

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

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

MOTION TO DISQUALIFY TRIAL JUDGE

Pursuant to 28 U.S.C. § 455, Jeffrey Baron hereby moves to disqualify the trial judge because the judge has personal knowledge of disputed evidentiary facts concerning the proceeding and in support, states:

I. Introduction

A. Standard for Recusal

The standard for recusal of a trial judge is set out in 28 U.S.C. § 455 which, in pertinent part, states:

- (a) Any justice, judge, or magistrate of the United States **shall** disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) **He shall also disqualify himself in the following circumstances:**
 - (1) **Where he has** a personal bias or prejudice concerning a party, or **personal knowledge of disputed evidentiary facts concerning the proceeding.**

II. Grounds for Recusal

The specific grounds for recusal are:

- 1. The trial judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

III. Statement of Facts

In the instant case, the Court must rule on various fee applications submitted by the Receiver. From the inception of this case, Mr. Baron has claimed that the receivership was imposed as a result of misleading, fraudulent statements made by the Trustee and Receiver and that the receivership was improperly maintained by the Receiver by and through the same deceptive, fraudulent statements. The Fifth Circuit has now settled the issue of whether a receivership over Mr. Baron was authorized, and has vacated the receivership order.

The Court entered the Order Granting Receivership at an *ex parte*, off-the-record hearing with the Trustee, Receiver, and other individuals. The nature, scope and details of the hearing are unknown to Mr. Baron and have been cloaked in secrecy. The very existence of the secret off-the-record hearing has been disputed. However, testimony in the Ondova bankruptcy case demonstrate that the trial court was misled about the factual, as well as the legal justification for imposing a receivership over Jeffrey Baron and other entities.

This Court entered an *ex parte* order and has entered findings reflecting the Court's understanding that Mr. Baron disobeyed the Court's mediation order, and caused the mediation to fail. This fact has now been repudiated by the Trustee in sworn testimony. Mr. Sherman has now admitted in sworn testimony that contrary to the allegations against Mr. Baron, it was the attorney claimants that refused to mediate.

The payment of some or any receiver's fees has been allowed by the Fifth Circuit based on equitable principles. Accordingly, equitable considerations and defenses are at issue in determining the amount, if any, of receiver fees is that is equitable. As a matter of established precedent, "he who comes into equity must come with clean hands". *Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 451 (1935). Where a party acts with unclean hands, they are not

entitled to equitable relief. *Id.* Relief procured by material misrepresentation may not be sustained. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 818 (5th Cir. 1989).

Therefore, a central and preliminary evidentiary issue in this case is what, specifically, Mr. Sherman and Mr. Vogel, and their counsel, represented to this Court in the off-the-record *ex parte* hearing held November 24, 2010. If the representations of Mr. Sherman and/or Vogel are shown to be material misrepresentations, the doctrine of unclean hands is established.

IV. The Trial Judge Is the only Independent Witness to the Ex Parte Off-the Record Hearing and Representations Made at that Hearing.

Corky Sherman's revelation that Jeff Baron did not breach any obligation owed to the trustee under the Global Settlement Agreement and that it was the attorneys who refused to mediate the attorney fee claims, support Mr. Baron's contentions that the Trustee and Receiver acted in bad faith by seeking the imposition of, or continuing the receivership in bad faith, and through fraud and misrepresentation. Accordingly, the statements actually made to the trial judge can themselves establish fraud, bad faith, and unclean hands.

The trial judge in this case has personal knowledge of what was represented at the disputed off-the-record *ex parte* hearing and is, moreover, the only independent witness of those evidentiary facts. Disqualification is therefore mandated. Mr. Baron has the Constitutional right to subpoena witnesses, including the trial judge as the only independent witness with personal knowledge of the representations made in the off-the-record *ex parte* proceedings. See Amend. 5, U.S Const.

In *Matter of Faulkner*, 856 F.2d 716 (5th Cir. 1988), the Fifth Circuit granted a writ of mandamus directing a trial judge to disqualify himself where, as in this case, the trial court's had "personal knowledge of disputed evidentiary facts concerning the proceeding".

A. The Facts In the Instant Case Mandate Recusal.

In the instant case, the Fifth Circuit Court of Appeals vacated an order of receivership granted at the request of the Trustee and other interested parties in an off-the-record *ex parte* hearing. The details of this off-the-record *ex parte* hearing are unknown to Mr. Baron, but obviously persuaded this Court to grant an *ex parte* order.

Because the trial judge clearly has personal knowledge of the disputed evidentiary facts concerning imposition of the receivership, and specifically as to facts bearing on issues relating to the Trustee and Receiver's good faith (or lack thereof) and clean hands (or lack thereof) in seeking the receivership, disqualification is mandated under 28 U.S.C. § 455.

Mr. Baron has no independent source of evidence other than the trial judge. The hearing was held in secret, off-the-record, and *ex parte*. Proof of the statements made to the trial judge at that hearing are key operative evidentiary facts at dispute in relationship to the issue of the equitable amount of fees to allow the receiver, if any.

WHEREFORE, Jeffrey Baron respectfully requests the Court enter an order of disqualification and request reassignment of the case to a different district court judge.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF CONFERENCE

This is to certify that, on December 30, 2012, counsel for Jeffrey Baron contacted counsel for the Receiver and Trustee and requested their concurrence in this motion. The Receiver responded by email stating his opposition to the motion.

/s/Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF GOOD FAITH FILING

This is to certify that counsel has reviewed the Motion for Disqualification of Trial Judge and believes that the motion is brought in good faith based on Supreme Court and other pertinent case law, as set out herein.

/s/Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF SERVICE

This is to certify that, on December 30, 2012, a copy of this Motion was served on all counsel through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen R. Cochell