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

IN RE:	§	
	§	
ONDOVA LIMITED COMPANY,	§	**CASE NO. 09-34784-SGJ**
	§	**(CHAPTER 11)**
DEBTOR.	§	

JEFFREY BARON'S OBJECTIONS TO TRUSTEE'S MOTION TO SELL SERVERS.COM

Jeffrey Baron, by and through counsel, hereby files his objections to the Trustee's Motion to Sell Servers.com.

I. The Chapter 11 Trustee's Motion Violates the Stay With Respect to *In re Baron*, Case No. 12-37971.

As the Court is aware and as further explained in this Objection, Mr. Baron has an interest in <servers.com> and has appealed the previous Order of this Court authorizing the sale, on the basis that he owns fifty percent of <servers.com>. Case No. 10-11202, Fifth Circuit Court of Appeals, Dkt. 691. Mr. Baron requests the Court take judicial notice of the filings in the appellate proceedings, and the arguments set out therein. Although this Court ruled in an adversary action that the estate had rights in the <servers.com> domain name, Baron was not a party to the adversary action, despite his ownership interest in <servers.com>.

Any attempt to sell <Servers.com> is automatically stayed pursuant to Section 362 of the Bankruptcy Code. As the Court is aware, this Court entered an Order for Relief against Mr. Baron, who has been adjudged an involuntary Chapter 7 debtor under Title 11, United States Code, in the United States Bankruptcy Court for the Northern District of Texas. Case No. 12-37921-sgj7. An Order for Relief was entered on June 26, 2013, where an appeal of the Order for Relief is currently pending.[1] Section 362 of the Bankruptcy Code provides:

1. Mr. Baron is without bankruptcy counsel because the involuntary petition circumvented the Fifth Circuit's December 2012 Order and subsequent mandate to return receivership property to Baron. Mr. Baron cannot access funds sufficient to hire bankruptcy counsel. In turn, the Bankruptcy Court denied Baron's request for a stay of its Order for Relief.

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of- (1) the commencement or *continuation,* including the issuance or employment of process, *of a judicial,* administrative, or other action or *proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; ...

11 U.S.C. § 362 (emphasis added).

Clearly, the Motion to Sell <servers.com> is a "continuation" of the action against the debtor, Mr. Baron and as such is automatically stayed. Moreover, it appears continuation of filing of a claim in this action is improper, as Mr. Baron's rights to the domain name are part of his bankruptcy estate.

II. The Trustee's Motion is an Attempt To Circumvent the Fifth Circuit Court of Appeals' Jurisdiction

a. The Fifth Circuit Court of Appeals Has Exclusive Jurisdiction Over <Servers.com>\

Upon filing of the appeal of the order concerning <servers.com>, this Court lost jurisdiction over the order and must await the ruling of the Fifth Circuit. **The Trustee's motion is merely an attempt to circumvent the jurisdiction of the Fifth Circuit Court of Appeals.** The rule of the Fifth Circuit was adopted by the U.S. Supreme Court, which held "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 over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Similarly, a lower court lacks jurisdiction to alter the status quo of the matter on appeal and retains jurisdiction only to maintain the status quo. *E.g.*, *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *RTC v. Smith*, 53 F.3d 72, 76 (5th Cir. 1995) ("`[u]ntil the judgment has been properly stayed or superseded, the district court may enforce it through contempt sanctions.'").

b. Two Courts Should Not Assert Simultaneous Jurisdiction over the Same Matter.

The Fifth Circuit has further held that a "federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Dayton Indep. School Dist. v. US Mineral Prods*. Co., 906 F.2d 1059, 1063-4 (5th Cir. 1990) ("our well-established rulings that the district court loses jurisdiction over all matters which are validly on appeal").

