

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE, INC.,	§	Civil Action No. 3-09CV0988-F
MANILA INDUSTRIES, INC., and	§	
MUNISH KRISHAN,	§	
Plaintiffs.	§	
	§	
v.	§	
	§	
JEFFREY BARON, and	§	
ONDOVA LIMITED COMPANY,	§	
Defendants.	§	

APPELLANTS' JOINT OBJECTION AND RESPONSE TO (1) THE RECEIVER'S FIRST APPLICATION FOR REIMBURSEMENT OF FEES AND EXPENSES INCURRED BY THE RECEIVER [DOC#192] AND (2) THE RECEIVER'S FIRST APPLICATION FOR REIMBURSEMENT OF FEES AND EXPENSES INCURRED BY GARDERE WYNNE SEWELL LLP [DOC#193]

TO THE HONORABLE ROYAL FURGESON, U.S. DISTRICT JUDGE:

COMES NOW, Appellant, defendant Jeffrey Baron and Appellants NovoPoint, LLC and Quantec, LLC and make this joint response and objection to (1) The Receiver's First Application For Reimbursement Of Fees And Expenses Incurred By The Receiver [DOC#192] and (2) The Receiver's First Application For Reimbursement Of Fees And Expenses Incurred By Gardere Wynne Sewell LLP [DOC#193].

1. Mr. Baron has appealed the order appointing the receiver [Doc #136] and NovoPoint, LLC and Quantec, LLC (“SouthPac’s LLC companies”) have appealed

from the order including the SouthPac LLC companies into the receivership [Doc #227].

2. The filing of a notice of appeal is an event of jurisdictional significance— it confers jurisdiction on the court of appeals and divests the district court of its control. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The divestiture of jurisdiction of the trial court involves those aspects of the case appealed. *Id.*

3. The Court had no jurisdiction over the receivership order after Mr. Baron filed his appeal. “A district court does not have the power to ‘alter the status of the case as it rests before the Court of Appeals’.” *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990).

4. Accordingly, the order to alter the original receivership order to include SouthPac’s LLC companies is void for lack of subject matter jurisdiction.

5. The order including SouthPac’s LLC companies into the receivership is also void for lack of personal jurisdiction over the owner of those LLC companies, SouthPac. SouthPac is a serious and reputable trustee, recognized by US Courts of Appeals. The bankruptcy court approved SouthPac to act as trustee and take possession of the LLC companies. SouthPac has not been served with any process in this case. Accordingly, by law this Court lacks personal jurisdiction over SouthPac and is without jurisdiction to seize its property.

6. The order including SouthPac's LLC companies into the receivership is also void for lack of subject matter jurisdiction on the further but significant grounds that the pleadings do not put their subject-matter at issue. *See Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (since the court had no jurisdiction over these properties, its order appointing a receiver to take charge of them was **void**, in fact, "their proceedings are absolutely void in the strictest sense of the term").

7. Moreover, the Fifth Circuit has ruled that the powers of the district court over a matter appealed from, pending appeal are limited to maintaining the status quo and do not to extend to the point that the district court can divest the court of appeals from jurisdiction while the issue is before the Court of Appeals on appeal. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989).

8. Accordingly, pending appeal the district court is without jurisdiction to dispose of any of the assets which were seized by the receiver. *See e.g., Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981) ("[T]he District Court was divested of jurisdiction only as to matters relating to the April 27 and May 12 orders and subsequent orders and, for that reason, fees cannot be recovered for work relating to these orders").

9. Further, Mr. Baron has no responsibility for the liabilities or administrative fees or costs relating to any other receivership entity, and

SouthPac's LLC companies have no responsibility for the liabilities or administrative fees or costs relating to Mr. Baron's assets. Also, the scope of the receivership extends to Mr. Baron's exempt property, and distribution of such exempt property would be unlawful.

10. Payment to the receiver with respect to SouthPac's companies is also improper because the receiver acted as an advocate seeking inclusion of the companies in the receivership order. A receiver is prohibited from seeking to be appointed receiver over a company and then charge those companies for its work as receiver. Rather, by law a receiver must be disinterested. *Booth v. Clark*, 58 US 322, 331 (1855). Similarly, the receiver's requested fees must be excluded because the receiver is not entitled to compensation from receivership assets for his role as an advocate against a party.

