not hear merits of interlocutory appeal and where "review of the record reveals that neither the bankruptcy court nor the district court certified this question for appeal"); *Matter of Phillips*, 844 F.2d 230, 231 (5th Cir. 1988) (dismissing appeal for lack of jurisdiction where the "bankruptcy court's order from which [party] appealed was not a final order, and the district court's order did not in any way 'cure' this lack of finality.").[6] Accordingly, this Court lacks jurisdiction under

[6] Petitioner's cite to *United Airlines*, 406 F.3d at 923 in support of its request is misguided for the reasons discussed *supra*. That case contained an extreme set of facts not present here.

section 158(d)(1) and Petitioner's request that the Court (i) dissolve the PI Order, or (ii) remand it to the District Court, should be summarily rejected.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Mandamus.

Dated: March 16, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2021, I electronically transmitted the Response. I further certify that the following counsel of record for Petitioner are being served with a copy of the Response by USPS First Class Mail and electronic means as indicated below:

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I further certify that a copy of the foregoing document is being provided to the Honorable Ada Brown.

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