

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

NETSPHERE, INC., Et. Al.	§	
<i>Plaintiffs,</i>	§	
vs.	§	Civil Action No. 3-09CV0988-F
	§	HEARING REQUESTED
JEFFREY BARON, Et. Al.	§	
<i>Defendants</i>	§	

**MOTION FOR APPOINTMENT AS COUNSEL TO OPPOSE CREATION OF
LIQUIDATING TRUST, TO DETERMINE COMPENSATION AND, IN THE
ALTERNATIVE TO FILE A DECLARATON UNDER SEAL FOR IN CAMERA
INSPECTION**

Stephen R. Cochell (“Movant”) moves for appointment as counsel for Jeffrey Baron to oppose the creation of a liquidating trust and further moves for an order determining compensation. As set out below in more detail, Movant requests the Court to review a Declaration of Jeffrey Baron in camera and under seal if the issues raised in this Motion are disputed by opposing counsel. In support of this motion. Movant states:

I. Procedural History and Background

1. On or about July, 2010, this action was fully and finally settled in a ‘Global Settlement Agreement’. [Dkt. 151 Ex. 9]
2. On November 24, 2010, the Vogel receivership was imposed on Jeffrey Baron personally and over various companies including two Cook Islands LLCs owned by SouthPac Trust International, NovoPoint LLC and Quantec LLC. Neither the Bankruptcy Court nor this Court have determined that the Cook Islands entities were, or could be found under

Cook Islands law to be alter egos of Ondova, L.L.C. Cook Islands law appears to preclude such a finding as a matter of law.

3. At paragraph 15, the “Global Settlement” provided a full release by Ondova for all possible liability, past, present, and future, of Mr. Baron, as well as of NovoPoint LLC and Quantec LLC. Accordingly, as a matter of substantive Texas law, any possible alter ego liability was fully released. It also appears that there is no basis under the law for the assets of Mr. Baron or the Cook Island LLC entities to be donated to the Ondova bankruptcy estate.
4. Mr. Baron is currently unrepresented in this action. It also appears that Mr. Baron was not, in practice, represented in the bankruptcy court proceedings and did not, in fact, receive legal advice or representation by Mr. Thomas. Mr. Baron did not have an advocate representing him in the courtroom, and did not have an advocate and counselor researching, advising, and protecting Mr. Baron’s rights with respect to the bankruptcy proceeding.
 - a. In a phone discussion with Martin Thomas on September 24, 2012, he consented to substitution as counsel in the bankruptcy case.
5. Mr. Thomas made it clear that his representation of Mr. Baron in the bankruptcy case was limited only to serving as an intermediary between the Receiver and Mr. Baron, and that he was not authorized to file objections to issues affecting Mr. Baron’s assets including, but not limited

to the issue of creating a liquidating trust, or any other matter in the litigation.

6. Given Mr. Thomas' view of the limitations on his representation, it is now clear why Mr. Thomas simply acceded to all motions filed by the Trustee and apparently had no input as to whether a liquidating trust should be created.
7. Thus, it appears that Mr. Thomas has not provided Mr. Baron any legal advice regarding the bankruptcy action, and has not served as an advocate for Mr. Baron in the Bankruptcy Case. In light of a flat fee payment of \$5,000 per month, such an arrangement would appear to be a waste of money.
8. At the same time, however, it does not appear that there is any support in the record for Mr. Thomas' conclusions that his representation of Mr. Baron was limited in scope.

- a. On December 17, 2012, this Court verbally stated:

THE COURT: Well, stay right here. My goal -- Frankly, I don't want to penetrate into the bankruptcy court and what the great Judge Jurnigan is doing. So actually I would rather you stay in the bankruptcy court. **I would rather you assert whatever needs to be asserted if anything does need to be asserted.** That would be sort of my goal, and I would not want the receivership order to prevent you from representing Mr. Baron in the court so long as it's appropriate with the settlement that's been reached and so forth. (emphasis supplied).

b. Counsel has reviewed numerous orders in the record, but has been unable to locate an order that limits Mr. Thomas' representation of Mr. Baron.

c. Mr. Baron stands ready to file the Declaration of Jeffrey Baron under seal for the Court's *in camera* review, which supports the statements made by Mr. Thomas, which support the conclusion that Mr. Baron was not effectively represented and did not receive effective legal advice or representation by Mr. Thomas regarding core issues in the bankruptcy litigation.

d. Because the Court's order directing that Mr. Baron be represented to "assert whatever needs to be asserted" apparently has either been misunderstood, disregarded, or even violated, substitution of Mr. Thomas is appropriate and counsel appointed to safeguard Mr. Baron's legal interests.

