

CAUSE NO. 2020-25857

CREATIVE CAPITAL FUNDING, LLC

*Plaintiff,*

vs.

VIRAGE SPV 2 LLC

*Intervenor*

vs.

PIERCE BAINBRIDGE BECK PRICE &  
HECHT LLP; PIERCE BURNS LLP DBA  
PIERCE BAINBRIDGE BECK PRICE &  
HECHT; PIERCE BURNS; and JOHN M.  
PIERCE

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

113th JUDICIAL DISTRICT

**INTERVENOR VIRAGE SPV 2 LLC’S PLEA IN INTERVENTION**

Intervenor Virage SPV 2 LLC files this Plea in Intervention pursuant to Texas Rule of Civil Procedure 60 (“Plea”) and would respectfully show as follows:

**I.  
PARTIES**

1. Virage SPV 2 LLC (“Virage”) is a Delaware limited liability company registered to do business in Texas. It has appeared in this lawsuit and may be served through counsel.

**II.  
FACTUAL BACKGROUND AND INTERVENOR’S INTEREST**

2. Virage and Pierce Bainbridge Beck Price & Hecht LLP (“Pierce Bainbridge”) entered into a number of agreements through which Virage extended loans to Pierce Bainbridge. The parties memorialized these loans in a number of agreements including, several restatements of the loan agreement (“Restated Loan Agreements”), a Security Agreement, and a Blocked Account Agreement.

3. The first Restated Loan Agreement is dated April 6, 2019. It, and its progeny, provided that Pierce Bainbridge's debt obligations to Virage would be secured by valid, perfected, and enforceable liens on all right, title, and interest held by Pierce Bainbridge in the proceeds from all of its legal matters. These agreements further provided that Pierce Bainbridge was to ensure that all proceeds it earned from its cases would be deposited into a depository account under Virage's control.

4. The Security Agreement provided that Pierce Bainbridge would provide collateral in the form of i) its accounts and general intangibles (including the attorney's fees the firm generated on its matters), ii) its deposit accounts, and iii) its other property as collateral for the loan obligations contained in the loan agreement.

5. The Blocked Account Agreement provided that Pierce Bainbridge would establish a deposit account—controlled by Virage—into which it would deposit the fees and reimbursed case expenses from its cases.

6. Virage perfected the security interests it obtained from Pierce Bainbridge via the Security Agreement by filing UCC Financing Statements. These financing statements specified Virage's security interest in Pierce Bainbridge's collateral, listing Virage's security interests in:

- Pierce Bainbridge's accounts and general intangibles (including payment intangibles) arising out of an "eligible case," as defined in the parties' operative loan agreement and included the proceeds from such cases as well.
- Any assigned accounts into which the collateral described above is deposited.
- All proceeds and products from any of the above.

Virage filed seven UCC Financing Statements in total. The dates of filing are: April 2, 2019; April 30, 2019; June 17, 2019; July 16, 2019; August 19, 2019; September 16, 2019; and November 15, 2019. These statements approximately correlate to the various restatements of the parties' loan

agreement. True and correct copies of these UCC Financing Statements are attached.

7. Pierce Bainbridge has defaulted on its debt obligations to Virage.

8. In January 2020, Creative Capital Funding, LLC (“CCF”) entered into various agreements with Pierce Bainbridge to purchase various accounts that served as Virage’s collateral. These agreements were executed after Virage obtained and perfected its security interests in Pierce Bainbridge’s property. The present lawsuit is CCF’s attempt to enforce an agreed judgment born out of the agreements it obtained from Pierce Bainbridge earlier this year.

9. Pursuant to the agreements above, Virage now seeks the relief described below.

### **III. CAUSES OF ACTION**

10. Pursuant to Texas Rules of Civil Procedure 58 and 59, Virage adopts by reference the factual allegations recited above as if fully restated for each of the following causes of action.

#### ***a. Declaratory Judgment***

11. Virage brings this suit for declaratory relief pursuant to the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*

12. Virage has security interests in various assets belonging to Pierce Bainbridge. Virage’s security interests have attached to and are perfected in the following:

- a. Pierce Bainbridge’s accounts and general intangibles (including payment intangibles) arising out of an “eligible case,” as defined in the parties’ operative loan agreement and included the proceeds from such cases as well.
- b. Any assigned accounts into which the collateral described above is deposited.
- c. All proceeds and products from any of the above.

13. Virage has perfected its security interests in the foregoing collateral. Virage has perfected its interest in the depository account created by the Blocked Account Agreement by virtue of its control over the account. TEX. BUS. & COM. CODE § 9.314. Beyond the depository

account created by the Blocked Account Agreement, Virage has perfected its security interest in Pierce Bainbridge's remaining collateral by filing UCC Financing Statements. *Id.*

14. Virage asks this Court to find and declare that:
  - a. Virage has a prior perfected Security Interest in the following collateral:
    - i. Pierce Bainbridge's accounts and general intangibles (including payment intangibles) arising out of an "eligible case," as defined in the parties' operative loan agreement and included the proceeds from such cases as well.
    - ii. Any assigned accounts into which the collateral described above is deposited.
    - iii. All proceeds and products from any of the above.
  - b. Virage's prior perfected Security Interest is senior to any security interest belonging to CCF.

15. A declaration from the Court is appropriate here. Such a declaration would resolve the priority of Pierce Bainbridge's creditors and so would clarify any uncertainty with respect to the parties' interests in Pierce Bainbridge's property. Virage also asks the Court to award its costs and reasonable and necessary attorneys' fees as are just and equitable.

