

No. 11-10501

**In the
UNITED STATES COURT OF APPEALS
for the Fifth Circuit**

Netsphere, Inc., et al., *Plaintiffs,*

v.

Jeffrey Baron, *Defendant - Appellant*

Quantec, L.L.C.; Novo Point, L.L.C., *Movants - Appellants*

Carrington, Coleman, Sloman & Blumenthal, L.L.P., *Appellant,*

v.

Peter S. Vogel; Daniel J. Sherman, *Appellees.*

**Appeal from the United States District Court
for the Northern District of Texas**

Honorable W. Royal Furgeson, United States District Judge

**BRIEF OF APPELLANT/NON-PARTY CREDITOR
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No. 11-10501: *Netsphere, Inc., et al v. Jeffrey Baron, et al.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5TH CIR. R. 28.2.1 have an interest in the outcome of this case.¹ These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Carrington, Coleman, Sloman & Blumenthal, L.L.P. (“CCSB”) believes that oral argument is not likely to aid the Court’s decisional process. With regard to CCSB’s single issue on appeal, the relevant facts are few and undisputed. In the event, however, that the Court grants oral argument to any other party to this appeal, CCSB requests the opportunity to participate at that argument.

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STATEMENT REGARDING JURISDICTION

CCSB takes this appeal and files this Brief subject to and without waiver of its previously-filed Motion to Dismiss in Part and to Lift Stay, or to Abate, and Reply in support, which CCSB hereby incorporates by reference. It is CCSB's position that this Court does not have jurisdiction to hear an appeal from the district court's May 18, 2011 Order. The Court lacks jurisdiction because CCSB timely filed a Motion to Reconsider or to Alter or Amend the district court's Order, which rendered the Baron Appellants' notice of appeal from the Order ineffectual and thus deprives this Court of jurisdiction. (Doc. 613 [Record Excerpt ("RE") Tab 5]) CCSB filed its own Conditional Notice of Appeal from that Order out of an abundance of caution (Doc. 614 [RE Tab 2]), but maintains that the district court must be given the opportunity to hear CCSB's Motion to Reconsider before this Court entertains any appeal of the Order itself.

STATEMENT OF THE ISSUES

1. Does the Order, as entered by the district court, constitute an abuse of discretion by approving the Receiver's proposed distribution of Receivership assets, when:
 - a. CCSB has presented uncontroverted evidence that Baron, the Receivership target, is jointly and severally liable with his company, Ondova Limited Company, for CCSB's unpaid attorney's fees;
 - b. the Order directs that the claims by certain other attorneys for their unpaid fees be paid in *full* from the Receivership assets, but that CCSB receive nothing for its attorney's fee claim; and
 - c. the only rationale for doing so is an alleged hearsay statement by the Trustee in the *Ondova* bankruptcy proceeding that CCSB might someday be paid something in that proceeding?

STATEMENT OF THE CASE

This appeal arises out of a receivership action currently pending in district court in the Northern District of Texas. The Receivership concerns multiple claims by various attorneys for attorney's fees incurred, yet never paid, by Jeffrey Baron. (Doc. 575 [RE Tab 3]) One of the claimants is CCSB, which presented uncontroverted evidence that Baron and his company, Ondova Limited Company, are jointly and severally liable to CCSB for at least \$224,233.27 in unpaid fees. (Ex. 9 to Apr. 28, 2011 Hearing [8 Supp. USCA5 208, 292] [RE Tab 6]; 8 Supp. USCA5 304)

The Receiver filed a proposed distribution plan that would pay some of the attorney's fees claims in full, but would pay nothing on other claims, including CCSB's claim. (Doc. 570) On May 18, 2011, CCSB objected (Doc. 572 [RE Tab 4]), but later that same day, the district entered its Findings of Fact, Conclusions of Law, and Order on Assessment and Disbursement of Former Attorney Claims (the "Order), essentially adopting the Receiver's plan. (Doc. 575 [RE Tab 3]) Also on the same day, Baron, Novo Point, LLC, and Quantec, LLC (the "Baron Parties") filed their Notice of Appeal from the Order, as well as from twenty-nine other interlocutory orders. (Doc. 576) CCSB filed a Motion to Reconsider or to Alter or Amend the Order ("Motion to Reconsider") (Doc. 613 [RE Tab 5]), and also a Conditional Notice of Appeal. (Doc. 614 [RE Tab 2])

STATEMENT OF FACTS

The subject of this Receivership action is Jeffrey Baron, along with one or more of his companies. The Receivership action concerns Baron's serially engaging a large number of lawyers, accepting their services, but failing to pay the lawyers' fees. (Doc. 575 [RE Tab 3]) After his related company, Ondova Limited Company ("Ondova"), sought Chapter 11 bankruptcy protection (the "*Ondova* bankruptcy"),² the bankruptcy Trustee initiated this receivership action against Baron and others. (Doc. 123) The district court appointed the Receiver on November 24, 2010. (Doc. 124) The Receivership includes 26 or more claims by various attorneys, including CCSB, for unpaid attorney's fees (the "Former Attorney Claims"), totaling \$1,453,208.27. (Doc. 575 ¶ 25 [RE Tab 3])

On April 28, 2011, the district court conducted an evidentiary hearing regarding, among other things, the disposition of the Former Attorney Claims. (8 Supp. USCA5 208-307) At the hearing, CCSB presented uncontroverted affidavit evidence that it was entitled to at least \$224,233.27 in unpaid legal fees. (Ex. 9 to Apr. 28, 2011 Hearing [8 Supp. USCA5 208, 292] [RE Tab 6]; 8 Supp.

