

Case No. 13-10120

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor.

PETFINDERS, L.L.C.,

Appellant

v.

CHAPTER 11 TRUSTEE DANIEL J. SHERMAN,

Appellee

Cons. w/ 13-10121

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor.

JEFFREY BARON,

Appellant

v.

DANIEL J. SHERMAN,

Appellee

Cons. w/ 13-10122

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor.

GARY N. SCHEPPS,

Appellant

v.

DANIEL J. SHERMAN, Chapter 11 Trustee

Appellee

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division,
The Honorable Royal Ferguson, Presiding

APPELLEE'S MOTION TO SUPPLEMENT RECORD

Raymond J. Urbanik, Esq.
Isaac J. Brown, Esq.
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ATTORNEYS FOR APPELLEE

Pursuant to Rule 10 and 32 of the Federal Rules of Appellate Procedure, Appellee Daniel J. Sherman moves to supplement the record with the attached Exhibits “APSR A” through “APSR F” as Appellee’s Supplemental Record (“APSR”). In support, Appellee would respectfully state as follows:

1. After reviewing the Appellant’s Motion to supplement Record filed on April 3, 2014, and reviewing the evidence currently before the Court on the Record, Appellee believes the Record is still incomplete with respect to the 2013 sale of the Internet domain name, Servers.com.

2. Attached are the following documents:¹

APSR A: Order Approving Trustee’s Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures. September 24, 2013, Dkt. No. 1122.

APSR B: Notice of Appeal of Order Approving Trustee’s Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures. October 7, 2013, Dkt. No. 1124.

APSR C: Final Order Approving Trustee’s Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures. November 6, 2013, Dkt. No. 1135.

¹ Docket numbers for APSR A through C are from the underlying bankruptcy case in the Bankruptcy Court for the Northern District of Texas, No. 09-34784-SGJ.

APSR D: Order denying Baron’s request for a stay. Fifth Circuit, No. 13-10121. November 1, 2013.

APSR E: Trustee’s Original Complaint. Bankruptcy Court for the Northern District of Texas (“Bankruptcy Court”), No. 11-03181. March 22, 2011, Dkt. No. 1.

APSR F: Trustee’s First Amended Complaint. Bankruptcy Court, No. 11-03181. July 7, 2011, Dkt. No. 54.

3. The documents are material to this appeal as they are needed to present the Court with the entire set of circumstances and actions taken by the Bankruptcy Court related to the sale of Servers.com. Nothing contained therein is prejudicial to Appellant.

WHEREFORE, premises considered, the Trustee respectfully requests that this Court accept the attached documents as a supplement to the record on appeal and/or take judicial notice of the same.

Respectfully submitted this 12th day of May, 2014.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Raymond J. Urbanik
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**ATTORNEYS FOR APELLEE,
DANIEL J. SHERMAN**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 12th day of May, 2014, he caused a true and correct copy of this Motion to be served on all parties requesting electronic notice via this Court's ECF system.

By: /s/ Raymond J. Urbanik
Raymond J. Urbanik, Esq.

CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he contacted Stephen R. Cochell to determine if Appellant consented to or opposed this Motion on May 12th, 2014. Mr. Cochell has not responded as of the time this Motion was filed.

/s/ Raymond J. Urbanik
Raymond J. Urbanik, Esq.

APSR A



U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK

THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed September 20, 2013

United States Bankruptcy Judge

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

In re:

ONDOVA LIMITED COMPANY,

Debtor.

§
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§
§
§

Case No. 09-34784-SGJ
(Chapter 11)

**ORDER APPROVING TRUSTEE'S MOTION FOR (A) AUTHORITY TO
SELL PROPERTY OF THE ESTATE PURSUANT TO 11 U.S.C. § 363(B)
AND (B) FOR APPROVAL OF SALE PROCEDURES**

Came on for consideration the Trustee's Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures ("Motion") filed on August 14, 2013 [Docket No. 1110], by Daniel J. Sherman, Chapter 11 Trustee ("Trustee") for Ondova Limited Company ("Ondova" or "Debtor"), which Motion seeks authority to sell the internet domain name "servers.com" ("Domain Name" or "Asset") to proposed purchaser XBT Holdings, Ltd., or an affiliate thereof ("Purchaser"), for the sale price of \$300,000.00, which offer has been designated as a stalking horse bid by the Trustee, subject to higher and better bids, if any, and this Court having considered the Motion, the arguments and representations of the

parties, and the evidentiary record before it, finds and concludes that¹: (i) the relief requested in the Motion, including the sale procedures proposed therein (“Sale Procedures”), which include, *inter alia*, a four (4) week period for the Trustee to market the Domain Name, are fair, reasonable, appropriate and designed to maximize the value of the Asset to be sold by the Trustee as proposed therein; (ii) the Purchaser, having submitted an offer of \$300,000.00 shall be designated stalking horse bidder and the proposed \$20,000.00 breakup fee to be paid to Purchaser, if Purchaser is not the high bidder at an auction sale if an auction is conducted by the Trustee, is in all respects approved; (iii) the Trustee has exercised his sound business judgment in determining to sell the Asset to the Purchaser as set forth in the Motion and pursuant to the Sale Procedures; (iv) the Trustee has formulated the Sale Procedures in good faith for the purpose of maximizing the value of the Asset; (v) due and adequate notice of the Motion has been given to all creditors and parties in interest and no other or further notice is necessary; (vi) the proposed Purchaser is a disinterested party not in any way connected to the Debtor, the Trustee or any party-in-interest and therefore is entitled to the protections of 11 U.S.C. § 363(m); and (vii) after due deliberation thereon and for all of the reasons stated by the Court on the record, good and sufficient cause exists to grant the relief set forth herein as being in the best interests of the estate and this estate’s creditors. Accordingly, it is hereby

ORDERED that as provided under 11 USC Section 363(b) and (f), the sale of the Domain Name is a reasonable exercise of the Trustee’s judgment, is based on a sound business justification and should be approved. This Court approves the Motion to sell the Domain Name to Purchaser, or, alternatively, the winning bidder in the event an auction sale is conducted, under the terms and conditions set forth in the Motion free and clear of all liens, claims and encumbrances with any liens, claims and encumbrances attaching to the proceeds of the sale. It is further

¹ Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. P. 7052.

