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

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

RESPONSE, OBJECTION, MOTION FOR LEAVE TO FILE, AND MOTION FOR RELIEF WITH RESPECT TO RECEIVER MOTION ON SECRET DOMAIN NAME LIQUIDATIONS HIDDEN FROM THE PUBLIC

TO THE HONORABLE JUDGE ROYAL FURGESON:

COMES NOW Appellants, and makes this response to a redacted motion for which no unredacted copy has been provided to any of the interested parties. In order to allow a reasonable opportunity to respond to a motion, the contents of the motion must be disclosed and a sufficient opportunity afforded to respond. Here, in a very unusual process, much fundamental operative information has been kept secret. For example, we are kept in the dark as to the individual domain names proposed to be sold— (1) preventing the parties from soliciting an alternative purchaser for more money and (2) preventing the parties from researching and gathering evidence to establish the market value of the domains in question. We are also kept in the dark about the sales price of any domain name (even if the domain name were kept secret, the sales price of each 'secret' domain could be stated), and

we are kept in the dark as to appraised value of those domain names with the 'appraiser' relied upon by the receiver. Accordingly, we move to have that information released, and a reasonable opportunity allowed to respond to the specific domains in question. (We have previously requested this information from the receiver, the Court deputy, and the Court's law clerk). We also request access to Mr. Baron's funds to allow hiring an expert to provide an independent appraisal by an accredited expert.

ISSUE 1: SEEKING TO USE NOVO POINT, LLC AND QUANTEC, LLC ASSETS TO PAY OFF NON-JUDGMENT DEBTS ALLEGED AGAINST OTHER PARTIES.

If the rule of law is important, using LLC assets to pay off someone else's alleged non-judgment debt is not authorized. Doing so would be to treat the corporate form of the companies as a complete nullity.

Bollore SA v. Import Warehouse, Inc.

The issue was presented to the Fifth Circuit in *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006). In *Bollore*, the district court entered an order appointing a receiver over an alleged 'alter ego' entity, and ordering turnover of property. *Id*. at 321. The Fifth Circuit vacated the receivership and held that turnover orders do "not allow for a determination of the substantive rights of involved parties" and may not be used "as a vehicle to adjudicate the substantive rights of non-judgment third parties". *Id*. at 323. The Fifth Circuit held that this rule ultimately springs from due process concerns. *Id.* (such a remedy "completely bypasses our system of affording due process.").

As explained by the Fifth Circuit in *Bollore*, alter ego proceedings are substantive proceedings arising out of state law. *Id.* at 324. Pursuant to Texas law, a party must pursue their alter ego proceedings in a separate trial on the merits. *Id.* No such proceedings were pled against Novo Point or Quantec, and no such trial was ever held. As in *Bollore*, because no independent trial was held against Novo Point or Quantec to establish an alter ego claim, their assets cannot be taken to satisfy someone else's debts.

By contrast, it is long settled law that receivership "determines no substantive right; nor is it a step in the determination of such a right." *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

Notably, if Novo Point and Quantec *had been* served with citation and appeared as parties in a lawsuit seeking to impute liability upon them under an alter ego or reverse piercing theory (neither of which has occurred), they would have prevailed at trial as a matter of law. **The first step to a claim for piercing the corporate veil (although notably, no such claim was pled or heard) is to determine which jurisdiction's law controls the issue. *E.g., Sommers Drug Stores Co. Emp. P. Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989).** Novo Point, LLC and Quantec, LLC are incorporated under the laws of the Cook Islands. The law of the Cook Islands therefore applies. *See e.g., Alberto v. Diversified Group, Inc.*, 55 F.3d 201, 203 (5th Cir. 1995); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Pursuant to Cook Islands law, there is no basis to impose

reverse alter-ego liability. *Cook Islands Ltd.Liab.Cos.Act 2009 §45.*[1]

Notably, an unsecured creditor also has, in the absence of statute, no substantive right, legal or equitable, in or to the property of even his own debtor. This is true, whatever the nature of the property; and, although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. Accordingly, a court does not have equitable jurisdiction to use receivership to enforce unsecured creditors' claims before they have been reduced to judgment. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923); *e.g., Williams Holding Co. v. Pennell,* 86 F.2d 230 (5th Cir. 1936).

