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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JEFFREY BARON,	§	**Bankr. No. 12-37921-SGJ**
	§	
Alleged Debtor.	§	**Hearing: Mar. 19, 2013 @ 10:30 a.m.**

JEFFREY BARON'S RESPONSE TO EXPEDITED APPLICATION FOR PAYMENT OF RECEIVERSHIP EXPENSES PURSUANT TO THE INTERIM ORDER [D.E. 39]

COMES NOW Jeffrey Baron, the Alleged Debtor, who files this Response to Receiver's Expedited Application for Payment of Receivership Expenses Pursuant to the Interim Order [DC D.E. Nos. 39, 1156 and 1163], and objects to payment of any fees or costs to the Receiver or his attorneys, employees or their respective agents [requested in Docket Nos. 61 – 63].

I. Introduction

As a threshold matter, a Receiver is not entitled to "defend" a receivership on appeal. More critically, the Fifth Circuit vacated the receivership. On December 31, 2012, Fifth Circuit Court clarified that "all fees and expenses need to be re-evaluated in light of our holding that the Receivership should not have been created." [Order, Case 11202 at 7] Simply stated, the losing

party is not entitled to costs and attorneys' fees. **In a vacated receivership, a receiver is entitled only to those fees that conferred a benefit on the estate.** *Speakman v. Bryan*, 61 F.2d 430, 431 (5th Cir. 1932). The Alleged Debtor respectfully submits that these fees, coming as they did from a misguided, reversed judicial taking of his property, should not be borne by the very assets improvidently seized. And with respect to expenses, payments to Damon Nelson, James Eckels and Joshua Cox do not appear to be supported by evidence proving they did anything to justify their charges to the estate.

II. Damon Nelson Should Not Be Paid the Requested Amounts, and Should Be Required to Produce All Documents Relating to His Activities Prior to Any Payment by the Receiver.

The Receiver asserts that Mr. Nelson is responsible for "providing day to day operation and management of the Portfolios." That claim does not appear to be supported by the record. Domain Holdings manages the domain names and handles their day to day operations—not Damon Nelson. The Court should not approve any amounts to be paid to Mr. Nelson unless or until there is a clear showing that he gave *anything* of value to the receivership estate, and that his fees are proportionate to that value.

Further, the evidence shows that Mr. Nelson was party to selling the domain names for less than 50% of the value represented to the Court. The Receiver requested permission to sell extremely valuable domain names obtaining court permission to sell the names based on values obtained by the Receiver based on a protocol using automated and "human" appraisals. However, Mr. Nelson apparently negotiated sales for far less value. It also been alleged [DC Docket 1196] that Mr. Nelson provided affidavit testimony to this Court regarding the appraisal amounts for domain names that are substantially lower than the appraisal amounts provided by the same appraiser (Estibot) when Baron's counsel investigated the matter.

Notably, the Receiver was ordered to produce the documents relating to those appraisals and related sales, but is believed not to have complied with the Order. [DC Docket 858, 934]. Prior to approval of any additional fees, this Court should also require Mr. Nelson to produce all documents relating to the negotiations and payment of the domain names sold through him to ensure its accuracy, and to ensure that, as represented, the 'bidders' had no prior relationship with the receiver. The fairness of these sales - - divestitures of property of the Alleged Debtor under color of the since-reversed authority delegated to the Receiver - - must be ascertained, and must be subject to reasonable judicial scrutiny as well as that of the Alleged Debtor.

III. Cox and Eckels Should Not Be Paid as Attorneys for Performing Paralegal Services.

With respect to Mr. Cox and Mr. Eckels, it is also unclear what *value* or *benefit* has been conferred on the estate with respect to their services. In his motion, the Receiver states: "Mr. Eckels serves as attorney responding to day to day UDRP and related domain name disputes regarding the Quantec portfolio." [Dkt. 1183 at 7; Bk. Dkt. 61 at 7]. Similarly, Mr. Cox "serves as attorney responding to day to day UDRP and related domain name disputes regarding the Novo Point portfolio." *Id.*

The primary problem is that neither Cox nor Eckels defended any of the UDRP disputes. All that was necessary to defend the disputes was to file a response detailing why the registration of the domain name at issue complied with the required criteria, and setting out other defenses to the UDRP dispute, e.g., showing that the domain name is generic, etc. Eckels and Cox never defended a single claim. Instead, the Receiver's responses to the UDRP and other claims have been comprised of the submission of a *form letter* stating that the domain names are part of a receivership and that all legal actions are automatically stayed. The review of a form UDRP complaint does not take more than five minutes when the response is a form letter. A paralegal-

secretary could accomplish that task with far less expense than these attorneys. Submission of form letters regarding a stay are hardly worth the amount of funds requested and appear to be nothing more than a *waste* of estate funds. The fees granted Cox and Eckels should be adjusted to no more than 15% of the requested amounts.