ORDERED for the reasons stated on the record and in this Order, all objections to the relief requested in the Motion are overruled in their entirety. It is further

ORDERED specifically that the Objection of Jeffrey Baron to Trustee's Motion to Sell Servers.com filed on September 7, 2013 ("Objection") [Docket No. 1115] is denied and overruled in its entirety. This Court, having considered all of the evidence presented, including the testimony of the Trustee and Jeffrey Baron ("Baron"), has determined that the record supports approval for the Motion in all respects. Baron, the former president of Ondova, asserting a reversionary interest in the Domain Name which would in essence convey to him personally proceeds from the sale of the Domain Name, failed to meet the necessary burden of proof under 11 USC § 363(p). Baron's claim of a reversionary interest, which he testified was granted to him on July 7, 2009, shortly before the Ondova Chapter 11 filing date of July 26, 2009, would be, at best, a claim subject to a bona fide dispute and the Court may proceed with the sale of the Domain Name pursuant to 11 U.S.C. § 363(b), (f) and (p). This Court notes that any party seeking to object to a sale of assets holds the burden of proof pursuant to 11 U.S.C. § 363(p) and based on the evidence presented at the hearing, Baron failed to meet his burden of proof as to any claim in and to the Domain Name. Regardless, this Court may sell an asset to which there is a bona fide dispute under 11 U.S.C. § 363(f) and in the event that there is a claim against such asset, such claim attaches to the proceeds to the same extent that they have validity against the actual asset. Finally, this Court was advised that John H. Litzler, the Chapter 7 bankruptcy trustee over Baron (Baron is a debtor in a pending Chapter 7 case before this Court) reached an agreement with the Trustee which allows Litzler to investigate whether Baron holds any legitimate claim or right with respect to the Domain Name. That agreement allows Litzler until October 31, 2013, to assert such claim, with such deadline being subject to extension by agreement of the parties. It is further

ORDERED that the Court finds that the Purchaser is a good faith purchaser for value and if the Purchaser is ultimately determined to be the winning bidder for the Domain Name, it

shall be entitled to all of the protections of § 363(m) of the Bankruptcy Code. Additionally the proposed break-up fee of \$20,000.00 is approved and under certain conditions as described in the Motion, may possibly be increased by order of this Court.² It is further

ORDERED that the Trustee shall proceed with the sale efforts for the Domain Name pursuant to the Sale Procedures (a copy of which are attached as Exhibit "A"), which procedures are hereby approved. The Trustee is authorized to take any and all actions necessary or appropriate to implement the Sale Procedures including, but not limited to, advertising the Domain Name for purchase by auction sale in publications and internet websites as determined by the Trustee, and in the event qualified bidders are located, thereafter conducting an auction sale, which the Trustee has scheduled for October 29, 2013 at 2 p.m. Central time, in accordance therewith. It is further

ORDERED that the sale hearing to consider final approval of the sale of the Domain Name to the successful bidder as purchaser shall occur on **November 4, 2013, at 2:30 p.m.** prevailing Central time ("Sale Hearing"). It is further

ORDERED that the Trustee's proposed Notice of Sale (a copy of which is attached hereto as Exhibit "B") and the Sale Procedures are hereby approved and the Trustee shall cause such Notice of Sale, the Sale Procedures and this Order to be served or filed as follows: (1) filed on the docket of this case; (2) served on all parties who have requested notice in this bankruptcy case pursuant to Rule 2002; (3) the United States Trustee, (4) Peter Vogel, the Receiver for Jeffrey Baron and his counsel, (5) John Litzler, the Chapter 7 Trustee for Jeffrey Baron and his counsel; (6) filed on the docket of the Baron Chapter 7 case; and (7) all parties whom the Trustee believes may be potential purchasers of the Domain Name (all collectively, the "Notice Parties"). It is further

² The Purchaser may seek a higher break-up fee if it is required to expend professional fees caused by any parties who might create additional delay or expense with respect to the Court approved sales process. Any increase in the break-up fee will be determined by this Court.

ORDERED that following the conclusion of the auction, the Trustee shall file and serve upon all Notice Parties, as well as any qualified bidders, notice of the auction results if an auction does occur or, alternatively, a notice that no auction sale was conducted, with such a notice to be filed by 5:00 p.m. Central time on October 31, 2013 ("Sale Notice"). The Sale Notice shall inform parties in interest of the intention to have this Court approve the sale of the Domain Name to the Purchaser, or other successful bidder, at the Sale Hearing. It is further

ORDERED that any objection to the sale of the Domain Name to the Purchaser or other successful bidder shall be in writing and shall set forth the basis of the objection and shall be filed with the bankruptcy court and served upon the Trustee so as to be received on or before November 1, 2013 at 5 p.m. Central time. It is further

ORDERED that this Court shall retain exclusive jurisdiction over matters related to or arising from the implementation of this Order including, but not limited to, any claim, matter or dispute arising from or relating to the Sale Procedures, the proposed sale or the implementation of this Order.

IT IS SO ORDERED.

END OF ORDER

Order Submitted by:

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APSR B

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(713)980-1179 (facsimile)
srcochell@cochellfirm.com

Attorneys for Jeffrey Baron

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE: §
§
ONDOVA LIMITED COMPANY, § **Case. No. 09-34784-SGJ**
§
Debtor. §

**NOTICE OF APPEAL OF ORDER APPROVING TRUSTEE’S MOTION FOR (A)
AUTHORITY TO SELL PROPERTY OF THE ESTATE PURSUANT TO 11 U.S.C. § 363(B)
AND (B) FOR APPROVAL OF SALE PROCEDURES**

Jeffrey Baron, files this Notice of Appeal to the United States District Court for the Northern District of Texas, Dallas Division, under 28 U.S.C. § 158 from the Order: Order Approving Trustee’s Motion For (A) Authority to Sell Property of the Estate Pursuant To 11 U.S.C. § 363(B) and (B) for Approval of Sale Procedures [Docket 1122].

The names of all parties to the order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Appellant: Jeffrey Baron,

Represented by: Stephen R. Cochell
The Cochell Law Firm, P.C.
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Appellee: Daniel Sherman

Represented by:

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E-mail: rurbanik@munsch.com

Very respectfully,

/s/ Stephen Cochell
Stephen R. Cochell
The Cochell Law Firm
Texas Bar No. 24044255

CERTIFICATE OF SERVICE

This is to certify that, on October 7, 2013, a copy of this document was served on all counsel through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen Cochell

APSR C



U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK

THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed November 6, 2013

United States Bankruptcy Judge

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

In re:

ONDOVA LIMITED COMPANY,

Debtor.

§
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§
§

Case No. 09-34784-SGJ
(Chapter 11)

**FINAL ORDER APPROVING TRUSTEE'S MOTION FOR (A) AUTHORITY TO
SELL PROPERTY OF THE ESTATE PURSUANT TO 11 U.S.C. § 363(B)
AND (B) FOR APPROVAL OF SALE PROCEDURES**

At Dallas, Texas, in said District, on the fourth day of November, 2013, came on for consideration the Trustee's Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures (the "Motion") filed on August 14, 2013 [Docket No. 1110], by Daniel J. Sherman, Chapter 11 Trustee (the "Trustee") for Ondova Limited Company ("Ondova" or "Debtor"). Upon consideration of the Motion, the presentations of counsel and the record before it, this Court finds and concludes as follows¹:

1. The Debtor filed its Voluntary Petition pursuant to Chapter 11 of the United States Bankruptcy Code on July 27, 2009 (the "Petition Date"). The Trustee was appointed pursuant to an order of this Court dated September 17, 2009.

