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Jeffrey Baron

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

NETSPHERE, INC.,	§	
MANILA INDUSTRIES, INC.,	§	
AND MUNISH KRISHAN	§	
	§	
PLAINTIFFS,	§	DIST. CASE NO. 3:12CV4489-L
	§	
V.	§	BANKR. CASE NO. 09-34784
	§	
JEFFREY BARON AND	§	EMERGENCY RELIEF REQUESTED
ONDOVA LIMITED COMPANY,	§	
	§	
DEFENDANTS.	§	

JEFFREY BARON’S EMERGENCY MOTION FOR STAY PENDING APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

Jeffrey Baron (“Baron”) Appellant, files this Emergency Motion for Stay Pending Appeal and would show this Court as follows:

1. Yesterday, November 7, 2012, there was a special oral argument heard in the Fifth Circuit regarding the assets at issue in this appeal. The Fifth Circuit expressed significant concern over the liquidation of these assets on the eve of the Fifth Circuit taking up the appeal regarding these assets. This motion, to stay the liquidation of the assets pending appeal, has been

anticipated by the Court of Appeals, and if granted, will preserve the Appellate Court's jurisdiction over the property at issue, so that the Court of Appeals, may enter a ruling on the substantive matters on appeal. If the instant motion is granted by this Honorable Court, resolution of the appeal pending before the Fifth Circuit will resolve this appeal.

2. In a Motion for an Order Approving Proposed Auction Procedures, the Trustee in this case sought an order from the Bankruptcy Court authorizing the sale, pursuant to 11 U.S.C. §363 of the two large domain name portfolios owned by Novo Point, L.L.C. and Quantec, L.L.C. Mr. Baron was effectively unrepresented when the Trustee filed this motion. Exhibit A, Declaration of Jeffrey Baron.

3. Neither Novo Point nor Quantec are debtors in this case.

4. Neither Novo Point nor Quantec have been substantively consolidated into this case.

5. The subject domain portfolios that the Trustee is proposing to sell by auction are not property of the bankruptcy estate.

6. Part of the proposed Motion to Sell includes a proposed "Stalking Horse Offer" of \$4,100,000.00. That offer is approximately one sixteenth of the fair market value of the two portfolios. Simply stated, the Receiver wants to auction \$65,000,000 in assets with a starting bid of \$4.1 million.

7. The proposed auction procedure suffered from a number of fatal defects, including, without limitation, an attempt to sell non-estate assets, a failure to provide constitutional due process to Mr. Baron, a lack of adequate pre-auction marketing, a prohibitively high escrow demand simply to come to Dallas and inspect the domain names and related information, and limiting the ability of potential bidders to conduct meaningful pre-sale due diligence. Bargain

hunters and speculators may well bid on the portfolio, but the pool of qualified bidders, both nationally and internationally, has been limited by an auction run by lawyers, and not by professional domain name brokers.

8. On September 27, 2012, the Bankruptcy Court heard arguments regarding the motion to sell. No evidence in support of the why the proposed sale was necessary or appropriate was offered or received. Similarly, no evidence in support of why non-estate assets should be sold was offered or received.

9. Despite the lack of evidence supporting the Trustee's motion, on October 26, 2011, the Bankruptcy Court entered an Order Granting Trustee's motion.

10. On November 6, 2012, Jeffrey Baron timely filed a notice of appeal of the Order.

11. Jeffrey Baron sought a stay pending appeal from Judge Jernigan. In his motion, Baron argued that: (a) the Receiver had violated the Bankruptcy Court's Expedited Scheduling Order, which impaired Baron's ability to prepare for depositions and the confirmation hearing; (b) that the Bankruptcy Court lacked jurisdiction over the domain names as sales of property cannot be sold unless it is property "of the estate"; (c) there was no valuation conducted of the Portfolios prior to sale despite the Receiver's long established practice of obtaining valuations of other domain names sold from these portfolios in this litigation; (c) The Stalking Horse Bid was a small fraction of the real values of the two portfolios, and sale of the portfolios would result in loss of tens of millions of dollars to the Estate; and (d) the Stalking Horse Bidder interfered with the litigation process by threatening to withdraw his bid if Baron's attorney received electronic evidence, even under an Attorneys Eyes Only protective order [Dist. Doc. 1070 at 3]. Baron is a creditor and non-debtor of the Estate. While a written order has not been filed, Judge Jernigan

denied Baron's motion for stay pending appeal.

