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.	§	
	§	
JEFFREY BARON, and	§	
ONDOVA LIMITED COMPANY,	§	
Defendants.	§	

TRIAL BRIEF FOR MOTION TO STAY RECEIVERSHIP PENDING APPEAL OR TO VACATE THE RECEIVERSHIP ORDER AS VOID *AB INITIO*

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

COMES NOW Jeffrey Baron, and respectfully files this brief and shows:

1. No property interest has been invoked. Without it, as a matter of law this Court may not order a receivership against an individual.

Receivership is a special remedy that is allowed only as a step to achieve a further, final disposition of property. This fundamental rule was established in *Gordon v. Washington*, 295 U.S. 30 (1935). The *Gordon* Court held "there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose." *Id*. at 37.

This rule has been explained by the Fifth Circuit in *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954). *Tucker* explains that "a receivership for the sake of a receivership with the consequent heavy burdens and expenses which will tend to dissipate in court costs and allowances the properties of the true owners, while unduly and without warrant keeping them out of the possession and use of their own" and that "**receiverships for conservation have a legitimate function but they are to be watched with jealous eyes lest their function be perverted**".

The *Tucker* Court explains at 631-632:

> Where a final decree involving the disposition of property is appropriately asked, the court, in its discretion, may appoint a receiver to preserve and protect the property pending its final disposition. …
>
> In the case at bar, the plaintiffs, though asking for a receiver with broad powers, are not asking for a final disposition of the property. …
>
> [S]uch action is clearly inappropriate under the above authorities for the reason that the receivership can accomplish no end, but must merely be an end in itself, if there is any reason for same.

Because the motion for receivership did not seek the appointment of a receiver as a step to achieve any further, final disposition of Mr. Baron's property, the receivership order imposed is unlawful. *Id*.

Accordingly the receivership should be immediately vacated and all the fees and expenses claimed by the receiver and his attorneys charged against Mr. Sherman and his counsel, the parties provoking the receivership. *Tucker* at 632; *Porter v.*

Cooke, 127 F.2d 853, 859 (5th Cir. 1942) (the parties whose property has been wrongfully seized are entitled, on equitable principles, to recover the costs from those who have wrongfully provoked the receivership).

Notably, non-judgment contract creditors, such as attorneys who claim unpaid fees, do not hold an interest in Mr. Baron's property and are not entitled to the remedy of receivership. *See Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

2. This Court does not have subject matter jurisdiction over disposition of Mr. Baron's personal assets nor the fee disputes with former attorneys.

The only subject matter jurisdiction vested in this Court is that jurisdiction authorized by the Constitution and statute and which is not to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 378 (1994). Unless a dispute falls within the confines of the jurisdiction conferred by Congress, such courts do not have authority to issue orders regarding its resolution. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1297 (5th Cir. 1985).

There is no claim or controversy pled before this Court relating to the disposition of Mr. Baron's personal assets.

This Court should honor the binding precedent of the Fifth Circuit. The ink is barely dry on the Fifth Circuit's opinion in *Griffin v. Lee*, (No. 09-30734, 5th Cir. Sept. 23, 2010), and **to attempt to use a receivership to pay former attorney's fee claims circumvents the Fifth Circuit's ruling and attempts to do what the Fifth Circuit has clearly and expressly prohibited.**

In *Griffith* an attorney sought to have the District Court hear his attorney fee claim arising in a case pending before the District Court. The Fifth Circuit expressed sympathy for the attorney, but held that the district court lacked subject matter jurisdiction over the fee dispute even though the fees were incurred for work before that court. The *Griffith* Court noted "Unless a dispute falls within the confines of the jurisdiction conferred by Congress, such courts do not have authority to issue orders regarding its resolution." The *Griffith* Court ruled that **the district court does not have subject matter jurisdiction to issue orders regarding non-diversity claims for attorneys' fees**.

3. Imposition of a receivership requires due process. Here, there was none, and the receivership order is void *ab initio* as matter of law.

A receivership is an "extraordinary" equitable remedy to be "employed with the utmost caution" and "granted only in cases of clear necessity." See e.g., *Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009); *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997); *Aviation Supply Corp. v. R.S.B.I. Aerospace*, Inc., 999 F.2d 314, 316 (8th Cir. 1993); *Consolidated*

Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 326-27 (1st Cir. 1988).