¹ To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent any conclusions of law constitute findings of fact, they are adopted as such.

2. On August 14, 2013, the Trustee filed the Motion seeking to sell the estate's interest in and to the internet domain name "servers.com" (the "Domain Name") free and clear of all liens, claims and encumbrances to XBT Holdings, Ltd., or an affiliate thereof (the "Purchaser"), for the sales price of \$300,000.00 subject to higher and better bids. The Motion also requested Court approval for certain sale and auction procedures to allow the Trustee the ability to market the Domain Name in order to determine whether there might be higher or better offers for the Domain Name.

3. Prior to the filing of the Motion, the Trustee and Purchaser had entered into an agreement, subject to higher and better bids and subject to Bankruptcy Court approval, for the sale of the Domain Name for \$300,000, and the Purchaser placed a \$40,000 deposit with the Trustee. The Purchaser is a web hosting business based in Europe with extensive operations in the United States.

4. The Court conducted an initial hearing on the Motion on September 10, 2013, and thereafter entered the Order Approving Trustee's Motion for (A) Authority to Sell Property of the Estate Pursuant to 11 U.S.C. § 363(b) and (B) for Approval of Sale Procedures (the "Order") [Docket No. 1122] on September 20, 2013. The Order required anyone objecting to the sale (either to a higher and better bidder resulting from an auction sale or to the initial Purchaser) to file an objection by November 1, 2013, at 5:00 p.m. Central Time.

5. The Court notes that no objections were filed by the November 1, 2013, deadline.

6. Pursuant to the Order, this Court approved certain procedures in order to allow the Trustee an opportunity to market the Domain Name. The Order also approved an auction process in the event interested parties contacted the Trustee with a bona fide interest in participating in an auction to purchase the Domain Name.

7. Thereafter, the Trustee commenced an extensive marketing process that included advertising the Domain Name for sale on targeted websites. Based on the evidence presented, the Trustee focused marketing efforts on: (a) websites aimed at the employees and

management of larger technology companies, such as the chief technology officer or chief information officer, in an effort to disseminate information regarding the Domain Name to companies that provide cloud computing, business web hosting or that are actual computer server manufacturers; (b) websites catering to the web hosting industry (the same industry as the Purchaser); and (c) websites catering to domain name investors.

8. The Trustee also directly contacted all parties who had previously expressed an interest in the Domain Name, a number of larger technology companies and a number of leading businesses involved in brokering domain name sales. Notwithstanding the extensive marketing efforts, the Trustee was not approached by any parties which had an interest in participating in an auction for the Domain Name. Accordingly, no auction was conducted by the Trustee.

9. The Trustee now seeks approval from this Court to proceed with the sale of the Domain Name to the Purchaser for the sum of \$300,000. The purchase price of \$300,000 (the "Purchase Price") constitutes the highest and best offer received by the Trustee for the Domain Name. The Purchase Price is fair and reasonable consideration for the Domain Name, was negotiated at arms' length, is in the best interest of the Debtor's estate and constitutes reasonably equivalent value. With respect to the Purchase Price, the Court notes that previous sale efforts were unsuccessful. The Trustee reminded the Court that Sedo.com was initially employed in 2011 to sell the Domain Name and that during the approximately one year period it was employed by the Ondova estate the highest offer ever received by Sedo.com was \$150,000.00.

10. The Purchaser has no connection to Ondova, the Trustee, Jeffrey Baron, entities related to Mr. Baron or any other party connected to this case. The Court believes the Purchaser is a good faith purchaser within the meaning of § 363(m) of the Bankruptcy Code and shall be entitled to all protections contained therein.

NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and this matter is a core proceeding under 28 U.S.C. § 157.

2. This Court finds that service of the Motion was proper and in compliance with the local rules for the Northern District of Texas.

3. As noted above, this Court previously set a deadline of November 1, 2013, at 5:00 p.m. Central Time and the Court's review of the docket shows that no objections were filed by any party by 5:00 p.m. on November 1, 2013.

4. This Court previously overruled an objection brought by Jeffrey Baron at the hearing which took place on September 10, 2013. Additionally, the Court was advised at the hearing that the Chapter 7 Trustee over the Jeffrey Baron case, John H. Litzler, does not object to the sale of the Domain Name and does assert a claim to the proceeds of the Domain Name.

5. Based on all the evidence presented, the Court believes that the Trustee's request to sell the Domain Name to the Purchaser is an exercise of his reasonable business judgment and the Trustee has demonstrated a sound business justification for the sale of the Domain Name. The Court therefore believes that the sale of the Domain Name should be approved pursuant to 11 U.S.C. § 363.

6. Pursuant to the Order and this Final Order, the Motion is approved and the Purchaser is hereby approved as the Purchaser of the Domain Name. The sale of the Domain Name to the Purchaser for \$300,000 is approved and the Domain Name shall be promptly conveyed to the Purchaser as soon as the sale is closed and the balance of the Purchase Price is paid to the Trustee.

7. The Purchaser is purchasing the Domain Name in good faith and is a good faith purchaser of the Domain Name within the meaning of § 363(m) of the Bankruptcy Code and therefore is entitled to all of the protections afforded by that provision. The Purchaser and its representatives have proceeded in good faith in all respects in connection with the sale and the sales process. The sale of the Domain Name was negotiated at arms' length and conducted

pursuant to commercially reasonable procedures previously approved by this Court designed to maximize the value of the Domain Name. The Purchaser is not in any way an “insider” as that term is defined by § 101 of the Bankruptcy Code.

8. The transfer of the Domain Name to the Purchaser under the Purchase Agreement negotiated between the Trustee and the Purchaser will constitute a legal, valid and effective transfer of the Domain Name and will vest the Purchaser with all right, title and interest of the Debtor in and to the Domain Name free and clear of all liens, claims and encumbrances of any kind or nature whatsoever whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated or unliquidated, asserted or unasserted and whether arising prior to or after the Petition Date and whether imposed by agreement, law, equity or otherwise at any time prior to the date of the closing on the sale of the Domain Name. Any and all such liens, claims and encumbrances, if any, shall attach to the proceeds of the Domain Name with the same extent, enforceability and priority as they have attached to the Domain Name previously and therefore all holders of any such liens, claims and encumbrances are adequately protected thereby.