ISSUE 2: THE REQUIREMENTS OF 28 U.S.C. 2001 APPLY TO PERSONALTY PURSUANT TO 28 U.S.C. 2004.

If there were a legal basis to liquidate any domain name, as a general rule "Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title". 28 U.S.C. 2004. No justification has been offered to explain a different approach in this case. If there are parties interested to purchase a domain, there is no logical reason why they would not bid on the domain in a public auction.

[1] The same result would be reached in applying Texas corporate law. As explained by the Fifth Circuit in *Bollore*, "Texas courts will not apply the alter ego doctrine to directly or reversely pierce the corporate veil unless one of the 'alter egos' owns stock in the other." *Id.* at 325. Since Jeff Baron owns no stock in either Novo Point, LLC, nor Quantec, LLC, alter-ego liability would not apply.

ISSUE 3: IT IS PATENTLY UNREASONABLE NOT TO ENGAGE IN ANY MARKETING EFFORTS WITH RESPECT TO THE DOMAIN NAMES SOUGHT TO BE LIQUIDATED.

Mr. Nelson states in his affidavit that he did not engage in **any** marketing efforts with respect to the domain names the receiver desires to liquidate. Mr. Nelson admits that he created a protocol for selling domain names at a reasonable value. That protocol includes advertisements on industry websites, press releases, engaging brokers, using an auction, and maintaining a sales website. None of these procedures were followed with respect to the domain names now at issue. That is patently unreasonable.

Mr. Nelson's affidavit establishes that the sales prices for many of the domains sought to be sold are "substantially lower than their appraised values." Liquidation in such circumstance is patently unreasonable.

ISSUE 4: MR. NELSON'S SOURCE FOR 'APPRAISALS' AND METHODOLOGY FOR DETERMINING DOMAIN VALUE IS NOT RELIABLE NOR REASONABLE.

Background

There are different aspects of domain name value, as follows:

1. "Parking" value. This aspect of value relates to the random traffic a name may obtain. "googl.com" for example may enjoy heavy traffic intended for google.com. Or, "hotmeals.com" may receiver traffic for those looking for hot meals. Or, if a website has appropriate content, a name may facilitate search traffic. With the last option value is dependent upon content, so that appraisal of value requires analysis of possible content and not just the name

itself. Notably, many of the factors used to evaluate the parking value of a domain can be affected. Web content, back links, and other factors can be modified to substantially increase the 'parking' value and passive income of a website. A website that generates only $1 a month might generate a thousand times that amount if content is added that generates search results, or if links to the site are seeded over the internet, etc. Accordingly, a 'developed' parking domain can have a thousand times value to an undeveloped site.

2. "Marketing" value. This value is the value to a company or advertiser for use in a marketing campaign. For example, the domain "Slice.com" might be worth a million dollars as a knife industry website, or half a million dollars as a Mrs. Baird's Bread promotion site. Or, for example, a PriceLine competitor could market "Slice the Price" using "Slice.com" with a valuation for the domain at several million dollars. Determination of the marketing value of any domain requires an expert opinion from a marketing professional in the relevant, applicable fields for which the domain would provide marketing value. Notably, because the value is determined by the marketing value to the company who purchases the domain based on marketing value, while Pure Smoothies may offer $10,000.00 as its maximum offer for the domain "Pure.com", Pure Investments might offer a hundred times that about for the same domain. For that reason valuation requires knowledge of the relevant markets, and has nothing to do with the internet searches or current domain traffic. Similarly,

marketing value cannot be determined by comparing physically 'similar' domains. For example "Coke.com"'s value has nothing to do with the value of "Poke.com" or "Joke.com". The bottom line in determining the marketing value of any domain is that it requires significant expertise and research into the "brick and mortar" world in order to determine a domain's value.

3. "Ego" value. For example, "Jones.com" may be worth a hundred thousands dollars someone named Jones that could afford the price. Accordingly, properly advertised auctions are necessary to realize a domain's ego value.

Nelson's Appraisals Unreliable

Estibot, like the other 'appraisal' sources relied upon by the receiver do not involve valuation of the domain's "Marketing" value. Rather Estibot and the other on-line 'appraisal' sources used by the receiver use a computed valuation based on the semantics of the domain name. The 'appraisal' sites are designed for amateurs who do not understand the domain name industry. That Mr. Nelson clearly has no idea what he is talking about and clearly lacks experience is established by his claim that Estibot's appraisals typically are within 20% of the eventual sale price. Any credible and independent industry expert will confirm this, and so does Estibot.com.