In the instant case, the Fifth Circuit previously ordered the trustee to cease sales efforts of domain names subject to Appeal. In addition, the Fifth Circuit ordered that the district court and this Court cease any efforts to sell domain names held by the receivership over Baron, as the sale would moot the appeal and thereby undermine the jurisdiction of the Fifth Circuit**.** Exhibit A, Fifth Circuit Stay Order_**;** *Netsphere v. Jeffrey Baron*, 703 F.3d 296 (5th Cir. 2012).

On November 28, 2012, the Fifth Circuit made its injunction against such domain name sales permanent. Netsphere, supra at 314 n.2 ("We stayed the closing on sales resulting from an auction of domain names. Our ruling means no closing can occur, and the stay is made permanent."). As in *Netsphere*, there is a serious legal question as to whether <servers.com> is now part of the Ondova estate.

III. A Bankruptcy court is not empowered or authorized to determine ownership rights of an asset in a motion under Section 363.

Federal Rule of Bankruptcy Procedure 7001(2) provides that a proceeding to determine the Estate's "interest in property" be an "adversary proceeding" and "governed by the rules of this Part VII." Fed.R.Bankr.P. 7001. On the other hand, a Section 363 motion to sell an asset of the Estate is merely a "contested matter" governed by Rule 9014. Fed.R.Bankr. P. 9014. Accordingly, a bankruptcy court is not empowered or authorized to determine ownership rights of an asset in a motion under Section 363. *E.g.*, *In re Hearthside Baking*

Co., Inc., 397 BR 899, 902 (Bkrtcy.N.D. Ill. 2008); *In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974 *6 (Bankr.D.Del. 2008), holding:

> The Court cannot determine whether the [property is] property of the estate through a contested matter, such as a sale motion under Section 363. Federal Rule of Bankruptcy Procedure 7001(2) requires that an adversary proceeding be commenced to determine the "validity, priority or extent of [an] interest in property."

The public policy served by this rule is substantial– before businesses or individuals outside of bankruptcy proceedings can be stripped of their assets, the bankruptcy court must conduct a full adversarial proceeding including service of process on the interested parties and the full disclosures required by Fed.R.Civ.P. 26(a). *See* Fed.R.Bankr.P. 9014(c) (mandatory disclosure requirements of "adversary proceedings" do not apply in "contested matters"). Accordingly, because a mandatory element required for authorization pursuant to Section 363(b) is that the property be owned by the Ondova estate, the Bankruptcy Court's order to sell an asset not owned by the bankruptcy estate is outside the grant of authority provided by Section 363(b).

As set out in prior pleadings, authorizing a bankruptcy court to finally adjudicate and transfer ownership interest in non-estate property constitutes an unconstitutional delegation of federal judicial authority to non-Article III judges. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-72 (1982); *Stern v. Marshall*, 131 S.Ct. 2594, 2615 (2011). Allowing a bankruptcy judge to finally adjudicate state law ownership rights would unconstitutionally grant such judges unbridled and unchecked judicial authority over the property of the entire community. *See Id.*

IV. Baron Owns Fifty Percent of <servers.com>

Pursuant to Bankruptcy Rule of Procedure 363(p), the entity asserting an interest in property has the burden of proof on the issue of the extent of such interest. Bankr.R.P. 363(p); 11 U.S.C. §101 (15) ("entity" includes the estate). In prior proceedings in the Emke matter, As a matter of law, the uncontroverted evidence establish that Jeff Baron owns a fifty percent interest in <servers.com> and the bankruptcy estate of Ondova owns none.

A. The Emke Settlement Provided for Baron's Ownership in <servers.com>

On July 6, 2009, an agreement for the ownership of <servers.com> was reached

among all interested parties (The Emke Settlement). (Exhibit B, Agreement For <servers.com> and Dkt 130 BK Case 11-03181 at p. 2). The Emke Settlement transferred most of the rights to <servers.com> to a new entity that the agreement required to be created (Servers, Inc., a Nevada corporation) (Id At pp. 2-3). The Trustee of the Ondova estate effectuated the transfer to Servers, Inc. (*Id*. At pp. 2-3).