9. This Court retains jurisdiction pursuant to its statutory powers under 28 U.S.C. § 157(b)(2) to, among other things, interpret, implement and enforce the provisions of the Order, this Final Order, the Purchase Agreement and any and all other matters related to the sale and transfer of the Domain Name. Any and all matters related to the sale and transfer of the Domain Name by the Debtor to the Purchaser shall be adjudicated exclusively by this Court.

10. No stay shall apply to the effectiveness of this order upon entry. Rather, the fourteen-day stay of this order provided under Fed. R. Bankr. P. 6004(h), or any other rule, is hereby expressly waived for all purposes and the parties are hereby authorized to promptly close and consummate the sale of the Domain Name upon entry of this order.

IT IS SO ORDERED.

END OF ORDER

Order Submitted by:

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APSR D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 13-10120

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor

PETFINDERS, L.L.C.,

Appellant

v.

CHAPTER 11 TRUSTEE DANIEL J. SHERMAN,

Appellee

Cons. w/13-10121

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor

JEFFREY BARON,

Appellant

v.

DANIEL J. SHERMAN,

Appellee

Cons. w/13-10122

In the Matter of: ONDOVA LIMITED COMPANY,

Debtor

GARY N. SCHEPPS,

Appellant

v.

DANIEL J. SHERMAN, Chapter 11 Trustee,

Appellee

Appeals from the United States District Court for the
Northern District of Texas, Dallas

Before DAVIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opposed motion of appellant Jeffrey Baron for stay pending appeal in case 13-10121 is DENIED.

APSR E

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Richard Hunt
Texas Bar No. 10288700
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ATTORNEYS FOR DANIEL J. SHERMAN,
CHAPTER 11 TRUSTEE

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

In re:	§	
	§	Case No. 09-34784-SGJ
ONDOVA LIMITED COMPANY,	§	(Chapter 11)
	§	
Debtor.	§	
<hr/>		
DANIEL J. SHERMAN,	§	
CHAPTER 11 TRUSTEE	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary Proc. No. _____
	§	
MIKE EMKE, CONRAD HERRING and	§	
SERVERS, INC.	§	
	§	
Defendant.	§	

TRUSTEE'S ORIGINAL COMPLAINT

TO THE HONORABLE STACEY G. C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW Daniel J. Sherman (the "Trustee"), the duly-appointed Chapter 11 trustee of Ondova Limited Company and the Plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), and files his *Original Complaint* against Mike Emke, Conrad Herring and Servers, Inc. (the "Complaint"), respectfully stating as follows:

I. PARTIES

1. The Trustee is the duly appointed Chapter 11 Trustee for the bankruptcy estate of Ondova Limited Company ("Ondova") in the above-captioned bankruptcy case (the "Bankruptcy Case").

2. Defendant Mike Emke ("Emke") is a resident of the State of California. Pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure, Emke may be served with process by mailing a copy of the Complaint and related summons via U.S. First Class Mail, postage prepaid, to his residence located at 1795 Rohnerville Rd., Fortuna, California 95540. A copy of the Complaint and related summons will also be sent to Emke's last-known counsel, Conrad Herring, 3525 Delmar Heights Road, #305, San Diego, California 92130.

3. Defendant Conrad Herring ("Herring") is a resident of the State of California. Pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure, Herring may be served with process by mailing a copy of the Complaint and related summons via U.S. First Class Mail, postage prepaid, to his office located at 3525 Delmar Heights Road, #305, San Diego, California 92130.

4. Defendant Servers, Inc. is a Nevada corporation. Pursuant to Rule 7004 of the Federal Rules of Bankruptcy Procedure, Servers, Inc. may be served with process by mailing a copy of the Complaint and related summons via U.S. First Class Mail, postage prepaid, to its Registered Agent, Corporation Makers, Inc., 1100 Salem Rose, Las Vegas, Nevada, 89144.

II. JURISDICTION AND VENUE

5. The Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. §§ 157 and 1334. The Adversary Proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (N), and/or (O).

6. Pursuant to 28 U.S.C. §§ 1408 and 1409, venue is proper in this District.

III. FACTUAL ALLEGATIONS

A. The Bankruptcy Case.

7. On July 27, 2009 (the "Petition Date"), Ondova filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), thereby initiating the Bankruptcy Case and creating Ondova's bankruptcy estate (the "Estate").

8. On September 17, 2009, the Court entered its order approving the appointment of the Trustee.

B. The Ondova's Ownership of Servers.com.

9. Prior to the Petition Date, Ondova, d/b/a Compana LLC, and Emke (the "Parties") were parties to a lawsuit styled *Emke v. Compana LLC, et al.*, Civil Action No. 3:06-CV-01416-O pending in the United States District Court for the Northern District of Texas (the "Lawsuit"). In the Lawsuit, the Parties disputed ownership of internet domain name "servers.com" (the "Domain Name").

10. On July 6, 2009 the Parties entered into a settlement agreement (the "Agreement"). A true and correct copy of the Agreement is attached hereto as "Exhibit A" and incorporated herein for all purposes. On the same day, the Lawsuit was dismissed pursuant to the terms of the Agreement. A copy of the dismissal is attached hereto as Exhibit "B".

C. The Terms of the Agreement and the Formation of Servers, Inc.

11. The Agreement contains the following material terms:

- (a) Emke and Ondova each own 50% of the Domain Name. (Agreement §1)
- (b) The Domain Name is to be transferred to a newly formed entity in which Emke and Ondova will each have a 50% interest. (Agreement §1)
- (c) Emke would, in exchange for a 10% revenue override, prepare a business plan for the newly formed entity to profit from the use of the Domain name, and operate the business under that plan. (Agreement §2)

12. Section VI of the Agreement also contains a cancellation provision (the "Cancellation Provision") giving either party a choice of three alternative remedies in the event of a disagreement about Emke's business plan and operations. The remedies are:

- (a) sell the business and/or the Domain Name and divide the revenues equally
- (b) have one party to buy out the other party "based on a best efforts [sic] to find a buyer at the highest possible price upon agreement between the parties"; or
- (c) submit their dispute to mediation and arbitration pursuant to the terms of section VII of the Agreement.¹

13. Section VI of the Agreement does not require a determination that one party or the other is correct concerning the management of the business – it gives either party an absolute right to compel the sale of the Domain Name in the event of a dispute.

14. On or about August 10, 2009, Emke had his attorney, Conrad Herring, incorporate Servers, Inc. as a Nevada S-Corp. Further, on information and belief, the Domain Name was transferred to Servers, Inc. on or about January 22, 2010, and has been held by Servers, Inc. since that time.