9. Previously, this Court, on May 3, 2012, this Court entered an order requiring that Mr. Baron retain counsel by or before June 1, 2012 to assist him in addressing contested issues in the Netsphere case, which would have cleared the way for the Court to close the receivership proceedings.

10. Mr. Baron requested the undersigned counsel to represent him in these proceedings at that time. Mr. Baron requests the Court appoint the

undersigned counsel to represent him in this matter and to represent him in the Bankruptcy Court proceedings.

11. The Court heard the matter and on July 13, 2012 entered an order appointing counsel for the limited and narrow purpose of assisting Mr. Baron in securing health care insurance coverage, and abating all other requests for authorization to represent Mr. Baron. With respect to that representation, Mr. Baron has secured health care coverage, However, there is some remaining uncertainty as to whether the carrier is going to cover Mr. Baron's pre-existing illnesses and conditions. Counsel will keep the Court advised of further progress on this issue.
12. On June 18, 2012, the Court entered an order that no funds be distributed to the former Baron attorneys until the completion of the appeal. This Court ordered that the funds then available be segregated and set aside by the Receiver until a decision is made by the Court of Appeals. [Doc. 987].
13. On June 18, 2012, the Court also entered an order in case 3:12-cv-00416 stating that once the Receivership is dissolved, all property under its control will be returned to Baron.
14. The traditional touchstone of the core duties of a receiver is impartiality and unquestioning obedience to the directives of the Court. See e.g., *Bosworth v. St. Louis Terminal Railroad Assn.*, 174 U.S. 182, 187 (1899) ("Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all

returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties”).

15. On September 10, 2012, a Plan of Reorganization was filed with the Bankruptcy Court proposing the creation of a liquidating trust, which would directly controvert the rulings of this Court and would call for the donation of the receivership assets to the Ondova bankruptcy Estate. In addition to using the receivership assets to fund obligations of the Ondova bankruptcy estate, the plan would directly controvert the Court’s order that no funds be distributed to the former Baron attorneys until the completion of the appeal. Oral argument on the appeal is set for hearing before the Fifth Circuit in approximately one month. The Trustee and Receiver’s ‘Plan’, thus appears to be a rush to end-run the prior rulings of the Court.
16. On September 11, 2012, a Notice of Hearing was issued setting a hearing on the matter for September 28, 2012.
17. On September 14, 2012, the Trustee filed a Motion for Entry of Orders (I) Approving the Receiver Entering into the Plan Settlement; and (II) Approving the Auction Procedures; and (III) Break-Up Fee.
18. Counsel renews his prior motion and further seeks appointment as counsel for Mr. Baron on the issues raised in the instant matter.

19. A preliminary review of the Reorganization Plan, and the Receiver's request that the Court approve a plan to create a liquidating trust suffers from serious and fatal deficiencies, as set out below.

II. Jurisdiction Pending Appeal Properly Rests in the Appellate Court.

Liquidation of all of Mr. Baron's assets is a substantive and not an "administrative" matter and should not be determined while his appeal of this Court's orders are pending appeal. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982).

III. The Receivership Assets Are Not Part of Ondova's Bankruptcy Estate.

Under the Bankruptcy Code, the retained assets of the bankruptcy estate may be transferred to a liquidating trust. Section 1123(a)(5)(B) provides that; "[A] plan shall ... provide adequate means for the plan's implementation, such as ... transfer of all or any part of the property **of the estate** to one or more entities, whether organized before or after the confirmation of such plan." (emphasis supplied). *See e.g., Torch Liquidating Trust Ex Rel. Bridge Assoc., LLC v. Stockstill*, 561 F.3d 377,387 (5th Cir. 2009). If the assets are not part of the "estate", it is clear that a transfer cannot be made.

