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.	§	

REPLY TO [DOC 195] SHERMAN RESPONSE TO MOTION TO STRIKE

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

COMES NOW, Jeffrey Baron, Appellant, and respectfully replies to Mr. Sherman's response to [DOC 172], (Mr. Sherman's Response to Mr. Baron's motion to strike Sherman's motion for sanctions filed in violation of the Federal Rules of Civil Procedure).

I. REPLY

Mr. Sherman's response evidences a long pattern of abuse on the part of Mr. Sherman's counsel.

Mr. Sherman's motion for sanctions was clearly made in violation of the Federal Rules of Civil Procedure. Mr. Sherman's counsel, however, do not acknowledge the law. Instead, the Chapter 11 trustee's attorney's fees were run up, to generate a 10 page response to a direct violation of the Rules of Procedure on their

part. The Chapter 11 trustee's attorney has generated more than a million dollars of fees billed to the Ondova bankruptcy with this method.

Mr. Sherman's counsel's story line is also clear, asserting in their response "the misconduct of Mr. Baron" wherein Mr. Baron "seeks to inject another delay into the Court's disposition of the matters before it" and that Mr. Baron's motion to strike is an "effort by Mr. Baron to either hijack or derail these proceedings".

Mr. Baron did not violate the rules of procedure, Mr. Urbanik did. Mr. Baron's objection to Mr. Urbanik's violation of the Federal Rules of Civil Procedure is met by Mr. Sherman's counsel with allegations against Mr. Baron, such as that he is attempting to "hijack" these proceedings—Just like Mr. Baron's objection to Mr. Urbanik's excessive fees in the bankruptcy court was immediately followed (within 3 business days) by this Court's issuing an ex-parte order appointing a receiver over Mr. Baron, and all trusts to which he is a beneficiary.

II. SEEKING TO INJECT DELAY

In case this Court is not aware, counsel for Mr. Baron raises to the attention of this Court, that perhaps behind the back of this Court, Mr. Urbanik, (purportedly on behalf of Mr. Sherman), has engaged in series of unreasonable tactics aimed at delaying resolution of these proceedings and increasing the billing of Mr. Urbanik.

Two clear examples:

1. On the eve of resolution of the disputes raised in this lawsuit, when all the parties were literally hours away from closing a global settlement, Mr. Urbanik attempted to torpedo the settlement negotiations by refusing to participate in the final negotiations and seeking an order from the bankruptcy court calling off the court ordered negotiated settlement process. The bankruptcy court was so stunned that in a rare opinion she described Mr. Urbanik's desires as "**unreasonable"**. The bankruptcy court continued the court ordered settlement negotiations as requested by Mr. Baron, over the objections of Mr. Urbanik. Thereafter, the final settlement was reached.
2. Mr. Baron performed his global settlement obligations, as have other parties, and pursuant to the terms of the agreement, Mr. Urbanik's firm was obligated to file in this court a motion for dismissal which has been executed by all parties to this lawsuit and approved by the bankruptcy court—and **is physically in the possession of Mr. Urbanik but which he—in order to drag out and keep open these proceedings, has failed and refused to produce to the Court.** These proceedings should have been dismissed, but Mr. Urbanik has wrongfully and *intentionally* delayed their closure.

III. MR. SHERMAN'S RESPONSE MAKES A SERIES OF CLAIMS, NOT SUPPORTED BY THE RECORD

The assertions in Mr. Sherman's response are simply not supported by the record. For example, Mr. Sherman's counsel assert that Mr. Baron "filed three additional motions asking for … delayed consideration, along with a "Motion to Clarify" that included a request for a continuance." The truth is opposite. Mr. Baron has vigorously sought immediate consideration and has never requested a continuance of the Court's consideration of the motion to stay the receivership order.