D. Emke's Failures to Perform Under the Agreement.

15. Although Emke's attorney, Herring, incorporated Servers, Inc. and the Domain Name was transferred to it, Emke did not carry out the provisions of the Agreement with respect to the formation of Servers, Inc. The most important failure was the failure of Servers, Inc. to issue shares to Ondova representing 50% of the shares of the company. In addition to this failure, Servers, Inc. failed, on information and belief, to conduct an initial shareholders meeting, elect a board of directors, adopt by-laws, elect officers, or otherwise prepare to do business. Based on information obtained by the Trustee, Herring is the sole officer and director of Servers, Inc. A copy of the Corporate Charter is attached hereto as Exhibit "C".

¹ Section VII of the Agreement is a mediation and arbitration provision that states, in pertinent part, that "[a]ny dispute under this agreement shall be subject first to mediation, and second to binding arbitration." The Trustee contends that such an arbitration provision is not enforceable under the circumstances and in light of *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997) and relevant case law interpreting that case.

16. In addition to failing to complete its initial organization, Servers, Inc. failed to comply with the requirements of the State of Nevada with respect to filing of franchise tax returns and related requirements and, therefore, was in default and subject to the possible revocation of its corporate charter. The Trustee took appropriate steps to advise Emke, Herring and Servers, Inc. (collectively, "Defendants") of their default which has only recently been remedied.

17. The Defendants have consistently failed to comply with their obligations under the Agreement to create a business plan and operate Servers, Inc. for the mutual benefit of Emke and Ondova. These failures include:

- (a) failed to produce and consult with and obtain Ondova's approval of a business plan.
- (b) failed to use "best efforts" to design and develop the Domain Name to serve as the sales and marketing platform for Servers, Inc. By way of example, and not limitation, there is no evidence that the Domain Name has generated, or will in the near future, generate any revenues or that it ever engaged in the business of PPC hosting.
- (c) failed to identify small web hosting companies as well as secure the financing to purchase the same.
- (d) failed to provide the management services for which Emke is to be compensated. By way of example, and not limitation, though Emke and/or Herring formed Servers, Inc. to own and operate the Domain Name, they have not even put forth the minimum effort required to ensure that Servers, Inc. is in good standing as a corporation in the State of Nevada.²
- (e) failed to provide an accounting of revenues from operation of the Domain Name as an ad site during portions of 2009 and 2010, failed to reimburse Ondova for the \$2,000 in operating costs funded by Ondova,³ and failed to tender to the Trustee Ondova's share of any ad site revenue.
- (f) failed to use "best efforts" to promote and develop the business, as evidenced by Emke's failure to develop a business plan (or even discuss a business plan with the Trustee), request operating capital, or generate revenues.

² Based on research conducted on March 18, 2011, Servers, Inc. is currently in default status with the Nevada Secretary of State.

³ In accordance with sections III and V of the Agreement, Ondova provided \$2,000 to Emke as start up capital (the "Start Up Funds"). See Agreement §§ III and V. The Start Up Funds were to be repaid to Ondova from the first profits of Servers, Inc. To date, Emke has not repaid the Start Up Funds.

18. With respect to matters concerning Emke's contractual obligations, his attorney, Herring, who is also the sole officer of Servers, Inc., acts as his agent. As a fiduciary of Servers, Inc., Herring is required to act in the best interests of Servers, Inc., which is an obligation that includes directing or requiring Emke to comply with his contractual obligations. The failure of Herring to require that Emke comply with his contractual obligations constitutes gross mismanagement in the conduct of the affairs of Servers, Inc. as that term is used in §78.650(b) of the Nevada Revised Statutes. Similarly, Herring's failure to act to protect Servers, Inc. and develop its assets constitute both misfeasance and nonfeasance as those terms are used in §78.650(c) of the Nevada Revised Statutes.

19. Herring's failure to act to require Emke to perform under the Agreement, or to hire someone to fulfill those obligations, has left Servers, Inc. unable to conduct its business or conserve its assets. Herring's failure constitutes acts, neglect and refusal to function as those terms are used in §78.650(d) of the Nevada Revised Statutes. As a result of his inaction and that of Emke, the assets of the corporation are in danger of waste, sacrifice or loss as those terms are used on §78.650(e) of the Nevada Revised Statutes.

20. Whether or not Herring has formally resigned as a director and been replaced by Emke, Emke is the de-facto sole director of Servers, Inc. and his conduct is in violation of §78.650(b-d) of the Nevada Revised Statutes.

21. The Domain Name is an extremely valuable asset, and certain third parties have expressed an interest in purchasing it from the Trustee. Based on Emke's consistent failure to perform the terms of the Agreement, the Trustee seeks to have the Domain Name sold pursuant to Section VI.1 of the Agreement. The Trustee has informed Emke of this election through calls and letters to both Emke and Herring.

22. In violation of his obligations under the Agreement, Emke has refused to cooperate with the Trustee regarding a sale of the Domain Name. In particular, Emke has made it clear that he will not cause Servers, Inc. to take the necessary steps to sell and

transfer the Domain Name to a buyer and that he will not permit the Trustee to take those steps on behalf of Servers, Inc.

23. In addition to, and notwithstanding the contractual obligation of Emke and Servers, Inc. to cooperate in the management and / or sale of the Domain Name, the sale of the Domain Name is necessary to the administration of the Estate. Even if Servers, Inc. were to generate revenue, there is no feasible way for the Trustee to keep the Estate open for years or decades merely to collect monthly payments. Effective administration of the Estate requires that Ondova's interest in the Domain Name be liquidated, and that liquidation can be accomplished only by a sale of the Domain Name and the distribution of the proceeds of sale.

E. The Domain Name can be Readily Sold and has Substantial Value.

24. There are well established means to sell domain names by auction or at private sale. For example, several different companies organize sales of domain names by public or private auction. The Trustee evaluated several such businesses and has concluded that several have the expertise and would be well suited to sell the Domain Name at the highest possible price. Such a sale would take place in a live auction or through a private sale in which the Trustee engages a broker for a private sale.

IV. CAUSES OF ACTION

COUNT 1: Declaratory Judgment as to ownership of Servers, Inc.

25. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 24 of the Complaint as if fully set forth here.

26. There is an actual controversy concerning the ownership of Servers, Inc. arising from the refusal of Emke and Herring to perform Emke's obligation under the Agreement to issue shares to the Trustee. The Trustee is entitled to a declaratory judgment pursuant to 28 U.S.C. §2201 that the Trustee is the beneficial owner of 50% of the shares of Servers, Inc. and is entitled to exercise all the rights of a shareholder.

COUNT 2: Breach of the Agreement – Damages.

27. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 24 of the Complaint as if fully set forth here.

28. As set forth in more detail above, Emke has breached the Agreement. As a result of his breach of the obligations to develop a business using the Domain Name and other failures, Ondova has suffered past damages equal to the profit that would have been earned had Emke fully performed. The Trustee is entitled to a judgment against Emke for damages in the amount of those lost profits, plus interest before judgment as provided by law.