Estibot expressly discloses that they are not offering an actual dollar appraisal for domain names, and expressly directs that their "appraisals" should not be used in

making sales decisions. At the bottom of each appraisal Estibot.com discloses "**The dollar valuation is not to be taken literally …. Do not make a purchase or sale decisions based on this appraisal.**"

Just like a U.S. District Court should not base decisions on the contents of fortune cookies, Estibot's 'appraisals' should not be used in making a sales decision. Here is a simple example to illustrate. Estibot.com 'appraises' "Japan.com" at $9,900.00. That is not very much money. By contrast, Estibot.com appraises "Germany.com" at around $1,600,000.00. Clearly, "Germany.com" is not worth by a factor of more than 160 (16,000%) the value of "Japan.com". Or, for example, Estibot.com values "Korea.com" based on the actual sale of the name, at over $5,000,000.00. Accordingly, **if Mr. Nelson and the receiver were relied upon to sell "Japan.com" it would be under-valued by around 50,000%**. I.e., if Estibot is the source of valuation (which Mr. Nelson relies upon to determine value within 20% of sales price) then the domains will be sold at a 99.5% discount, essentially giving the domains away.

The other web based 'appraisal' services relied upon by Mr. Nelson and the receiver are similar. Factors used to determine domain value are "backlinks, Google PageRank, Compete rank, Quantcast rank, and Alexa rank" as well as "the meaning of the keywords present in the domain name". For the web based appraisal services such as DomainApprisal.com, "Commerce Potential" means "monthly keyword search volumes, CPC advertising cost, historical search volume trends, and seasonal search volume trends." None of these statistics about internet traffic have anything

to do with the marketing value of any particular domain name with relationship to any particular industry or product.

Respondent acknowledges that the *current* "Parking" wholesale market value of a non-generic domain name site (such as 'bigsadangles.com") can be reasonably determined by an 'appraisal' by a site like sedo.com. That evaluation methodology is not appropriate nor reasonable for marketing name websites. The result is that domain names worth millions of dollars, such as "Japan.com" are 'appraised' at under $10,000.00, or 99.5% below their real market value.

ISSUE 4: THE RECEIVERSHIP ORDER HAS BEEN APPEALED

As a matter of established law, the trial court has been divested of jurisdiction over the matter of the receivership by the interlocutory appeal of the receivership order. Jeff has appealed the order appointing the receiver [Doc #136] and NovoPoint, LLC and Quantec, LLC have appealed from the order including the companies into the receivership [Doc #227]. **The Supreme Court has established that the filing of a notice of appeal is an event of jurisdictional significance— it confers jurisdiction on the court of appeals and divests the district court of its control. *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982).** The divesture of jurisdiction of the trial court involves those aspects of the case appealed. *Id*. Accordingly, the Fifth Circuit has established that "A district court does not have the power to 'alter the status of the case as it rests before the Court of Appeals'." *Dayton Indep. School Dist. v. US Mineral Prods. Co.,* 906 F.2d 1059, 1063 (5th Cir.

1990).

The Fifth Circuit has established that the jurisdiction of the district court over a matter appealed from, pending appeal are limited to **maintaining the status quo**. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). For that reason, an approach that achieves the Court's goals without disregarding the law and controlling precedent should be preferred.

For example, the Court can insure that the attorney's claims, if valid, will be secured by requiring from the 'receivership parties' security to stay the receivership pending appeal. The companies can provide a security interest in domain names valued well in excess of the attorney fees claims. The receivership can then be 'stayed' and the parties released from receivership. That will achieve your honor's goals while following the law and respecting controlling precedent. The claims will then be resolved in appropriate forums, most likely the State Bar fee committee – if the attorney claimants are willing to participate. Such a solution would also respect and uphold the constitutional right to trial by jury. Notably, the Seventh Amendment guarantees the right to trial by jury. *E.g.*, *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).

Respectfully submitted,

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FOR JEFFREY BARON

CERTIFICATE OF SERVICE

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

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COURT ORDERED TRIAL COUNSEL
FOR JEFFREY BARON