Mr. Sherman's counsel assert "The Motion to Strike continues this pattern deluging the Court with extraneous matters". The opposite is true—the motion to strike seeks to strike Mr. Urbanik's deluging the Court with improper and extraneous matters in his response, to wit: allegations of Rule 11 violations against Mr. Baron's counsel which have nothing to do with the issue at hand—Mr. Urbanik's ethical violation.

Mr. Sherman's counsel assert that Mr. Urbanik was not a necessary witness with respect to the response filed to Mr. Baron's motion to stay. **Not only was Mr. Urbanik a necessary witness, Mr. Urbanik was the ONLY witness offered by Mr. Sherman in his response—Mr. Urbanik's declaration was the only declaration offered by Mr. Sherman.**

Mr. Urbanik improperly injected himself as **the** key and **only** witness offering a declaration in support of Mr. Sherman's response to Mr. Baron's motion to stay.

As this Court is aware, counsel for Mr. Baron bent over backwards to avoid the issue, and attempted to view Mr. Urbanik's filings as being on his own behalf, as a party such that it would have been ethical to offer himself as a witness.

Once Mr. Urbanik informed counsel that under no uncertain terms was he appearing as a party, the issue became acute. It is grossly improper and unethical for a non-party advocate to testify to substantive matters other than narrow issues of attorney's fees in appropriate circumstances. Crossing the line between advocate and witness prejudices Mr. Baron and the fairness of the adjudication process.

Mr. Urbanik's declaration is the only declaration filed with Mr. Sherman's response to Mr. Baron's motion to stay. Mr. Urbanik claims personal knowledge that Mr. Baron's assets are substantially located in the Cook Islands, etc. Pursuant to Texas Disciplinary Rules of Professional Conduct 3.08, it is unethical for Mr. Urbanik to be both an advocate before the Court and a fact witness of facts essential to the position taken by him as an advocate. Because Mr. Urbanik injected himself as a fact witness as to essential substantive allegations against Mr. Baron, Mr. Urbanik must be disqualified as counsel in this case.

Notably, all this is far afield from the issue at hand—Mr. Urbanik's violation of the rules of procedure.

IV. MR. SHERMAN'S REQUEST FOR THIS COURT TO DO ONE THING UNDER THE GUISE OF DOING SOMETHING ELSE

In his reply Mr. Sherman's counsel ask this Court not to honor the Federal Rules of Civil Procedure, and instead to circumvent them. Rule 11 is clear, direct, and explicit. When the issue of sanctions is raised at the initiative of a party, **it must made "separately from any other motion"** and it must be served at least 21 days *before* it is presented to the Court. The injunctions of the rule are explicit and mandatory a motion for sanctions "**must be made separately"** and "**must not be filed or be presented to the court**" until the 21 days expires.

The initiative for sanctions has been made by Mr. Sherman's counsel (in violation of the Federal Rules of Civil Procedure), and not by the Court. Mr. Sherman's counsel have shamelessly moved this Court to act as if the initiative had actually come from the Court 'on its own initiative'.

V. THE LAW CITED BY MR. SHERMAN CONDEMNS HIS ETHICAL AND SUBSTANTIVE ARGUMENTS

The sole case relied upon by Mr. Sherman is *McCuin v. Tex. Power & Light Co.,* 714 F.2d 1255 (5th Cir. 1983). In conjunction with announcing the general rule of law that a lawyer may not enter a case for the primary purpose of forcing

the presiding judge's recusal, *McCuin* recognizes the primary rule that "**a litigant's motives for selecting a lawyer are not ordinarily subject to judicial scrutiny and that, by permitting inquiry into these motives, we open the door to a host of problems.**" *Id.* at 1265.

The discretion allowed a court is not what counsel a litigant may employ. Rather, it is in the discretion of the court whether to allow substitution of counsel at bar *before the court*. *Id*. at 1263 ("[T]he ultimate decision on [delaying a trial for the appointment of separate counsel] must remain with the trial judge; otherwise unscrupulous defense attorneys might abuse their `authority,' presumably for purposes of delay or obstruction of the orderly conduct of the trial.").

