

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 222] 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 222], (Mr. Sherman's Response to Mr. Baron's motion to strike the bankruptcy court's report and recommendation and to vacate the order adopting same).

I. LACK OF SUBJECT MATTER JURISDICTION CANNOT BE WAIVED

1. Subject matter jurisdiction is never waived. *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382 (1884). As Justice Harlan explained, "the presumption . . . is that the court below was without jurisdiction" unless "the contrary appears affirmatively from the record." *King Bridge Co. v. Otoe County*, 120 U. S. 225, 226 (1887) ("[T]he rule, springing from the nature and limits of the judicial power

of the United States, is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.”). The facts supporting jurisdiction must appear affirmatively from the record. *Id.*

2. Other than a misplaced hope that the defect could be waived, Mr. Sherman has no response to the bankruptcy court’s lack of subject matter jurisdiction over the subject matter of the report.

II. BANKRUPTCY RULE 9033 APPLIES TO ALL NON-CORE PROCEEDINGS

3. Two courts cannot exercise concurrent jurisdiction over the same matter. Accordingly, the only way for the district court to act as a ‘supervisor’ of the bankruptcy court (to use this Court’s terminology), is either by withdrawing the reference (in which case the bankruptcy court is divested of jurisdiction) or by appellate review from the bankruptcy court, (in which case the requirements of Rule 9033 must apply).

III. YET ANOTHER 'SUA SPONTE' BYPASS SUGGESTED BY MR. SHERMAN

4. Mr. Sherman is now a serial offender in seeking to rely on purported "sua sponte" actions of the district court as a means to circumvent the law and rules of procedure.

5. The bankruptcy court's report was either a motion to withdraw its reference or it wasn't. If it wasn't, it was dressed up in a false wrapper, and Mr. Sherman's argument fails. If it was, the Federal and local rules were circumvented, and the report must be stricken.

6. The Bankruptcy Rules require that a motion to withdraw reference be made in the bankruptcy proceeding. The Bankruptcy Rules do not provide for the bankruptcy court to act in the absence of such motion. 28 U.S.C. 157(d) ("The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.")(emphasis). Even the case cited by Mr. Sherman, *In re Moody*, 64 B.R. 594 (Bankr. S.D. Tex. 1986) involves a motion. Notably, pursuant to the rules promulgated by Congress, either the district court or any party may make the motion. No provision allows the bankruptcy judge to do so. In any case, a motion is required, and there is a specific rule for the handling of the motion.

7. In the Northern District of Texas, withdrawal of reference is governed by local rule 5011-1. Local Rule 5011-1 'Withdrawal of Reference' requires that "a)

Procedure. A motion to withdraw the reference of a case or a proceeding in a case **shall be directed to the district court, but shall be filed with the Bankruptcy Clerk. A status conference on the motion shall be held by the bankruptcy judge with notice to all parties involved** in a contested matter or adversary proceeding of which the reference is proposed to be withdrawn.” Moreover, the bankruptcy and local rules lay out the appropriate method for a bankruptcy court to communicate to a district court regarding the withdrawal of reference. Suffice to say the bankruptcy court’s report violates almost every requirement mandated by law. *See e.g., L.B.R. 5011-1.*

8. Bankruptcy Rule 5011 expressly requires that a motion for withdrawal of a case or proceeding shall be heard by a district judge. Accordingly, if the order adopting the bankruptcy court’s report was an order on withdrawal, a hearing was mandated. Having been issued without a hearing, the order of withdrawal should be vacated.

9. Similarly, Mr. Sherman offers no rule or authority to excuse the Court’s failure to allow 14 days to object to the report before adopting it, especially where no notice of a shorter period was provided prior to the report’s adoption.

10. Finally, no rule imposes a time limit for which to move to vacate or strike filings or orders in an active lawsuit. The matter is not moot because the adopted findings form a principal *asserted* grounds of the motion for receivership.

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

Gary N. Schepps