

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

NETSPHERE, INC.,	§	Civil Action No. 3-09CV0988-F
MANILA INDUSTRIES, INC., and	§	
MUNISH KRISHAN,	§	
Plaintiffs.	§	
	§	
v.	§	MOTION FOR <u>EMERGENCY RELIEF</u>
	§	
JEFFREY BARON, and	§	
ONDOVA LIMITED COMPANY,	§	
Defendants.	§	

**EMERGENCY MOTION TO VACATE ORDER APPOINTING RECEIVER AND IN
THE ALTERNATIVE, MOTION FOR STAY PENDING APPEAL, AND BRIEF IN
SUPPORT**

TO THE HONORABLE ROYAL FURGESON, U.S. DISTRICT COURT JUDGE:

NOW COMES Jeffrey Baron, Appellant, and files pursuant to Federal Rule of Appellate Procedure 8(a)(1), this Emergency Motion to Vacate Order Appointing Receiver signed on November 24, 2010 [Docket #124, and Docket #130, Entered 11/30/2010], and Motion for Stay Pending Appeal, and would raise to the attention of this Court:

I. SUMMARY

Jeffrey Baron is entitled to the entry of an order vacating the order appointing receiver because the order was not issued for one of the three grounds recognized by the Fifth Circuit for the entry of such orders. If the order is not vacated, Mr. Baron is entitled to relief from the order pending appeal because he has substantial likelihood of success on appeal, and is suffering irreparable injury from the order.

The relevant law is clear and longstanding. There is no basis in law to appoint a receiver in this case and the law expressly prohibits such an appointment.

Moreover, the order appointing receiver squarely violates the Constitution of the United States. No purpose, no matter how well intended, justifies even temporary suspension of the constitution. The damages being inflicted upon Mr. Baron by virtue of the order are very real, harsh, and irreparable.

II. STANDARD IN GRANTING STAY PENDING APPEAL

The Fifth Circuit has adopted the four standards set out in *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 259 F.2d 921 (DC Cir. 1958) to determine whether stay pending appeal should be granted. *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968). Those factors are: (1) Whether the movant has made a showing of likelihood of success on the merits; (2) Whether the movant has made a showing of irreparable injury if the stay is not granted; (3) Whether the granting of the stay would substantially harm the other parties; and (4) Whether the granting of the stay would serve the public interest. *Id.*

III. ARGUMENT & AUTHORITIES

A. LIKELIHOOD OF SUCCESS ON APPEAL

The appoint of a receiver in this case is prohibited by law

As a matter of longstanding Federal law, an unsecured contract creditor¹ has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor and may not be granted an order of receivership against the debtor. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). *Pusey* explains “[A]n unsecured simple

¹ Daniel J. Sherman is not even a creditor of Mr. Baron’s, lacks diversity with Mr. Baron, and lacks even the standing to bring a motion for appointment of a receiver in this lawsuit.

contract creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor ... He has no right whatsoever in equity until he has exhausted his legal remedy. After execution upon a judgment recovered at law has been returned unsatisfied he may proceed in equity by a creditor's bill.”

The Fifth Circuit has accordingly recognized three grounds for which a District Court may appoint a receiver: (1) the appointment of a receiver can be sought “by anyone showing an interest in certain property or a relation to the party in control or ownership thereof such as to justify conservation of the property by a court officer.”; (2) receivers may be appointed “to preserve property pending final determination of its distribution in supplementary proceedings in aid of execution.”; and (3) receivership may be an appropriate remedy for a judgment creditor who (a) “seeks to set aside allegedly fraudulent conveyances by the judgment debtor”, (b) “has had execution issued and returned unsatisfied”, (c) “proceeds through supplementary proceedings pursuant to Rule 69”, (d) “seeks to subject equitable assets to the payment of his judgment”, or (e) “otherwise is attempting to have the debtor's property preserved from dissipation until his claim can be satisfied.” *Santibanez v. Wier McMahon & Co.*, 105 F. 3d 234, 241 (5th Cir. 1997)(underline emphasis).

Notably, the appointment of a receiver so that a defendant can not hire a lawyer is not one of the three grounds allowed in the Fifth Circuit, nor by the US Supreme Court.

The purpose for which the receiver was appointed is clearly unconstitutional

The Fifth Amendment to the United States Constitution establishes that a civil litigant has a constitutional right to retain hired counsel. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). Moreover, “the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement.” *Id.* at 1118; *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981).

An individual's relationship with his or her attorney “acts as a critical buffer between the individual and the power of the State.” *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002). A defendant must be afforded a fair opportunity to secure counsel “of his own choice” and that applies “in any case, civil or criminal” as a due process right “in the constitutional sense”. *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932).