The stock of Servers Inc. is owned 50/50 by Ondova and Mike Emke. *Id.* at p 5. It is undisputed that Ondova owns 50% ownership of the Servers, Inc. stock *(Id.* at p 5). However, Ondova does <u>not</u> own any direct interest in the <Servers.com> <u>domain</u> <u>name</u>. Further, the Emke Settlement expressly reserved an interest in the Servers.com domain name for Emke and Jeffrey Baron personally. Agreement For <Servers.com>. That interest is a security and reverter interest in <Servers.com>, reverting ownership to Baron and Emke in the event thatServers, Inc. was placed into receivership. Id. Specifically the Emke Settlement provides:

> In the event of insolvency, receivership and/or other default of the jointly owned company, the domain name <servers.com> shall revert to Jeff Baron and Mike Emke, to be owned jointly and equally. To this degree, these two principals <u>shall maintain a first lien and security interest in the domain name superior to any other investor, equity holder or creditor.</u> (emphasis supplied).

Id.

B. Servers, Inc. was Placed into Receivership. Per the Terms of the Settlement Agreement, Ownership of <Servers.com> Reverted to Baron and Emke.

On October 18, 2011, this Court entered an order placing Servers, Inc. into receivership because Servers, Inc. was in default of its obligations regarding the Emke Settlement and <Servers.com>. (Exhibit C, Order Appointing Receiver over Servers, Inc.,).

Because of Servers, Inc.'s default, as a matter of Texas and Nevada state law, and pursuant to the agreement between the parties, the domain name servers.com reverted to Baron and Emke, each owning a fifty percent ownership interest. The result of the receivership is that the Ondova bankruptcy estate retains its fifty percent ownership interest in Servers, Inc. but, as a matter of Texas and Nevada state law, Servers, Inc. no longer owns any interest in the <servers.com> domain name."

To be clear, the reversion of the interest in <servers.com> was <u>not</u> triggered by a bankruptcy. In fact, Servers, Inc. has never been in bankruptcy. Instead, the triggering event of the reversion of Servers.com was **<u>Servers, Inc.'s default</u>** in carrying out its purpose, as set

out and agreed in the Emke Settlement. After being forced into receivership, Servers, Inc. has no remaining right to sell servers.com. Notably, Ondova has not lost any interest in <Servers.com>, since one hundred percent ownership of <Servers.com> was vested in Servers, Inc.--not in Ondova.

Similarly, Servers, Inc.'s loss of <servers.com> is unrelated to the fact that Ondova filed for bankruptcy. The Ondova estate is a stockholder of Servers, Inc., and it still owns the stock, but <u>does not own any of Servers, Inc's assets</u>. While the value of the stock that Ondova owns in <Servers.com> may be diminished due to Servers, Inc.'s loss of the <Servers.com> domain name, Ondova does not have any greater interest in the individual assets of Servers, Inc. than it would in individual assets of a publically traded company in which Ondova were a stockholder. The mere fact that Ondova happened to own Servers, Inc. stock when Ondova went into bankruptcy does not give Ondova any special rights to the asset, <Servers.com>. In fact, the statutory protections afforded to an entity in bankruptcy do not extend to third party entities of which the bankrupt entity is a stockholder.

For the above reasons, the Court should sustain Jeffrey Baron's Objections and deny the Trustee's Motion to Sell.

Very respectfully,

<u>/s/ Stephen R. Cochell</u>

Stephen R. Cochell
The Cochell Law Firm, P.C.
7026 Old Katy Rd., Ste. 259
Houston, Texas 77034
(713)980-8796
(713)980-1179 (fax)

Attorneys for Jeff Baron

CERTIFICATE OF SERVICE

This is to certify that a copy of this document was electronically served on all counsel of record on September 7, 2013.

<u>/s/Stephen R. Cochell</u>
Stephen R. Cochell