² *In re Ondova Ltd. Co.*, No. 09-34784 (Bankr. N.D. Tex.).

USCA5 304)³ These fees were owed, jointly and severally, by Ondova and Baron. (Ex. 9 to Apr. 28, 2011 Hearing [8 Supp. USCA5 208, 292] [RE Tab 6])

On May 13, 2011, the Receiver filed his proposed Findings of Fact, Conclusions of Law, and Order on Assessment and Disbursement of Former Attorney Claims [Corrected Version] (the “Proposed Findings”). (Doc. 570) In this document, the Receiver proposed that certain of the unpaid lawyers be paid in full from the Receivership proceeds for their attorney’s fee claims. (*Id.* Ex. A ¶ 25) But the Receiver also proposed that CCSB receive nothing from the Receivership proceeds for its claim because the Trustee in the Ondova bankruptcy proceeding “ha[d] advised the Receiver that [CCSB’s] claim will be paid through the Ondova bankruptcy estate.” (*Id.* Ex. A ¶ 25, line 9 of table)

On May 18, 2011, CCSB filed its Objection to the Receiver’s Proposed Findings of Fact, Conclusions of Law, and Order on Assessment and Disbursement of Former Attorney Claims (“Objection”). (Doc. 572 [RE Tab 4]) But on the same day – and apparently before it could consider CCSB’s Objection – the district court entered the Order, which in large part adopted the Receiver’s Proposed Findings. (Doc. 575 [RE Tab 3]) Like the Proposed Findings, the Order provided

³ In the affidavit, CCSB pointed out that under the terms of its engagement agreement with Ondova and Baron, it was entitled to seek as much as \$608,480.73 in fees. (Ex. 9 to Apr. 28, 2011 Hearing [8 Supp. USCA5 208, 292] [RE Tab 6])

that certain of the former attorneys would be paid in full, others would receive partial payment, but that CCSB would receive nothing. (*Id.* ¶ 25) While the Order purported to allocate Receivership assets among the Former Attorney Claims, it did not identify where the money would come from. (*Id.* ¶ 35) Indeed, at the time of the April 28 hearing, the Receiver was still attempting to locate these funds. (8 Supp. USCA5 301-14)⁴

Shortly thereafter – also on May 18, 2011 – the Baron Parties prematurely filed their Notice of Appeal, in which they purported to appeal from 30 separate interlocutory orders, including the Order. (Doc. 576) On May 24, 2011, the district court entered an order staying “further action in the various matters involved in the instant appeal.” (Doc. 586) On June 15, 2011, CCSB filed its Motion to Reconsider, in which it re-urged the issues in its Objection. (Doc. 613 [RE Tab 5]) To preserve its right to test the merits of the Order on appeal in the event its Motion is denied, and out of an abundance of caution, CCSB also filed on June 15 its own Conditional Notice of Appeal from the Order. (Doc. 614 [RE Tab 2])

⁴ CCSB does not seek to become involved in the larger issues between the Receiver and Baron relating to the propriety or conduct of the Receivership. Rather, CCSB’s objective is simply to preserve its rights – as holder of an obligation owed jointly and severally by both the *Ondova* bankruptcy estate and Baron – to receive its ratable share of any Receivership distributions, if and when made, leaving any reimbursement, contribution, or other reconciliation issues between the Trustee and the Receiver.

On June 20, 2011, the district court informed the parties that, based on its conversation with this Court's clerk's office, it was "stayed from taking further action in the various matters involved in Mr. Baron's appeal." (Doc. 616) On July 1, 2011, the district court advised the parties how it would proceed, once the case is "back at the district court level," as to various motions currently pending before the court. (Doc. 630) Regarding CCSB's Motion, the court stated that when it was able, it would "evaluate the merits" of the Motion. (*Id.*) In a supplemental advisory, the district court stated that it would also stay "orders concerning fees to be paid to the Baron attorneys pending appeal." (Doc. 631)

SUMMARY OF THE ARGUMENT

The May 18, 2011 Order represents an abuse of discretion because it allocates Receivership assets in a fundamentally inequitable way. The Order states that certain of the Former Attorney Claims will be paid in full, while others, including CCSB's claim, will not be paid at all. The alleged statement by the *Ondova* bankruptcy Trustee that CCSB would be paid from the bankruptcy estate provides no guarantee of any payment actually being made. Nor does it provide any reasonable basis for the court below to deny CCSB payment from Receivership assets. Baron and Ondova are jointly and severally liable for CCSB's fees, yet the district court's order essentially relieves Baron of his liability.