If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense. *Chandler v. Fretag*, 348 U.S. 3, 10 (1954). A necessary corollary is that “a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth.” *Id.*

The means of the receivership order is also clearly unconstitutional

The seizure clause of the Fourth Amendment prohibits the unreasonable interference with possession of a person's property. *Severance v. Patterson*, 566 F.3d

490 (5th Cir. 2009). The seizure ordered by this Court was purely arbitrary—based on no case law or statute, ordered without a trial on the merits of any claim, and entered based on no objective guidelines or guiding principles.

B. IRREPARABLE INJURY

Deprivation of constitutional rights is irreparable injury as a matter of law

It is well settled that the loss of constitutional freedoms for even minimal periods of time constitutes irreparable injury. *Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Accordingly, the receivership order—expressly designed to interfere with Mr. Baron’s constitutional right to hire legal counsel—involves irreparable injury as a matter of law.

Similarly, each day, in fact each hour that Mr. Baron is deprived of his own property taken by an unreasonable seizure, as a matter of law he is suffering irreparable injury. Similarly to, with each piece of private and personal information about his private life and affairs that Mr. Baron is compelled to disclose, his constitutional right to privacy is either threatened or in fact being impaired. This “mandates a finding of irreparable injury”. *Deerfield* at 338.

Serious and real harm to Mr. Baron personally

As detailed in Mr. Baron’s declaration attached hereto and incorporated herein by reference, this Court is imposing very real injury to Mr. Baron personally:

1. He is living in constant fear, day and night. Threatened with contempt, is a prisoner to the constant demands and threats of the receiver.

2. He is being, against his will forced to reveal all sorts of private, personal information.
3. He is suffering emotionally, is becoming despondent at times, feels threatened with contempt and even jail.
4. He is having shortness of breath and getting dizzy several times a day to the extent that he has lost his balance and cannot stand upright.
5. **COUNSEL RAISES TO THE ATTENTION OF THIS COURT THAT THE LOSS OF ALL OF HIS ASSETS WITHOUT A TRIAL IS CAUSING MR. BARON TO BECOME SEVERELY DEPRESSED.**
6. With every piece of private information that the receiver and his adversary obtain from him, Mr. Baron feels that he is being exploited. **MR. BARON'S SENSE OF SELF CONTROL HAS BEEN TAKEN FROM HIM, NO LESS THAN IF HE HAD BEEN THROWN IN JAIL.**
7. Mr. Baron cannot travel – his money has been taken from him.
8. Mr. Baron cannot hire lawyers to defend himself.
9. Mr. Baron's health and medical condition are rapidly deteriorating under the stress of the receivership order.
10. Mr. Baron not able to sleep and is having frequent panic attacks, blood glucose levels over 500 (normal readings are less than 100), nausea and general ill health. He cannot go to an independent doctor because the receiver has his money.

11. Mr. Baron's diabetes is worsening under the stress of the Court's order and he is no longer able to control his blood sugar level.

C. NO SUBSTANTIAL HARM TO OTHER PARTIES

This case has settled. Moreover, no party has a legitimate interest in denying Mr. Baron his constitutional right to legal counsel of his choice. If such an interest could be constitutionally served, an injunction prohibiting Mr. Baron from retaining counsel would serve the same interest, without taking away Mr. Baron's constitutional right to own and possess property.

D. PUBLIC INTEREST

There is a compelling public interest in upholding the US Constitution. Protecting an individual's rights in his property and his privacy, and his right to hire legal counsel of his choice, are important public interests served by granting the relief requested by Mr. Baron.

IV. CONCLUSION

This Court has suspended Mr. Baron's constitutional right to own and control his own property, for the purpose of denying Mr. Baron the ability to retain counsel. Such an order is unlawful and violates the US Constitution.

V. PRAYER

Wherefore, Mr. Baron prays that this Honorable Court grant this motion, and immediately vacate the order appointing receiver entered by this Court on November 24, 2010. If the order is not vacated, Mr. Baron prays that this Honorable Court stay the order appointing receiver pending appeal and determination by the Fifth Circuit as to the legality and constitutionality of the Court's order.

Respectfully submitted,

/s/ Gary N. Schepps
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Dallas, Texas 75367
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**APPELLATE COUNSEL FOR
JEFFREY BARON**

CERTIFICATE OF SERVICE

This is to certify that this was served on all parties who receive notification through the Court's electronic filing system.

/s/ Gary N. Schepps
Gary N. Schepps

CERTIFICATE OF CONFERENCE

This is to certify that the undersigned conferred with Mr. Raymond J. Urbanik, attorney for DANIEL J. SHERMAN, Trustee for ONDOVA LIMITED COMPANY, and Mr. Urbanik is opposed.