12. Jeffrey Baron seeks a stay pending appeal before this court pursuant to Bankruptcy Rule 8005. The criteria for a stay pursuant to Rule 8005 are well established. The Movant must show: (1) likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) absence of substantial harm to the other parties from granting the stay; and (4) service to the public interest from granting the stay. *Hunt v. Bankers Trust Co.*, 799 F. 2d 1060, 1067 (5th Cir. 1986). With regard to the likelihood of success prong, a movant should only have to present a substantial case on the merits. *S.C. of Okaloosa, Inc.*, 2006 U.S. Dist. LEXIS 57187 (W.D. La. 2006).

13. As this Motion is filed, Mr. Baron has not yet filed his statement of issues on appeal. Without limiting the issues to be presented on appeal, there are substantial legal questions presented including, but not limited to whether the Court has jurisdiction over the domain name portfolios being sold or whether the pending appeal of the receivership orders to the Fifth Circuit Court of Appeals deprives this court of jurisdiction to sell the assets, whether the Bankruptcy Court has jurisdiction over non-debtor assets (i.e. the domain name portfolios), and whether the court erred in granting a sale of assets without taking any evidence on the need for the auction, the commercial reasonableness of the Stalking Horse bid of \$4.1 million, the need for a full valuation of the assets prior to the auction, the marketing plan and adequacy of notice to potentially qualified bidders in the domain name market, the limitations on type and format information provided to potential qualified bidders (excluding electronic information), the excessive escrow amount of \$500,000 required for a qualified bidder to be allowed inspection of a list of 153,000 domain names and then be required to conduct due diligence within the

relatively brief time period allowed between access to the domain name list and the November 9, 2012 auction date, the severe loss that would be incurred if the domain name portfolios were sold in one “batch” versus sale as individual or smaller groups of domain names over a longer period of time, there was no immediate need to sell the domain name portfolios, whether limitations on expedited discovery deprived Jeffrey Baron of due process, the Stalking Horse bidder is not a bona fide purchaser and has interfered with discovery in the instant case, and that the value of the portfolios would not decline if the auction were deferred to later date.

14. The Court has authorized the sale of an asset which does not belong to the Estate and is the property of a non-debtor.

15. **Likelihood of Success.** The Trustee did not present evidence at the hearing to approve an auction of the domain names, but simply relied on the argument of counsel. The Trustee and the Receiver acknowledge that the Novo Point and Quantec portfolios are property of the Receivership and propose a Plan to transfer the portfolios into the Estate to pay Mr. Sherman’s legal fees. The Trustee did not present evidence showing that he had a *right* to sell the property of a non-debtor, that such a sale should be conducted outside the ordinary course of business, or that there was a need to sell the entire group of more than 153,000 domain names this week for the Stalking Horse bid starting at \$4.1 million, rather than sell the domain names in three months, or over a period of an extended period of time to obtain the fair market value of the estate.

It is well-established that a Bankruptcy Court may not order the sale, under §363 of the Bankruptcy Code, of assets which are not property of the estate. *Moldo v. Clark (In re Clark)*, 266 B.R. 163, 172 (B.A.P 9th Cir. 2001). It is a necessary predicate to any proposed §363 sale

that the representative of the bankruptcy estate establish that the property sought to be sold is, in fact, property of the estate. *In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974, *4 (Bankr. Del. 2008) (“A bankruptcy court may not allow the sale of property as “property of the estate” without first determining whether the property is property of the estate.”)

The Receiver’s Motion to Approve Auction Procedures in this case was not a mere procedural formality, as it started an extremely short, expedited process to selling off the portfolios at a minimum bid price and through procedures that essentially guarantee that the sale of the assets will not reach a broad market of buyers. The process also limits the number of qualified bidders by limiting potential domain name buyers from obtaining electronic information that would enable them to make an informed decision about the value of the portfolios. In an internet age, it is absurd to require bidders to come to a Dallas law firm office to rummage through 153,000 domain names in an attempt to determine the value of the portfolio. Discovery of 153,000 domain names and valuing them without electronic information was designed to frustrate Mr. Baron’s ability to oppose the sale with a fully informed expert who had sufficient time to value the portfolio.