IV. Dykema Should Not Be Paid Fees.

As set out above, an improvidently granted, but vacated receivership does not entitle a receiver or his lawyers to compensation from the very funds they were wrongfully put in charge of. Moreover, the American rule does not allow payment of fees for defending the receivership **from** the prevailing party in a receivership whose property was improperly seized.

A. The Receiver Breached His Fiduciary Duty to Defend UDRP Claims.

There are serious questions about the manner in which the receivership was conducted. A receiver is charged with maintaining and preserving the receivership---essentially returning the property in the same condition in which he found it. While the receivership may have *appeared* to be maintaining and preserving the property, in most cases, defaults were entered against the Portfolio on the UDRP claims, resulting in an avalanche of UDRP claims.

UDRP claims can be defended successfully, but it requires at least some, minimal effort. The receiver did not make that effort, and defaulted on virtually all of the UDRP claims. In sum, the Receiver has not "maintained and preserved" the receivership and has failed to return the Portfolios in the condition in which he found them. Thus, the Alleged Debtor contends that the Receiver disregarded his duty to maintain and preserve the value of the portfolios by failing to defend or settle UDRP claims.

B. Dykema Breached its Fiduciary Duty to Obtain a Bona Fide Appraisal of the Domain Names or to Retain a Qualified Broker to Conduct the Auction.

The Alleged Debtor also asserts that the Receiver and Dykema breached fiduciary duties to preserve and maintain the property by failing to obtain a bona fide appraisal of the domain names before conducting an auction [DC Docket No. 1196 @ p. 5]. While the Receiver produced a professional expert witness who provided after-the-fact testimony to justify the sales price, this testimony was contradicted by an expert, Dr. Theis Lindenthal, who actually participates in valuing and selling large portfolios of domain names.[1] The Alleged Debtor contends that if the Receiver had followed his own previously established protocol in determining value of the domain names, he would have reached the same result as Dr. Lindenthal.

The Alleged Debtor also asserts that Dykema engaged in gross neglect, or willful mis-performance in conducting the 'liquidation trust auction' [See *id.*]. First, Dykema insisted on Dykema handling the auction, instead of having the auction handled by a broker or auction house. When the Fifth Circuit stayed the sale of the assets, Dykema proceeded with the auction anyway, running up legal fees on a matter the Fifth Circuit had clearly stayed. Dykema then inflated the fees involved by failing to produce documents as ordered by the bankruptcy court. Worse, Dykema ignored and froze out *bona fide* bidders from participating in the auction. At least three bidders have now been identified that Dykema: (1) in at least one case, entirely failed to respond to about the auction despite repeated letters and calls seeking to participate [See

[1]A post-hoc appraisal by Mr. Morris, an expert "testifier" who never bought or sold a portfolio of domains name, much less a portfolio of 153,000 domain names, was clearly a part of defending a sale that should have never been ordered in the first place. In contrast, Dr. Theis Lindenthal, is an full time expert in domain name valuation and has sold numerous portfolios through Sedo.com.

Exhibit A, Declaration of Eli Pearlman]; and (2) in multiple cases failed to respond to multiple requests to provide information about the list of actual domain names being auctioned off.

Crucially, none of these potential bidders were disclosed in Dykema's discovery responses, and so Dykema's neglect and/or malfeasance was kept hidden by Dykema's withholding of court-ordered discovery. Then, when caught, Dykema attempted to make it falsely appear that one potential bidder, Pearlman, did not phone Fine as Pearlman testified he did repeatedly.

C. Dykema Had a Conflict of Interest Because the Firm Previously Consulted with Baron on This Same Case.

The Alleged Debtor has also asserted that, in or about January 11, 2010, Gerrit Pronske referred Mr. Baron to the Dykema firm; Jeff Baron conferred with lawyers at Dykema to see if they would represent him in the Netsphere case, and Mr. Baron talked at length to the Managing Partner, Darrell Jordan and Brian Colao, a partner of the firm. [See *id.* at p. 6, and attached Exhibits]. While the Alleged Debtor ultimately did not retain Dykema, he nevertheless justifiably believed that the content of his in-depth consultation was privileged.

When in or about September 2012, the Receiver retained Dykema to take an adverse position in the very case in which Baron had previously consulted with Dykema for representation, the conflict ripened. In or about September or October, 2012, Counsel for Mr. Baron informed Jeffrey Fine, counsel for the Receiver that he thought that they might have a conflict of interest and should investigate the matter.

The protection of the attorney client privilege extends to the 2010 communications. Moreover, a privileged communication with one member of a law firm constitutes a communication with all members of the Firm, who are presumed to know the details of the

privileged discussion. In the decision *In re American Airlines, Inc.*, 972 F.2d 605, 614 & n. 1 (5th Cir. 1992), the Fifth Circuit Court explained as follows:

> Texas Rule 1.06(a) provides that "[a] lawyer shall not represent opposing parties to a litigation." As American indicates, this rule applies even in cases where an attorney-client relationship has not been formed: A lawyer may not "switch[] sides and represent[] a party whose interests are adverse to a person who sought in good faith to retain the lawyer." Texas Rule 1.09 Comment 4A; *see also* Hazard & Hodes, The Law of Lawyering § 1.9:111 (1991). (emphasis supplied).