Receivership is not—by a far cry— necessary to exercise the Court's power over what attorneys it allows to appear before it. The Court can control what attorneys appear at bar before the court by simply saying "no". The ordering of a Receivership over a person, his property, and the trusts for which he is a beneficiary, in order to prevent his counsel for appearing at bar before the court is manifestly unreasonably, and so patently unjust as to shock the conscience.

But *McCuin* holds more. *McCuin* holds that "An ethical code is not a garment that lawyers may don and doff at pleasure." *Id*. at 1264. *McCuin* holds further that " 'A motion to disqualify counsel is a proper method for a party-litigant to bring the issues of conflict of interest or a breach of ethical duties to the

attention of the court.'[31] Indeed 'a District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it.' ".

McCuin references and relies upon two key cases that condemn the position taken by Mr. Sherman. The first is *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742 (5th Cir. 1980), which holds:

> A district court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it. *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976); *Sanders v. Russell*, 401 F.2d 241, 246 (5th Cir. 1968). *See generally E. F. Hutton & Co. v. Brown*, 305 F.Supp. 371, 376-77 (S.D. Tex.1969). A motion to disqualify counsel is the proper method for a party-litigant to bring the issues of conflict of interest or breach of ethical duties to the attention of the court. Id. at 376."

The second is *Bottaro v. Hatton Associates*, 680 F. 2d 895 (2nd Cir. 1982) holding:

> DR5-102(A) serves the threefold purpose of *avoiding*:
>
> 1) a situation in which "the public might think that the lawyer [as witness] is distorting the truth for the sake of the client,"
>
> 2) the possibility that the lawyer will enhance his or her credibility as an advocate by virtue of having taken an oath as a witness, and
>
> 3) the "unfair" and "difficult" situation which arises when an opposing counsel must cross-examine a lawyer-adversary and impeach his or her credibility.
>
> (emphasis)

Still, *McCuin* holds more, further condemning Mr. Sherman's position. *McCuin* holds that "**A lawyer must not make 'any statement or suggestion ... that he can or would circumvent' procedures by which legal matters can be presented in an impartial manner.**" This is precisely what Mr. Sherman's counsel have asked this Court to do now— to pretend that they did not move for sanctions, and that the initiative for sanctions actually came from the Court 'on its own initiative'. This is precisely the procedure used by Mr. Urbanik after Mr. Baron objected to Mr. Urbanik's fees— presenting an ex-parte motion for extraordinary relief without notice, heard off the record behind closed doors.

A pattern of circumvention of procedures has become a 'modus operandi' for attorneys taking action against Mr. Baron in these proceedings.

VI. MR. SHERMAN'S CONTINUED PERSONAL ATTACKS AGAINST APPELLATE COUNSEL

In their response, Mr. Sherman's counsel make repeated personal attacks against counsel for Mr. Baron, accusing appellate counsel of "lying to the Court", of filing "a knowingly false pleading in a Court that they thought might be fooled by it", and engaging in "a charade used as an excuse for a delay." All of which is improper and irrelevant to the issue at hand— Mr. Urbanik's violation of the rules.

VII. CONCLUSION

Mr. Sherman's motion for sanctions violates the Federal Rules of Civil Procedure, and it does not seem Mr. Sherman's counsel deny that. Instead, Mr. Sherman's counsel ask this Court not to honor the Federal Rules of Civil Procedure, and instead to circumvent them.

Mr. Sherman's response to the motion to disqualify Mr. Urbanik directly violates the Federal Rules of Civil Procedure and should be stricken. Mr. Sherman's counsel's request that the Court pretend they did not move for sanctions, and that the initiative for sanctions actually came from the Court 'on its own initiative', is dishonorable, and unbefitting of officers of this Court.

Respectfully submitted,

/s/ Gary N. Schepps
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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
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