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**CASE NO. 11-4445**

LEONARD GREEN, Clerk

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**H. THAYNE DAVIS**  
**Plaintiff**

**And**

**H. THOMAS MORAN, II**  
**Receiver-Appellee**

**ROBERT G. BURGESS**  
**Interested Party-Appellant**

**VS.**

**LIFETIME CAPITAL, INC., et al.,**  
**Defendants**

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**APPEALED FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO  
CASE NO. 3:04cv00059**

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**APPELLANT'S REPLY BRIEF**

**Mr. Robert G. Burgess**  
**101 Crested Butte**  
**Cedar Creek, Texas**

78612

A handwritten signature in black ink, appearing to read "Robert Burgess", is written over a solid horizontal line.

**Robert Burgess**

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## INTRODUCTION

Appellee/Receiver's ("Receiver") Brief in this Appeal does not address one single inconvenient fact on which this Appeal turns, namely that the District Court never ruled on the issue of the ownership of the proceeds of the Jordan life insurance proceeds. Receiver has to acknowledge that it filed a Motion to Clarify (R. 82) the ownership issues, since those issues controlled whether the District Court had any authority to take any action regarding those proceeds. The District Court took issue under advisement (R. 134); and thereafter did not decide issue of ownership. Accordingly, all proceedings that followed cannot be a substitute for the tabled decision on ownership. Viewed in that proper context, therefore, the District Court could not require non-consenting investors to participate in the voluntary, participating investors' settlement. Emphatically, the approval of the settlement did not decide the ownership issue; it only determined that the compromise appeared to be fair between those who agreed. Since the Appellant did not assent to the voluntary distribution of proceeds in that compromise, the District Court's decision could not decide Appellant's ownership claims.

## DISCUSSION

- I. The Receiver's Assertion that the District Court Decided the Ownership of the Jordan Policy Proceeds is Wrong

The Receiver begins his argument by erroneously asserting that the ownership issue was resolved when the District Court approved the settlement reached only between the settling parties (Brief, at pp. 16, 19). Receiver then asserts that the Court overruled the “then-moot” Motion for Clarification (Brief, at pp. 16- 20), concluding that the District Court decided the ownership issue. However, there is no such decision by the Court. The Court’s original decision to take the ownership issue under advisement never has been changed.

The Receiver then asserts that these Appellants did not challenge the District Court’s decisions approving the settlement, as if that fact resolves the issue of ownership in the proceeds of the Jordan policies. Simply put, the ownership issue never had been decided by the District Court. The voluntary settlement by others was expressly not one that any party with an interest in the proceeds was under any obligation or jeopardy to accept; and accordingly, the settlement can only be binding between those who participated, not those who declined. Those who declined thus had their original rights intact until the District Court ruled on the ownership issue. The District Court still has not made any decision on that matter.

The Receiver’s assertion that the abuse of discretion standard applies (Brief, at p. 18) to the District Court’s decision also comes undone in light of the at large decision on the ownership issue. Clearly, the standard of review cited applies only to decisions relating to distribution of the receivership assets. It does not apply to

actions taken regarding money that does not belong to the receivership in the first place. The proceeds of the Jordan policies indisputably belong in that category, as even the Receiver recognized when he filed his Motion to Clarify. The District Court's decision to take that issue under advisement left the ownership issue unresolved. Accordingly, the District Court could not terminate the Jordan Investors' claim to ownership since it had not decided the ownership issue and could not implement any distribution plan over money not part of the receivership.

The best the Receiver can do to support the District Court's actions is to assert (Brief, at p. 19) that the District Court "implicitly" decided the ownership issue when approving the terms of the voluntary settlement (R416). However, the Order takes no such step, and it can only apply to the terms of those who consented to the voluntary settlement. Certainly, none of the Receiver's motions or the District Court's notices concerning the settlement gave any indication that it would apply to those who elected not to participate. Indeed, it was not until the Receiver filed his Motion to Disallow that anyone took any step to apply the terms of the settlement to non-assenting parties/investors. That is when these Appellants voiced their objection, asserting their unresolved ownership claims. The District Court still refuses to address those unresolved claims.