In the instant case, Mr. Baron disputes that the assets are part of the estate. The disputed assets are owned by different entities and pursuant to the Bankruptcy Code, may not be transferred into a bankruptcy estate without a finding and determination of Ondova's claim to ownership of the assets. It does not appear that either the Receiver nor the Trustee raised a claim

that Ondova owns part or all of the assets. Thus, raising a claim at this point will directly violate the Global Settlement Agreement.

Transfer of the assets, as proposed by the Receiver/Trustee, must be raised in an adversary proceeding. Part VII of the Bankruptcy Rules. Rule 7001 defines an "adversary proceeding" as: [A] proceeding in a bankruptcy court (1) to recover money or property, except a proceeding under § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d). *See In re Simmons*, 765 F. 2d 547, 552 n. 5 (5th Cir. 1985).

Further, preliminary review of the assets in the Receivership does not support a claim against the LLCs and their assets. In determining which law to apply, Texas courts look to the jurisdiction of incorporation of the target company. Counsel understands that Cook Islands law does not recognize alter ego liability with respect to Cook Islands LLCs. Even *assuming* that an alter-ego claim could be made by Ondova, the Global Settlement Agreement released all claims against Baron and the LLC's. Ondova received substantial funds in consideration for the release of claims against Ondova. The Trustee cannot rely on the Global Settlement Agreement as authority for creating the liquidating trust but then raise arguments that were released as a result of the Global Settlement Agreement.

The Trustee and the Receiver apparently wish to side-step the prior orders of the Court in favor of creating a liquidating trust by court fiat, which frustrates the relief sought by Mr. Baron on appeal and circumvents any need to resolve issues of subject matter jurisdiction and ownership of the assets.

IV. The Court Should Appoint Counsel to Fully Analyze the Issues Raised in a Liquidating Trust.

Mr. Baron is not represented by counsel in the district court and it appears that he is not represented in the Bankruptcy Court. In his Notice, the Receiver asserts that bankruptcy counsel, Martin Thomas, reviewed the proposed liquidating trust. At the time of this submission, it does not appear that any objections were filed on behalf of Mr. Baron by counsel nor does it appear that Mr. Thomas has been allowed to act to protect Mr. Baron's interests.¹ At best, it appears that Mr. Thomas' "representation" of Mr. Baron is, at best, a misnomer. Continued representation of Mr. Baron by Mr. Thomas would, in any event, be inappropriate, as Mr. Thomas is adverse to Mr. Baron with respect to issues pending on appeal, including Mr. Thomas' fees which have been contested by Mr. Baron on appeal. The Court should appoint the undersigned counsel to represent Mr. Baron's interests on these issues. Counsel should be allowed sufficient time to fully research the relevant legal standards, and become readily familiar with the legal and factual issues and detailed history of the proceedings.

Hearing on this Motion is requested for September 27, 2012.

WHEREFORE, Movant requests the Court enter an order that appoints counsel in the District Court, enter an order directing that the Bankruptcy Court allow the substitution of the undersigned counsel in the Bankruptcy proceeding, and direct that the Bankruptcy Court remove the Motion to Approve the Liquidating Trust from its hearing docket and reschedule the matter for briefing, allowing the undersigned counsel sufficient time and resources to provide further research and argument on the issues. Counsel alternatively requests that, if the Court believes

¹ No trial counsel has been allowed to represent the interests of the Cook Islands LLCs.

that it needs further proof regarding the adequacy of Mr. Baron's representation in the Bankruptcy Court, or on the issue of the creation of a liquidating trust, that counsel be permitted to file under seal the Declaration of Jeffrey Baron, with accompanying exhibits.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF COMPLIANCE

This is to certify, that on September 25, 2012, the undersigned contacted Jeffrey Fine by email and generally sought his concurrence in the relief sought. Mr. Fine was apparently unable to return the phone call.

/s/Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF SERVICE

This is to certify that, on September 25, 2012, a copy of this Motion was served on all counsel through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen R. Cochell