Neither the Receiver nor the Trustee obtained a valuation of the portfolio, despite the fact that the Receiver routinely obtained a valuation of about 200 domain names sold prior to the proposed auction. As set out in Exhibit B, Damon Nelson obtained valuations in motions to approve the sale of property, using valuation services such as Estibot and Sedo.com. As to the Stalking Horse Bid, the \$4.1 million starting bid is a tiny fraction of the real value. Using Sedo and Estibot valuations, an expert from Sedo.com values the portfolios at \$65,000,000. There is no principled reason that the Receiver failed to obtain a valuation before rushing to sell assets

that are sixteen (16) times higher than the Stalking Horse Bid. Exhibit C, Declaration of Jay Finnan. Moreover, there is no principled reason that the entire portfolio has to be sold to satisfy the Estate's estimated liabilities of \$2.2 million. The Receiver's failure to get a valuation is explained quite simply---he did not want a valuation of the fair market value of the domain names because his direction from the Court was to close the receivership by the end of the year. Exhibit D, P. Vogel Deposition. Even *assuming* that one gives the Receiver the benefit of the doubt, failure to follow one's own procedures to value the domain names before selling them casts serious doubt on selling an asset in a commercially reasonable way at a fair market value.

16. **Irreparable injury to Jeffrey Baron.** Mr. Baron has a beneficial interest in the Novo Point and Quantec portfolios and, under the Plan, will receive the proceeds of any sale after payment to creditors. As such, he is directly impacted by any sale of the non-debtor portfolios. The likelihood of achieving anything close to fair market value for the portfolios is remote, and would likely result in a loss measured in the tens of millions.

17. As demonstrated in the record of hearing before the Court, and Jeffrey Baron's objections to the Chapter 11 Plan and Motion to Strike or to Continue Auction (Document No. 895, filed under seal), the \$4.1 million Stalking bid *grossly understates* the value of the Novo Point and Quantec portfolios and that the value of the domain names will not decline over the short term period of six months or a year. Exhibit C, Declaration of Jay Finnan. Should the Trustee sell the domain names and it is later determined, as Mr. Baron alleges, that the Trustee cannot sell the property of a non-debtor, or that the auction procedures limited and/or chilled the number of qualified bidders able to participate in the auction, and/or that the conduct of the Stalking Horse bidder interfered and compromised the judicial process leading up to the auction,

Mr. Baron will have no remedy for his loss. Mr. Baron can only be made whole through the rightful return of the domain names to Novo Point and Quantec.

In sum, Mr. Baron was denied *due process* when an auction order was issued without any evidence or testimony supporting the *need* for an auction or evidence supporting a *starting bid* of \$4.1 million. There was no valuation conducted of the assets before the Receiver and Trustee sought to sell the property. [Bk. Doc. 895 at 7]. The sequence of events is structured in such a way as to deny, or have the effect of denying Mr. Baron the fundamental right to appeal a taking of property without due process, as guaranteed by the Fifth Amendment to the United States Constitution. There is also a risk that, if the auction and sale is allowed to go forward and is approved by the bankruptcy court, Section 363(b) of the Bankruptcy Code will *bar* any recovery of the domain names act to deprive Mr. Baron of the right to appeal the legitimacy of the auction and sale. This Court can stay and continue a date for the auction or stay the finality of any sale until this Court's approval.

18. No substantial harm to interested parties. For the same reasons as stated above, the attorneys and the Estate have little risk of actual loss. Because the domain names belong to Novo Point and Quantec, the Estate will have suffered no loss as it did not have any ownership rights in the first instance. Because the value of the domain names will not decline in the short term, no harm will occur to the Estate.

19. No harm to the public interest. There is a significant public interest to this court's decision whether to grant or deny the requested stay. It is not in the interest of the public to sell a non-debtor's property where, as here, the primary purpose of sale of the assets is to pay the Trustee's legal fees.

WHEREFORE, PREMISES CONSIDERED, Jeffrey Baron prays that this Court grant his Motion for Stay Pending Appeal and for such other and further relief to which it may show himself justly entitled.

Dated: November 8, 2011

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF SERVICE

This is to certify that, on November 8, 2012, a copy of the above was served on all counsel of record through the Court's ECF filing system.

/s/ Stephen R. Cochell
Stephen R. Cochell