***b. Constructive Trust [Creative Capital Funding, LLC Only]***

16. To the extent that CCF is in possession of funds that are rightfully owed to or which belong to Virage, CCF has an equitable duty to convey these funds to Virage. CCF's retention of this property is wrongful and it would be unjustly enriched if it were permitted to retain these funds.

17. As a result, Virage requests that the Court impose a constructive trust on any funds held by CCF and which rightfully belong to Virage.

***c. Application for Temporary Injunction***

18. In accordance with Texas Rules of Civil Procedure 681, 683, Chapter 65 of the

Texas Civil Practice and Remedies Code, and Chapter 24 of the Texas Business and Commerce Code, Virage requests this Court to grant, after hearing, a temporary injunction that prevents CCF and Pierce Bainbridge from: transferring any and all assets, including funds, and proceeds to CCF from any account held by Pierce Bainbridge.

19. The purpose of a temporary injunction is to preserve the status quo of the litigation's subject matter pending a trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). “Status quo is the last actual peaceable noncontested status which preceded the present controversy[.]” *J.C. Penney Co. v. Walker*, 395 S.W.2d 76, 77 (Tex. Civ. App.—Waco 1965). Here, the last peaceable status was prior to the improper transfer of assets, including funds, out of Pierce Bainbridge’s account(s) to CCF. *See, Lifeguard Benefit Servs., Inc. v. Direct Medical Network Solutions, Inc.*, 308 S.W.3d 102, 114

20. To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru*, 84 S.W.3d at 204.

21. Virage will suffer immediate and irreparable harm, for which it has no adequate remedy at law, if Pierce Bainbridge and CCF are not restrained from transferring any and all assets, including funds, and proceeds to CCF from any account held by Pierce Bainbridge. The Texas Civil Practice and Remedies addresses the situation at hand and states that an injunction may be granted if (1) “irreparable injury to real or personal property is threatened, irrespective of any remedy at law” or if (2) “a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of the pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual.” TEX. CIV. PRAC. CODE. § 65.011(2), (5).

22. Virage has established a probable right to the relief sought. Pierce Bainbridge is in default on the debt obligations it owes to Virage. Furthermore, Virage is a senior secured lender; it obtained its security interest in Pierce Bainbridge's property before CCF. Thus, the attempts to transfer funds out of Pierce Bainbridge's accounts to CCF prevents payment of the debt obligations owed to Virage.

23. Virage is willing to post a bond in the amount the Court deems appropriate.

#### **IV. ARGUMENTS & AUTHORITIES**

24. Texas Rule of Civil Procedure 60 provides that "[a]ny party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." TEX. R. CIV. P. 60. As the Texas Supreme Court has explained, "th[is] rule authorizes a party with a justiciable interest in a pending suit to intervene in the suit as *a matter of right*." *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008) (orig. proceeding) (emphasis added) (citing *Guar. Fed. Sav. Bankv. Horseshoe Operating Co.*, 793 S.W.2d 652,657 (Tex. 1990)).

25. The standard for intervention is not onerous: "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation." *Smith v. City of Garland*, 523 S.W.3d 234, 241 (Tex. App.—Dallas 2017, no pet.).

26. "To constitute a justiciable interest, '[t]he intervenor's interest must be such that if the original action had never been commenced, and he had first brought it as the sole plaintiff, he would have been entitled to recover in his own name to the extent at least of a part of the relief sought' in the original suit. In other words, a party may intervene if the intervenor could have brought the [pending] action, or any part thereof, in his own name" *Id.* (alteration in original) (quoting *King v. Olds*, 12 S.W. 65, 65 (Tex. 1888); *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657). Critically, "*[t]he interest asserted by the intervenor may be legal or equitable.*" *Guar. Fed. Sav.*

*Bank*, 793 S.W.2d at 657 (emphasis added).

27. Here, Virage has legal justiciable interests. As a threshold matter, Virage’s legal interests are justiciable insofar as Virage could have initiated this declaratory judgment action in its own name without Creative Capital Funding, LLC’s involvement. Moreover, Virage could have intervened to establish its priority in the assets of Pierce Bainbridge. *Guniganti v. Kalvakuntla*, 346 S.W.3d 242, 253 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (upholding trial court’s declaratory judgment issued in favor of intervening party).

### **PRAYER**

Virage respectfully requests the following relief:

- a. That Virage be allowed to intervene in this matter.
- b. That Virage obtain an order from this Court declaring that Virage has a prior perfected Security Interest in the following collateral:
  - i. Pierce Bainbridge’s accounts and general intangibles (including payment intangibles) arising out of an “eligible case,” as defined in the parties’ operative loan agreement and included the proceeds from such cases as well.
  - ii. Any assigned accounts into which the collateral described above is deposited.
  - iii. All proceeds and products from any of the above.
- c. That Virage obtain an order from this Court declaring that Virage’s prior perfected Security Interest is senior to any security interest belonging to Creative Capital Funding, LLC.
- d. That Virage prevail on its claim for constructive trust.
- e. That Virage obtain a temporary injunction enjoining Pierce Bainbridge and CCF from transferring any and all assets, including funds, and proceeds to CCF from any account held by Pierce Bainbridge.
- f. That Virage obtain all other relief to which it may be entitled.

Respectfully submitted,

/s/ Marc S. Tabolsky

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*Counsel for Intervenor Virage SPV 2 LLC*

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing was served on all counsel of record on May 29, 2020 in accordance with the Texas Rules of Civil Procedure.

/s/ Marc S. Tabolsky

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Marc S. Tabolsky