

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.	§	

**MOTION TO STRIKE NOTICE OF TRANSMITTAL REGARDING
WITHDRAWAL OF REFERENCE [DOC 118] TO CLARIFY RECORD
FOR HEARING ON STAY PENDING APPEAL & BRIEF IN SUPPORT**

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

COMES NOW, Jeffrey Baron, Appellant, and respectfully requests this Court to clarify the record of proceedings and strike the Notice of Transmittal Regarding Withdrawal of Reference [DOC 118].

1. The report and recommendation attached by the bankruptcy court to the transmittal is not a report regarding withdrawal of reference.

2. The bankruptcy court's report was transmitted in violation of the Federal Rules of Bankruptcy Procedure. Bankruptcy Rule 9033, which governs the procedure for transmittal of reports and recommendations and mandatorily requires that the report shall be filed with relationship to proceedings which were **heard** by the bankruptcy Court. The bankruptcy Court conducted no hearing on the subject

of the report, and the filing of such report is accordingly not in conformity with the Bankruptcy Rules.

3. The required opportunity to object to the report was also circumvented. The Rules of Bankruptcy Procedure require that “The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket” and “Within 14 days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection.” *F.R.Bankr.P. 9033*. This procedure was not followed. **Less than 14 days after the drafting of the report, the district court adopted the report, circumventing the statutory objection period.**

4. The bankruptcy court lacked subject matter jurisdiction to make the report. The bankruptcy court erroneously concluded that it had jurisdiction to make the recommendation because “there could conceivably be an impact on the Ondova bankruptcy estate, if attorneys who represented Jeffrey Baron and his related entities go unpaid and make ‘substantial contribution’ claims against the bankruptcy estate.” Since the right to reimbursement is owned primarily by the creditor and based on contribution to the estate, whether the attorney is paid or not is irrelevant to any conceivable impact on the bankruptcy estate.

If a creditor pays an attorney who provided the services creating a substantial contribution to the bankruptcy case, that creditor is entitled to file a claim and recover his expenses. *E.g., In re Energy Partners, Ltd.*, 422 BR 68 (Bankr.S.D.Tex. 2009). An example of this rule applied in by the Fifth Circuit Court of Appeals is *Matter of DP Partners Ltd. Partnership*, 106 F. 3d 667 (5th Cir. 1997).

In *DP Partners* HFG incurred \$150,700 in attorney's fees. The Court held that “reasonable compensation for professional services rendered by an attorney or an accountant of an entity whose expense is allowable under paragraph (3) of this subsection” and that “under the plain language of the statute, if HFG meets the requirements of section 503, it shall recover administrative expenses. This statutory mandate permits of no discretionary calls by the courts.” Accordingly the Court held HFG was “entitled to actual and necessary expenses incurred in making a substantial contribution to DP's Chapter 11 reorganization, including reasonable professional fees.”

So, if a creditor pays attorney's fees for work which made a substantial contribution to the bankruptcy case, the creditor is entitled to file a claim and receive reimbursement as was HFG in the *DP Partners* case.

If the same creditor does not pay the attorney, then the attorney is entitled to file a claim to receive the same reimbursement directly. *E.g., In re Texaco, Inc.*, 90 B.R. 622 (S.D.N.Y. 1988).

Accordingly, there is no conceivable impact to the bankruptcy estate arising out of a creditor's payment or non-payment of attorney's fees and the bankruptcy court is without subject matter jurisdiction to issue recommendations regarding the subject—especially where there is no formal dispute or state litigation regarding the alleged claims.

FOR THE FOREGOING REASONS, Mr. Baron respectfully requests this Court to strike the Notice of Transmittal Regarding Withdrawal of Reference [DOC 118].

Respectfully submitted,

/s/ Gary N. Schepps
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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 called conferred with Mr. Raymond J. Urbanik, attorney for DANIEL J. SHERMAN, Trustee for ONDOVA LIMITED COMPANY, and they oppose.

/s/ Gary N. Schepps
Gary N. Schepps