In *Corrugated Container Antitrust Litigation Kraft, Inc. v. Alton Box Board Co.*, 659 F.2d 1341, 1346 (5th Cir. 1981), the Court held that knowledge of one partner is imputed to the lawyer disqualified, even if the partnership is later dissolved. In sum, Mr. Baron consulted the Dykema Firm and, in good faith, consulted with them about the receivership for the purpose of potentially retaining them as counsel.

After engaging in privileged consultations about the case with Baron, Dykema then agreed to represent the Receiver *against* Jeffrey Baron ***in the same case***. Dykema thus breached the duty of loyalty and confidentiality owed to Mr. Baron, and was required to decline a subsequent representation on those same matters. This type of breach of fiduciary duty is extremely serious, as clients and potential clients reasonably expect both (1) their communications about a case with prospective counsel to remain privileged and inviolate when they consult a lawyer for the purposes of discussing the client's retaining representation of the attorney; and (2) an attorney with whom they consult to represent them on a case will have the loyalty not to switch sides and represent the prospective client's opponents in the same case.

D. Dykema's Fees Sought Are Excessive and Have Not Actually Benefited the Receivership Estate.

Perhaps most critically, Dykema's fees - - they are presently holding and request they be permitted to pay themselves $737,276.72 from funds much of which would come from the Alleged Debtor's estate if an order for relief is entered - - cannot be justified, especially in view

of the vacatur of the receivership, and do not appear to have been subject to a thorough, critical examination worthy of such a large fee request.

Dykema's involvement in the relatively long-running disputes in issue in these cases has been, in relative terms, very short. Dykema became involved as counsel for the Receiver in the mid- to latter part of 2012, at a time when the receivership issues were all but fully briefed and pending before the Fifth Circuit Court of Appeals. Then, the Fifth Circuit handed down its vacatur orders for the very receivership Dykema was "defending." For that short period and what seems like it ought to have been a small amount of effort providing very little in benefit or results to the receivership or the Alleged Debtor, Dykema's fees have exceeded $1.0 million, for which a portion have already been paid and for which the remaining $737,276.72 represents the vast majority of the balance. Further, while the District Court has ordered other attorneys involved in these cases to disgorge significant amounts relative to the fees they've sought or been paid, Dykema's fees have been allowed without evidentiary hearings at or near 95% of the amounts requested.

The Alleged Debtor asserts that generous fees should not be awarded the Receiver's counsel in a vacated receivership, where no or little provable benefit was rendered to the receivership estate, and that assertion is supported by established Fifth Circuit precedent.[2] To this point, at least, there has been no evidentiary analysis of which the Alleged Debtor is aware on this critical subject, and at minimum there has been no opportunity for creditors to fully and fairly contest any claims of benefit. And, for reasons set forth above, there are extremely good reasons to question whether such an analysis will yield a finding that the fees sought by Dykema

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[2] *Speakman v. Bryan*, 61 F.2d 430, 431-32 (5th Cir. 1932); *Tucker v. Baker*, 214 F.2d 627, 632 (5th Cir. 1954); *see accord, Andrews & Kurth, L.L.P. v. Family Snacks, Inc. (In re Pro-Snax Distribs., Inc.)*, 157 F.3d 414, 426 (5th Cir. 1998) (requiring that, to receive compensation, bankruptcy estate professionals must show that their work results in "identifiable, tangible and material benefit to the estate").

will meet the standard for their allowance and payment, much less payment in full, or whether upon critical analysis they will also be subject to reduction.

Finally, the Alleged Debtor has raised considerations regarding confidentiality and fiduciary duty which, if proven, would justify a reduction or disgorgement of the Dykema fees under applicable Texas law.[3] Those issues should also be fully vetted before any decision to permit a drawdown of the receivership (or possibly, bankruptcy) estate's assets is permitted to satisfy Dykema's pre-petition fees for a now-vacated receivership.

It was this very sort of analysis that the Fifth Circuit was contemplating when it ruled that the receivership fees "must be reconsidered by the district court." The Dykema motions seek to side-step that reconsideration in favor of a payment-in-full strategy.

V. Conclusion

This Court should allow discovery and hold an evidentiary hearing before allowing the payments sought to be made.

Respectfully submitted,

STROMBERG STOCK, PLLC

By: */s/ Mark Stromberg*
Mark Stromberg
State Bar No. 19408830

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013 a true and correct copy of the foregoing document was sent by email to Lisa Lambert, Counsel for the United States Trustee; Gerrit Pronske, Counsel for the Petitioning Creditors, was served upon all persons identified below by regular mail, postage prepaid, and to all other persons requesting notices via the ECF system.

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[3] See, e.g., *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).

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