ARGUMENT

I. Standard of Review

This Court reviews the approval by a district court of a receiver's distribution plan for an abuse of discretion. *See Sec. & Exch. Comm'n v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001). The distribution of receivership assets is an equitable remedy. *Id.*

II. The District Court Abused Its Discretion in Ordering That CCSB Receive Nothing From the Receivership Proceeds.

Despite the district court's broad discretion in ordering the distribution of the Receivership's proceeds, it abused that discretion here when it ordered that CCSB receive nothing from the proceeds for its attorney's fee claim, while also ordering other Former Attorney Claims be paid in full. (Doc. 575 ¶¶ 25, 35 [RE Tab 3]) It is well-established that receivership assets should be distributed such that "investors with substantially similar claims to repayment receive proportionately equal distributions." *Sec. & Exch. Comm'n v. Wealth Mgmt. LLC*, 628 F.3d 323, 333 (7th Cir. 2010). To that end, this Court and other courts have "routinely endorsed pro rata distribution plans" among receivership creditors. *Id.*; *see also Quilling v. Trade Partners, Inc.*, 572 F.3d 293, 298-301 (6th Cir. 2009); *Forex*, 242 F.3d at 331; *United States v. Durham*, 86 F.3d 70, 72-73 (5th Cir. 1996); *Alonso v. Trigueros*, 369 Fed. App'x 178, 179 (2d Cir. 2010); *Sec. & Exch.*

Comm'n v. Malek, 397 Fed. App'x 711, 715-16 (2d Cir. 2010); *Liberte Capital Group, LLC v. Capwill*, 148 Fed. App'x 426, 434-37 (6th Cir. 2005).

Here, the district court's Order fails to effectuate an equitable distribution among the Former Attorney Claims. Instead of a pro rata distribution of the Receivership assets, the Court picked and chose among the various claimants, paying some in full, while leaving others, like CCSB, without any payment whatsoever. (Doc. 575 [RE Tab 3])

The Receiver's stated rationale – adopted by the district court – for doing so is entirely defective. In his Proposed Findings, the Receiver explained that he had been “advised” that CCSB's claim will be paid through the *Ondova* bankruptcy estate. (Doc. 570 Ex. A ¶ 25; Doc. 633) Notably, the bankruptcy Trustee himself did not make this representation to the district court; it was merely repeated as unsubstantiated hearsay by the Receiver. (*Id.*) Of course, the fact that the Receiver has been “advised” of some action that might take place in the *Ondova* bankruptcy is not a guarantee that this event will actually occur.⁵ Moreover, neither the Receiver nor the Trustee has ever stated when or by what means (*e.g.*,

⁵ This Court may take judicial notice of the fact that in the *Ondova* bankruptcy, no plan of reorganization seeking to pay CCSB's claim has been filed and no other motion to permit any pre-plan payment is pending. *See In re Ondova Ltd. Co.*, No. 09-34784 (Bankr. N.D. Tex.). And even if such a plan or motion were filed, any award to CCSB is subject to the bankruptcy court's approval. The Receiver's undoubtedly sincere belief that these events might come to pass does not make them any less speculative, nor does it justify the arbitrary distribution plan contained in the Order.

by order following a motion, by order confirming a plan of reorganization, or otherwise) CCSB can expect payment from the bankruptcy estate. A distribution on this basis is not an exercise in equity, but rather an affirmatively inequitable penalizing of CCSB based on the speculation of the bankruptcy Trustee. *Cf. Wealth Mgmt.*, 628 F.3d at 333-34 (affirming district court's efforts to "avoid inequity" by refusing to give certain investors preference over others); *Forex*, 242 F.3d at 331-32 (pro rata distribution would provide a "fair and equitable remedy").

The district court's elimination of CCSB's claim was particularly troubling in light of the fact that CCSB served as attorneys for both Jeffrey Baron and Ondova Limited Company. Baron and Ondova are therefore jointly and severally liable for CCSB's attorney's fees. (Ex. 9 to Apr. 28, 2011 Hearing [8 Supp. USCA5 208, 292] [RE Tab 6]) The Receiver does not dispute this fact. But the Receiver and the district court's Order treat CCSB's claim as if Baron were not liable for the fees, even though he plainly is. The fact that CCSB is *also* permitted to assert a claim for its fees in the *Ondova* bankruptcy proceeding should not constitute a basis for eliminating Baron's obligation and essentially wiping his slate clean.

CONCLUSION AND PRAYER

Appellant/Non-Party Creditor Carrington, Coleman, Sloman & Blumenthal, L.L.P. respectfully prays that the Court reverse and vacate the district court's Order as it relates to the payment of CCSB's attorney's fee claim, lift any stay that is currently in place, and remand to the district court for further proceedings. Alternatively, and in accordance with its previously-filed Motion to Dismiss in Part, CCSB prays that the Court dismiss the Baron Appellants' appeal of the Order, lift any district court stay, and remand to the district court for further proceedings, or at least abate this appeal and lift any district court stay to allow the district court to rule on CCSB's Motion to Reconsider. CCSB further requests any other relief, both legal and equitable, to which it may be entitled.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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September 6, 2011

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USDC No. 3:09-CV-988


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Sincerely,

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