11. The fees run up by the receiver and his law firm are unreasonable and include fees and charges prohibited by law. For example, the receiver and his law firm have charged for executing upon property exempt from execution as a matter of law, such as Mr. Baron's Roth IRAs. Seizure of exempt assets appears to be around half, or more, of the entire receivership with respect to Mr. Baron.

12. The fees are also excessive and unnecessary. Mr. Baron complied with this Court's injunction order with respect to his assets, even though it was issued without notice, without supporting affidavit, and without supporting findings, in

violation of the law and rules of procedure. There was no necessity to run up fees to obtain the information on Mr. Baron's accounts—he provided the information and bank statements to the receiver.

13. The billing rate charged by the receiver's law firm are excessive, the attorneys working on the matter do not have sufficient experience working on this particular type of matter, and their hourly fees are excessive.

14. Mr. Baron is an individual; his only material assets are some banking accounts and two small apartments, one of which is his home. The receiver and his firm are running up fees at the rate of almost \$10,000.00 per business day. The amount is grossly excessive, unreasonable and inequitable. The entire 'estate' of Mr. Baron involved some US accounts which Mr. Baron himself provided statements for.

15. The receivership was brought on behalf of no claimant to the property of Mr. Baron. Accordingly, the receivership in place for this Court's personal desire to pay attorneys fees from Mr. Baron's money, is akin to a governmental action to recover a debt. Accordingly, the *maximum* statutory fee allowed in such circumstances— 5 percent of the sums received by the receiver (which themselves are limited by law to non-exempt assets)— should set the maximum equitable fees allowed. *See 28 U.S.C. §3103(g)(1)*.

16. Moreover, the entry of a receivership without due process and subject matter jurisdiction over the property placed into receivership is unconstitutional and void *ab initio*. The great mass of weight of clear and controlling Fifth Circuit and Supreme Court precedent extending back for more than a century that establishes the unlawful and unconstitutional nature of the receivership order – and the absence of any controlling precedent to support the receivership order– signed without notice, without hearing, without affidavits, without supporting findings, and without lawful cause– makes the receiver’s action under the order unreasonable and a violation of the receiver’s fiduciary and legal duties to inform the Court of the illegality and unconstitutionality of the receivership order and process by which it was entered.

17. For further grounds, should same be necessary, the receiver and his firm are estopped from entitlement to payment for fees because at the time he was appointed receiver in this Court’s order, he was employed by your honor as a special master in this very case. See Docket #37. The receiver himself recognized that holding both roles was inappropriate and sought termination of his employment as special master on December 10, 2010. See Docket#147. Post appointment termination of his employment as special master, however, is not sufficient. Pursuant to 28 U.S.C. 958, Mr. Vogel was legally ineligible to be appointed as

receiver. 28 U.S.C. 958 mandates that a person holding employed by any judge of the United States may not at the same time *be appointed* a receiver. *Id.*

18. Similarly, Mr. Vogel undertook to act as a mediator with respect to this case, and was provided confidential information of Mr. Baron with respect to that mediation. Accordingly, to then act as an adversary against Mr. Baron in the very same proceedings and concerning the same subject matter, is a violation of Mr. Vogel's fiduciary duties as a mediator in the case. Pursuant to state law, Mr. Vogel and his law firm, are not entitled to profit from the fiduciary violation and any fee must be forfeited.

CONCLUSION

The Supreme Court has ruled that “[t]he filing of a notice of appeal is an event of jurisdictional significance— it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs*, 459 U.S. at 58.

Movants pray this Honorable Court to respect the jurisdiction of the Court of Appeals, and, should the receivership order be upheld on appeal and jurisdiction over the order be returned to this Court, to proceed with respect to the requested fees pursuant to the law and the good and equitable judgment of this Court.

Respectfully submitted,

/s/ Gary N. Schepps

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CERTIFICATE OF SERVICE

This is to certify that this was served on all parties who receive notification through the Court's electronic filing system.

/s/ Gary N. Schepps

Gary N. Schepps