COUNT 3: Breach of the Agreement – Specific Performance.

29. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 24 of the Complaint as if fully set forth here.

30. Emke's breach of his obligation to cooperate in the sale of the Domain Name is one that cannot be adequately compensated by an award of damages because (a) in the absence of a sale the Trustee will incur long term expenses of administration that cannot be calculated and (b) the Domain Name is an asset that, like real estate, has a unique value.

31. Emke's agent, Herring, has also refused to cooperate in the sale of the Domain Name and his cooperation is necessary because he is the sole officer and director of Servers, Inc.

32. The Trustee is entitled to a judgment of specific performance requiring that Emke and Herring cooperate in the sale of the Domain Name and be ordered to execute any documents necessary to transfer the Domain Name to the ultimate buyer.

COUNT 4: Dissolution of Servers, Inc. and Sale of the Domain Name Pursuant to Section 363(h) of the Bankruptcy Code.

33. The relief requested in this Count 3 is in the alternative to Count 2 and only if the same is denied.

34. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 24 of the Complaint as if fully set forth here.

35. Emke's and Herring's course of conduct and failure to perform Emke's obligations under the Agreement and their persistent refusal to cooperate in a sale of the Domain Name as required by the Agreement demonstrate that Emke has not performed, and in fact, never intended to perform his obligations under the Agreement. It is clear that Emke seeks to benefit himself personally by essentially holding for ransom his interest in the Domain Name. Notwithstanding months and months of effort, Emke has refused to participate in good faith negotiations.⁴ The Trustee believes that Servers, Inc. was itself formed to permit Emke to perpetrate a fraud.

36. Emke transferred the Domain Name to Servers, Inc. without issuing shares to Ondova, thus permitting Emke and Herring to remain in control of Servers, Inc. and the Domain Name. Emke's conduct transparently evidences he is merely trying to delay the Trustee's efforts for his own personal benefit. Herring's actions as sole officer and director of Servers, Inc. have assisted Emke in this conduct and the many breaches of the Agreement.

37. In addition, the conduct of Emke and Herring, satisfy the statutory grounds for dissolution of a corporation set out in paragraphs (b) through (d) of §78.650 of the Nevada Revised Statutes

38. Ondova is entitled under §78.650 of the Nevada Revised Statutes to a judicial dissolution and winding up of Servers, Inc. Because Servers, Inc. has never engaged in any business, has no third party debts and has only one asset, the Domain Name. This dissolution and winding up can be accomplished by a declaratory judgment that (a) Servers,

⁴ For example, notwithstanding his knowledge that the Domain Name has a very high appraised value, Emke offered to buy out the Trustee for \$15,000 in November, 2010. Conversely the Trustee has been proposing to sell the name and to split the proceeds 50/50 between Emke and the Estate for well over a year.

Inc. is dissolved and (b) the Trustee and Emke each own an 50% undivided interest in the Domain Name.

39. As the owner of an undivided interest in the Domain Name, the Trustee is entitled to sell the Domain Name pursuant to section 363(h) of the Bankruptcy Code. Section 363(h) provides that a trustee may sell property of the estate in which the debtor has an undivided interest as a tenant in common or joint tenant, "only if –

- (1) partition in kind of such property among the estate and such co-owner is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interest of such co-owners;
- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power."

11 U.S.C. § 363(h).

40. The first requirement of Section 363(h) is satisfied because it is impossible to partition a Domain Name. The second requirement is satisfied because no purchaser would consider buying ½ of a Domain Name because that is merely an invitation to litigation over management of the Domain Name.

41. The third requirement of Section 363(h) is satisfied because the benefit to the Estate from the sale of the Domain Name free and clear of Emke's interest clearly outweighs any detriment to Emke. Pursuant to section 363(j) of the Bankruptcy Code, Emke will receive his share of the proceeds from the sale of the Domain Name. In fact, because the Trustee has done all the work to arrange the sale of the Domain Name (subject to approval of the Court), Emke will have to do nothing more than receive a check in the mail after the Domain Name is sold.

42. Conversely, the Trustee is in the process of winding down the Estate and liquidating its remaining assets. Because the expenses of administration increase daily, every delay harms Ondova's creditors. Under the benefit-detriment analysis of Section 363(h), the Trustee should be permitted to sell the Domain Name.

43. Finally, the Domain Name is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

44. Based on the foregoing, the Trustee is entitled to a declaratory judgment that Servers, Inc. is dissolved, that the Trustee owns an undivided 50% interest in the Domain Name, and that the Trustee is entitled to sell the Domain Name under Section 363(h).

COUNT 5: Appointment of the Trustee as Receiver for Servers, Inc.

45. The relief requested in this Count 4 is in the alternative to the relief requested in Counts 2 and 3 and is requested only if the same is denied.

46. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 24 of the Complaint as if fully set forth here.

47. Section §78.650 of the Nevada Revised Statutes permits the Court to appoint a receiver to wind up the affairs of Servers, Inc. and distribute its assets to its shareholders. That section does not require that the receiver be a disinterested party, but instead provides that preference shall be given to any "directors or trustees who have been guilty of no negligence nor active breach of duty."

48. The Trustee has not been guilty of either negligence or active breach of duty and is therefore entitled to be appointed as receiver to wind up the affairs of Servers, Inc., including the sale of the Domain Name and the distribution of the proceeds to the shareholders, Emke and Ondova.

COUNT 6: Attorneys Fees.

49. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 43 of the Complaint as if fully set forth here.

50. Counts 1 and 2 above are claims for which attorneys fees may be recovered under Chapter 38 of the Texas Civil Practice & Remedies Code, and every condition precedent to the recovery of fees has occurred.

51. In addition to the relief requested in Counts 1 and 2 above, the Trustee is entitled to recover his reasonable and necessary attorneys fees herein from Emke.

V. MOTION FOR EMERGENCY RELIEF

52. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 46 of the Complaint as if fully set forth here.

53. In order to realize the maximum value from the sale of the Domain Name, it must be sold in an appropriate forum. The Trustee believes the most effective such forum is a live auction or sale of the Domain Name by a broker in a private sale. Every day of delay in the sale of the Domain Name and in the winding up of Servers, Inc. creates additional administrative expenses and delays the winding up of the Estate. This in turn harms Ondova's creditors, who must share in an asset pool that is being diminished by the ordinary expenses of administration.

54. Section §78.650 of the Nevada Revised Statutes provides that in an action to appoint a receiver the Court may, on five days notice, make a temporary appointment of a receiver. Under the circumstances it is appropriate for the Court to enter an order to show cause why a temporary receiver should not be appointed to market and sell the Domain Name on such terms as the receiver finds prudent pending the entry of an order for a permanent receiver, subject only to the Court's approval of any proposed sale.