/s/ Gary N. Schepps _____
Gary N. Schepps

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

DECLARATION OF JEFFREY BARON

1. My name is Jeffrey Baron. I am competent to make this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct. I have personal knowledge of the stated facts which I learned as the result of being subjected to the facts and events stated herein.

2. I am not a judgment debtor. I have not been indicted with any crime. I have not lost any trial. By working hard and saving money, I had accumulated substantial investments. I am an American citizen.

3. All of my assets along with the assets of trusts for which I am a beneficiary have been seized so that I will have no money and cannot hire attorneys to protect my interests and enforce my legal rights.

4. The seizure of all my assets in this circumstance has caused me to become increasingly despondent. I feel constantly threatened with contempt and jail. I cannot live my life, have shortness of breath and get dizzy several times a day to the extent that I lose my balance and cannot stand upright. I feel helpless.

5. With the receivership order, I am living in constant fear, day and night. Threatened with contempt, I am a prisoner to the constant demands and threats of the receiver. I am forced, by threat of jail for contempt of the order, literally to work in servitude to the demands of the receiver.

6. I am being forced, against my will, to reveal all sorts of private, personal information. I am being forced to turn over my private, personal documents. It is painful to have lost control of my own property, my own secrets, my own private affairs. With every piece of private information that the receiver and my adversary obtain, I feel distress at the loss of my control over my life and my privacy.

7. The Receiver has seized boxes of attorney-client materials from my attorney and will not agree not to disclose the materials.

8. The feeling of helplessness is hard to describe but so emotionally painful that it physically hurts. I am unable to sleep at night.

9. A basic human right, to own property, has been taken from me, and being reduced to a sub-human status is deeply emotionally painful, even to the extent of making me physically ill.

10. I cannot hire lawyers to defend myself, while my adversaries have dozens of lawyers with a determined focus of attacking me and taking my property. I am watching my IRA and the assets of companies that I have a beneficial interest in, and planned to rely on for the rest of my life, disappear with only a \$1000.00 bond to protect me.

11. The stress on me from losing my right to possess and control my own property, from being prohibited from obtaining legal counsel to advise me and look after and protect my interests is enormous. The stress and deprivation of not being able to freely travel, of not being able to freely express myself and take out an advertisement in the newspaper to tell the world what has happened to me, is literally causing my heart to beat irregularly.

12. I see my health rapidly deteriorating as I am suffocating under the stress-- I am not able to sleep and have frequent panic attacks, my blood glucose levels are jumping over 500 (normal readings are less than 100), I am suffering nausea and general ill health. I am scared. I am unable to keep my diabetes under control with all the stress from having all of my assets stripped from me and being forced to be dependent literally to have a little food to eat on the 'good graces' of someone.

13. Daily, more and more of my money is being taken from me by the receiver and those he desires to give my money to. It is painful. I am being forced to watch as other's make off with my assets without the ability to hire the legal counsel necessary to stop them.

14. I am literally a prisoner to the receivership. I am forbidden from entering contracts. I am forced to live in an apartment/condo and cannot buy a house—I cannot enter a contract, or borrow money.

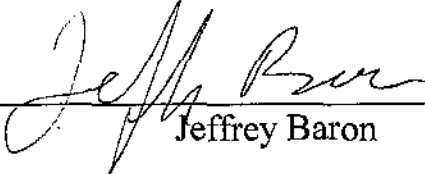
15. I have lost my freedom to make money and travel and am entirely depended for my food and clothing on the whims of the Receiver who has allowed me only \$1,000.00 of my own money with strict limitations of how I can spend it—while the receiver is attempting to take thousands (and likely soon, hundreds of thousands) of dollars of my money for himself and the members of his own law firm whom he has 'hired'. I have done nothing to entitle another to help themselves to my money.

16. Without access to my own money I cannot hire attorneys to protect my interests and represent me. My rights as a creditor and beneficial equity holder in the Ondova bankruptcy are being prejudiced by my lack of ability to control the actions taken on my behalf, and the lack of legal counsel representing me before the bankruptcy court. There are four or five or so active lawsuits in which through legal counsel I was defending myself and in the process of seeking relief. Now, because of the receivership order, these cases are stayed and I cannot seek relief nor pay for counsel.

17. Mr. Schepps is the only attorney willing to take any action on my behalf at this point. I have no funds to pay him for his continuing time and expenses, and his representation is strictly limited to being appellate counsel for the narrow purpose of seeking relief from the order appointing the receiver. That is literally my last hope.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 3rd day of December, 2010, in Dallas, Texas.



Jeffrey Baron