The Receiver also asserts that the "nature of a settlement" renders issues resolved by the settlement moot (Brief, at p. 20). That can be true only between or

among the parties who agree with the settlement. Throughout the series of settlement discussions and follow up hearings on the settlement, neither the Receiver nor the District Court took any action to try to bind non participating Jordan Investors to the terms of the settlement, until the Receiver filed his Motions to Disallow (R. 1111, 1112). That is when these Appellants voiced their objections, which the District Court summarily rejected, leading to this Appeal. Accordingly, the settlement rendered nothing moot regarding these Appellants' rights in the Jordan policy proceeds.

The Receiver next asserts (Brief, at p. 21) that the District Court resolved the ownership issue when it overruled the Motion to Clarify (R 406). However, the District Court took that action only on the consent of the settling parties. There is no indication that the District Court notified other interested parties of any proposed action. The cited Order also erroneously asserts that "the interested parties" had reached a settlement, which cannot be true for those who chose not to participate. Further, the District Court itself makes no claim that its overruling the Motion to Clarify actually decided the ownership issue.

## II. The *Liberte* Decision Does Not Require Formal Intervention

The *Liberte* case, 421 F. 3d 377 (6<sup>th</sup> Cir. 2005) does not require formal intervention as Receiver asserts. Rather, the Court there approached the entire

matter in terms of required due process, first finding that the appellant there had a property interest due to her investment in the disputed policies. 421 F.3d at 383. The Court then applied an analysis of the substance of the procedure afforded, concluding that the trial court there did not provide a hearing relative to the seizure of the policy proceeds, and that hearings related to “equity and justice” skirted the legal basis of the claims to ownership and did not satisfy the due process requirements to protect the ownership claims involved. Moreover, the Receiver can point to no authority exalting the formalities of intervention when the matters as here already were before the court and the court was poised to determine the property interests of the Jordan Investors.

Here, the Appellants have satisfied all requisites for the District Court to have considered whether they had received the appropriate due process. First, there is no dispute that these Appellants had an ownership interest in the proceeds of the Jordan policies. Second, there is no dispute that the District Court did not give these Appellants a hearing on that issue. The repeated so-called “fairness hearings” do not provide the due process required, just as the Court in *Liberte* recognized.

The Receiver’s reference (Brief, at pp. 24-25) to *Greenlaw v. United States*, 554 U.S. 237 (2008) is misplaced. That case involved a *sua sponte* undertaking by the Appellate Court to take up an argument neither party advanced. It has nothing



to do with whether formal intervention is as sacrosanct as Receiver and the District Court assert.

III. The District Court Did not Provide Appellants With Necessary Due Process On the Ownership Issue

Receiver's secondary point that these Appellants received "more-than-sufficient" due process also comes undone in light that the Court never conducted any proceedings to determine the ownership issue. None of the six hearings referenced by the Receiver addressed the ownership issue; they were directed at the so-called fairness of the agreed settlement by agreeing parties. Receiver also ignores the representations that none of the Jordan Investors or those with interests in the Jordan policies were under any compulsion to participate in the mediation, agree with the others' acceptance of the settlement terms, or accept any settlement, AS THE District Court found (R. 1207). The Court's step to terminate the Jordan Investors' unresolved claims to ownership in the proceeds of the Jordan policies due only because the Jordan Investors did not participate in the settlement is a complete denial of their right to due process.

**PRAYER**

For the foregoing reasons stated herein, Appellant, Robert Burgess,

respectfully requests that upon oral argument, the Court reverse the District Court's November 10, 2011 remand this case to the District Court for further proceedings specifically on the ownership of the Jordan Policy proceeds, and for further relief to which Appellant may be entitled in law or equity.

Respectfully submitted,



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Robert Burgess

Appellant

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 25, 2012, a true and correct copy of the foregoing document was served by certified mail, return receipt requested to:

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