VI. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Trustee respectfully requests that the Court enter judgment in favor of the Trustee: (a) awarding appropriate damages to the Trustee on account of Emke's breach of the Agreement; (b) ordering specific performance of Section VI

of the Agreement by ordering Emke and Herring to cooperate in the sale of the Domain Name, or in the alternative; (c) ordering the dissolution of Servers, Inc. and the distribution of its asset to the Trustee and Emke, followed by a sale under Section 363(h) or the Code; or, in the alternative (d) ordering the appointment of the Trustee as receiver to dissolve Servers, Inc. and liquidate its assets. In addition, the Trustee requests that the Court grant such other and further relief as to which he may show himself justly entitled.

Respectfully submitted this 22nd day of March, 2011.

MUNSCH HARDT KOPF & HARR, P.C.

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CHAPTER 11 TRUSTEE**

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ATTORNEYS FOR DANIEL J. SHERMAN,
CHAPTER 11 TRUSTEE

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

In re:	§	
	§	Case No. 09-34784-SGJ
ONDOVA LIMITED COMPANY,	§	(Chapter 11)
	§	
Debtor.	§	
<hr/>		
DANIEL J. SHERMAN,	§	
CHAPTER 11 TRUSTEE	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary Proc. No. 11-03181
	§	
MIKE EMKE and SERVERS, INC.	§	
	§	
Defendants.	§	

TRUSTEE'S FIRST AMENDED COMPLAINT

TO THE HONORABLE STACEY G. C. JERNIGAN, U.S. BANKRUPTCY JUDGE:

COMES NOW Daniel J. Sherman (the "Trustee"), the duly-appointed Chapter 11 trustee of Ondova Limited Company and the Plaintiff in the above-captioned adversary proceeding (the "Adversary Proceeding"), and files his *First Amended Complaint* against Mike Emke and Servers, Inc. (the "Complaint"), respectfully stating as follows:

I. PARTIES

1. The Trustee is the duly appointed Chapter 11 Trustee for the bankruptcy estate

of Ondova Limited Company ("Ondova") in the above-captioned bankruptcy case (the "Bankruptcy Case").

2. Defendant Mike Emke ("Emke") is a resident of the State of California. Emke has appeared.

3. Defendant Servers, Inc. is a Nevada corporation. Servers, Inc. has appeared.

II. JURISDICTION AND VENUE

4. The Court has jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. §§ 157 and 1334. The Adversary Proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (N), and/or (O).

5. Pursuant to 28 U.S.C. §§ 1408 and 1409, venue is proper in this District.

III. FACTUAL ALLEGATIONS

A. The Bankruptcy Case.

6. On July 27, 2009 (the "Petition Date"), Ondova filed its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"), thereby initiating the Bankruptcy Case and creating Ondova's bankruptcy estate (the "Estate").

7. On September 17, 2009, the Court entered its order approving the appointment of the Trustee.

B. Ondova's Ownership Interest in Servers.com.

8. Prior to the Petition Date, Ondova, d/b/a Compana LLC, and Emke (the "Parties") were parties to a lawsuit styled *Emke v. Compana LLC, et al.*, Civil Action No. 3:06-CV-01416-O pending in the United States District Court for the Northern District of Texas (the "Lawsuit"). In the Lawsuit, the Parties disputed ownership of the internet domain name "servers.com" (the "Domain Name").

9. On July 6, 2009 the Parties entered into a settlement agreement (the "Agreement"). A true and correct copy of the Agreement is attached hereto as Exhibit "A" and incorporated herein for all purposes. On the same day, the Lawsuit was dismissed pursuant to

the terms of the Agreement. A copy of the dismissal is attached hereto as Exhibit "B".

C. The Terms of the Agreement and the Formation of Servers, Inc.

10. The Agreement contains the following material terms:

- (a) Emke and Ondova stipulate that each owns 50% of the Domain Name. (Agreement §1).
- (b) The Domain Name is to be transferred to a newly formed entity in which Emke and Ondova will each have a 50% interest. (Agreement §1).
- (c) Emke is required, in exchange for a 10% revenue override, to prepare a business plan for the newly formed entity to profit from the use of the Domain Name, and operate the business under that plan. (Agreement §2).

11. Section VI of the Agreement also contains a cancellation provision (the "Cancellation Provision") giving either party a choice of three alternative remedies in the event of a disagreement about Emke's business plan and operations. The remedies are:

- (a) sell the business and/or the Domain Name and divide the proceeds equally;
- (b) have one party to buy out the other party "based on a best efforts [sic] to find a buyer at the highest possible price upon agreement between the parties"; or
- (c) submit their dispute to mediation and arbitration pursuant to the terms of Section VII of the Agreement.¹

12. The Cancellation Provision does not require a determination that one party or the other is correct concerning the management of the business – it gives either party an absolute right to compel the sale of the Domain Name in the event of a dispute.

13. On or about August 10, 2009, Emke's attorney, Conrad Herring, incorporated Servers, Inc. as a Nevada S-Corp. with 1000 shares of authorized stock. Herring designated himself as the sole officer and director of Servers, Inc. Servers, Inc. is a beneficiary of and is both bound by and entitled to enforce the Agreement.

14. The Domain Name was transferred to Servers, Inc. on or about January 22,

¹ Section VII of the Agreement is a mediation and arbitration provision that states, in pertinent part, that "[a]ny dispute under this agreement shall be subject first to mediation, and second to binding arbitration." The Trustee contends that such an arbitration provision is not enforceable under the circumstances and in light of *In re National Gypsum Co.*, 118 F.3d 1056 (5th Cir. 1997) and relevant case law interpreting that case.

2010, and has been held by Servers, Inc. since that time. However, Ondova's option under Section VI(1) of the Agreement to compel the sale of the Domain Name gives Ondova an equitable interest in the Domain Name even though record title was conveyed to Servers, Inc.

15. On June 17, 2011 Emke and the Trustee executed unanimous consents as shareholders making each of them a director of Servers, Inc. and setting the size of the Board of Directors at two. Herring subsequently resigned his positions as officer and director.

16. Emke and the Trustee cannot agree on any matter with respect to the operation of Servers, Inc., including the election of new officers and the sale of the Domain Name.

D. Emke's Failures to Perform.

17. Emke has consistently failed to comply with his obligations under the Agreement to create a business plan and operate Servers, Inc. for the mutual benefit of Emke and Ondova. As a result, Servers, Inc. has never generated any net revenues. The Trustee has not received any revenue from operation of the Domain Name.

E. Sale of the Domain Name is in the Best Interest of Servers, Inc. and Ondova.

18. The Domain Name is a valuable asset, and the amount of money that would be generated by its outright sale far exceeds the present value of the income stream from its use by Servers, Inc.