A district court has discretion to appoint a receiver "only **after** evidence has been presented and findings made showing the necessity of a receivership." *E.g., Solis*, 563 F.3d at 438 (emphasis). It needs no extended argument that absent being ***preceded*** by the presentation of evidence, the receivership order violates the fundamental principles of due process. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969). Even the temporary taking of property that is not in execution of a final judgment is a "deprivation" as contemplated by the constitution and must be "preceded by a fair hearing". *Fuentes v. Shevin*, 407 U.S. 67 (1972) (emphasis). Notably, due process requires presentation of evidence ***prior*** to the deprivation of property rights even if a hearing is provided thereafter. *Mathews v. Eldridge*, 424 U.S. 319, 333.

The District Court's order appointing receiver was not preceded by a evidentiary hearing, and was not supported by affidavit. It is therefore void for lack of procedural due process. *See Pennoyer v. Neff*, 95 U.S. 714, 737 (1878) ("such proceeding is void as not being by due process of law"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("rendered in violation of due process is void in the rendering"); *Margoles v. Johns*, 660 F. 2d 291,295 (7th Cir. 1981)("void only if the court that rendered it lacked jurisdiction ... or if it acted in a manner inconsistent with due process of law").

4. This Court must exercise restraint and use the *least* power necessary in ordering equitable remedies. Receivership is grossly excessive and manifestly unreasonable for the grounds raised in Mr. Sherman's motion to appoint a receiver.

A court is obliged to use the "least possible power adequate to the end proposed". *Spallone v. United States*, 493 U.S. 265, 272 (1990). The ultimate touchstone of inherent powers is **necessity**. *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1412 (5th Cir. 1993) ("Traditional sanctions—perhaps a monetary penalty that increased each day for Fox's noncompliance with the other post-judgment discovery orders—would have accomplished the court's purpose more properly")

If the purpose of the receivership is to prevent Mr. Baron from being represented by new counsel in the pending court proceedings, the Court can simply say "no" when a new attorney asks to be allowed appearance in the case.

The Court clearly does not need to order a receivership in order to have control over which attorneys appear at bar before it. *McCuin v. Tex. Power & Light Co*., 714 F.2d 1255 (5th Cir. 1983) (a case relied upon by Mr. Sherman, and holding "[T]he ultimate decision on [delaying a trial for the appointment of separate counsel] must remain with the trial judge; otherwise unscrupulous defense attorneys might abuse their `authority,' presumably for purposes of delay or obstruction of the orderly conduct of the trial.").

On the other hand, a**ttempting to bar an individual from freely hiring attorneys to give legal counsel is blatantly unconstitutional**. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980) ("the fifth amendment to the United States Constitution establishes that a civil litigant has a constitutional right to retain hired counsel" and "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement"); *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981)(the right to the advice of retained counsel in civil litigation is implicit in the concept of due process); *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002) (attorney acts as a critical buffer between the individual and the power of the State); *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932) (right to hire counsel of one's choice is a due process right in the constitutional sense that applies in any case, civil or criminal).

If the purpose of the receivership is to prevent Mr. Baron's attorneys from making claims in the bankruptcy court for fees, the Court can simply enter an injunction requiring Mr. Baron to include a term in any attorney employment contract with new attorneys that the attorney will not file any claims in the bankruptcy court. The Court does not need to order a receivership in order to do that.

If the purpose of the receivership order is to prevent alleged vexatious litigation, the Court can adopt Mr. Sherman's own recommendation [Doc 195] that the Court "enjoin Mr. Baron and his lawyers from filing any pleading or other paper with the Court until the Magistrate Judge has reviewed it and determined that is offered in good faith." Notably, an injunction, and not a receivership, is the remedy authorized by the Fifth Circuit for vexatious litigants. *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 187 (5th Cir. 2008). Notably, *Baum* holds that while a district court has jurisdiction to impose **a pre-filing injunction** to deter vexatious, abusive, and harassing litigation, such injunction must still preserve "the legitimate rights of litigants". *Id*. Mr. Baron's right to file lawful objections, to control settlement of his own claims, to a jury trial for claims raised by or against him, etc., have been squashed by this Court's receivership order. (The receivership order also squashes most of Mr. Baron's civil and constitutional rights as well).

Notably, *before* any of the above described sanctions should be imposed, Mr. Baron must be entitled to opportunity to fairly and fully—with the assistance of qualified counsel—appear in Court to defend himself and require the movant to prove by lawful evidence their factual allegations. That is the American way—the way of a free society that protects the civil and constitutional rights of her citizens and resolves disputes through a centuries old process—due process. That includes

the right to have a jury hear and decide, in public, claims for damages for any alleged breach of contract.

Respectfully submitted,

/s/ Gary N. Schepps
Gary N. Schepps
State Bar No. 00791608
Drawer 670804
Dallas, Texas 75367
(214) 210-5940
(214) 347-4031 Facsimile
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