19. In addition, the Trustee has exercised his contractual option under Section VI(1) of the Agreement to require a sale of the Domain Name and the division of the proceeds of sale. Emke has refused.

20. In addition to, and notwithstanding the contractual obligation of Emke and Servers, Inc. to cooperate in the management and / or sale of the Domain Name, the sale of the Domain Name is necessary to the administration of the Estate. Even if Servers, Inc. were to generate revenue, there is no feasible way for the Trustee to keep the Estate open for years or decades merely to collect small monthly payments. Effective administration of the Estate requires that Ondova's interest in the Domain Name be liquidated, and that liquidation can be

accomplished only by a sale of the Domain Name and the distribution of the proceeds of sale.

F. The Domain Name can be Readily Sold.

21. There are well established means to sell domain names by auction sale or private sale. For example, several different companies organize sales of domain names by public auction. The Trustee evaluated several such businesses and has concluded that several have the requisite expertise and would be well suited to sell the Domain Name in order to obtain the highest possible price for all parties.

IV. CAUSES OF ACTION

COUNT 1: Specific Performance of the Agreement and Sale pursuant to Section 363(h) of the Bankruptcy Code.

22. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 21 of the Complaint as if fully set forth here.

23. Emke and Servers, Inc. have breached the Agreement by refusing to cooperate in the sale of the Domain Name as required by Section VI(1) of the Agreement. The Trustee has no adequate remedy at law for this refusal because the Domain Name is a unique asset whose value can be determined only through sale. The Trustee is therefore entitled to a judgment requiring specific performance of the Agreement by sale of the Domain Name.

24. In addition, the Trustee owns an equitable undivided interest in the Domain Name that constitutes property of the estate and is therefore subject to sale pursuant to Section 363(h) of the Bankruptcy Code. Section 363(h) provides that a trustee may sell property of the estate in which the debtor has an undivided interest as a tenant in common or joint tenant, "only if –

- (1) partition in kind of such property among the estate and such co-owner is impracticable;
- (2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interest of such co-owners;

- (3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and
- (4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power."

11 U.S.C. § 363(h).

25. The first requirement of Section 363(h) is satisfied because it is impossible to partition a Domain Name. The second requirement is satisfied because no purchaser would consider buying ½ of a Domain Name because that is merely an invitation to litigation over management of the Domain Name.

26. The third requirement of Section 363(h) is satisfied because the benefit to the Estate from the sale of the Domain Name free and clear of Emke's interest outweighs any detriment to Emke. A sale of the Domain Name will provide cash into the Estate and it will permit the Trustee to wind up the bankruptcy and pay creditors, neither of which will be possible while the Domain Name is being used by Servers, Inc. Pursuant to Section 363(j) of the Bankruptcy Code, Emke will receive his share of the proceeds from the sale of the Domain Name after reduction for costs of sale and he will therefore suffer no detriment.

27. Finally, the Domain Name is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

COUNT 2: Receivership and Dissolution of Servers, Inc.

28. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 27 of the Complaint as if fully set forth here. This Count is partially in addition to and partially in the alternative to Count 1 above.

29. As of the date of this First Amended Complaint, the Trustee and Emke as directors of Servers, Inc. have reached an impasse with respect to the management of Servers, Inc. In particular, they cannot agree on who should be an officer of Servers, Inc., and cannot agree on whether Servers, Inc. should fulfill its obligation to cooperate in the sale of the Domain

Name.

30. Under Section 78.650 of the Nevada Revised Statutes this impasse justifies the appointment of a Receiver to wind up the affairs of Servers, Inc. If the Court grants the relief requested in Count 1 above, the Receiver's only duty will be to handle the formal requirements for dissolution under Nevada law. If the Court denies the relief requested in Count 1 above the Receiver's duty will include the liquidation of the Domain Name and the distribution of assets to the Trustee and Emke prior to the dissolution of Servers, Inc.

31. Section 78.650 of the Nevada Revised Statutes does not require that the receiver be a disinterested party, but instead provides that preference shall be given to any "directors or trustees who have been guilty of no negligence nor active breach of duty." The Trustee has not been guilty of either negligence or active breach of duty and is therefore entitled to be appointed as receiver to wind up the affairs of Servers, Inc.

COUNT 3: Derivative Action against Emke on behalf of Servers, Inc.

32. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 31 of the Complaint as if fully set forth here. This Count is in the alternative to Counts 1 and 2 above.

33. The Trustee, as a shareholder in Servers, Inc., is entitled to bring a derivative action on its behalf to enforce its rights.

34. Servers, Inc. is a beneficiary of and entitled to enforce the Agreement with respect to the obligations of Emke to prepare and execute a business plan for Servers, Inc. as described in the Agreement. Servers, Inc. is therefore entitled to sue Emke for breach of his obligations under the Agreement.

35. It is futile to demand that Servers, Inc. enforce its rights against Emke the Trustee has made several demands on Emke to perform under the Agreement and he has refused. In addition, the impasse described above makes it impossible for Servers, Inc. to make any litigation decision.

36. Servers, Inc. is entitled to a judgment against Emke in the amount of the damages it has suffered as a result of their failure to perform under the Agreement.

COUNT 4: Breach of the Agreement – Damages.

37. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 37 of the Complaint as if fully set forth here. This is in the alternative to Counts 1, 2 and 3 above.

38. As a result of his breach of the obligations to develop a business using the Domain Name and other failures, Ondova has suffered past damages equal to the profit that would have been earned had Emke fully performed. The Trustee is entitled to a judgment against Emke for damages in the amount of those lost profits, plus interest before judgment as provided by law.

COUNT 5: Attorneys Fees.

39. The Trustee hereby incorporates the allegations contained in paragraphs 1 through 42 of the Complaint as if fully set forth here.

40. Counts 1 and 4 above are claims for which attorneys fees may be recovered under Chapter 38 of the Texas Civil Practice & Remedies Code, and every condition precedent to the recovery of fees has occurred.

41. In addition to the relief requested in Counts 1 and 2 above, the Trustee is entitled to recover his reasonable and necessary attorneys fees herein from Emke.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, the Trustee respectfully requests that the Court enter judgment in favor of the Trustee granting the relief described above, along with such other and further relief as to which he may show himself justly entitled.

Respectfully submitted this 7th day of July, 2011.

MUNSCH HARDT KOPF & HARR, P.C.

By: /s/ Raymond J. Urbanik

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**ATTORNEYS FOR DANIEL J. SHERMAN,
CHAPTER 11 TRUSTEE**

CERTIFICATE OF SERVICE

On this 7th day of July 2011, the undersigned hereby certifies that he caused a true and correct copy of the foregoing document to be served on all parties requesting electronic notice via the Court's ECF system as well as on the following parties via U.S. first class mail, postage prepaid, and via electronic mail:

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