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

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| 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 SHERMAN RESPONSE TO MOTION TO DISQUALIFY [DOC 172]**

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

COMES NOW, Jeffrey Baron, Appellant, and subject to the pending motion to strike such response, respectfully replies to the response to Motion to Disqualify Mr. Urbanik [DOC 172].

## I. SUMMARY

Mr. Urbanik's conduct is unethical because his position as an advocate before this Court was used to interfere with the fair, unbiased hearing of evidence at issue before the Court. The ethical rule prohibits an attorney from doing exactly that—being both an advocate and a fact witness to establish essential facts on behalf of his client.

## II. THE ETHICAL RULE IS MANDATORY, NOT OPTIONAL

Texas Disciplinary Rules of Professional Conduct are mandatory in character because they establish the minimum level of conduct below which no lawyer can fall. *Koch Oil Co. v. Anderson Producing, Inc.*, 883 SW 2d 784, 787 (Tex.App. Beaumont–1994).

## III. THE EVIDENCE TESTIFIED TO BY MR. URBANIK WAS ESSENTIAL

The evidence Mr. Urbanik claimed to testify to in his declaration included essential facts such as that Mr. Baron had taken steps had to transfer 300,000 internet domain names, to a foreign entity outside of the jurisdiction of the federal courts. Although the fact itself is suspect— no attempt was made to change the ownership of the names, and the names are serviced ultimately by a US company, Mr. Urbanik never-the-less injected himself as a fact witness as to those facts. Similarly Mr. Urbanik claims personal knowledge that entities located in the Cook Islands are controlled by Mr. Baron, etc. These are clearly essential facts, and Mr. Urbanik clearly is offering claims of personal knowledge as to them.

## IV. THE STATE ETHICS RULE

In his response, Mr. Sherman makes reference to the comments of the state ethics rules, but noticeably omits mention of the relevant comment, Comment 4.

Comment 4 to Rule 3.08 (Lawyer as Witness) explains the application of the rule in this circumstance:

> [T]he principal concern over allowing a lawyer to serve as both an advocate and witness for a client is the possible confusion that those dual roles could create for the finder of fact. Normally those dual roles are unlikely to create exceptional difficulties when the lawyer's testimony is limited to the areas set out in sub-paragraphs (a)(1)-(4) of this Rule. **If, however, the lawyer's testimony concerns a controversial or contested matter, combining the roles of advocate and witness can unfairly prejudice the opposing party.** A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Mr. Sherman also neglects to fully cite the content of Comment 10:

> This Rule may furnish some guidance in those procedural disqualification disputes where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the opposing lawyer's service in the dual roles. … [A] lawyer should not seek to disqualify an opposing lawyer by unnecessarily calling that lawyer as a witness. Such unintended applications of this Rule, if allowed, would subvert its true purpose by converting it into a mere tactical weapon in litigation.

Notably, *Mr. Baron* did not intend to call Mr. Urbanik as a witness. Mr. Urbanik **injected himself into the case as a fact witness with personal knowledge** and filed a sworn declaration in opposition to Mr. Baron's motion to stay pending appeal. Mr. Urbanik's testimony was the *only* declaration testimony offered in opposition to the motion to stay. Accordingly, the attempt to call Mr. Urbanik's as a witness was not done by Mr. Baron (as some litigation ploy), it was done purposely by Mr. Urbanik. Moreover, counsel for Mr. Baron attempted to

give all benefit of the doubt to Mr. Urbanik, and treated him as a party in interest who had filed on his own behalf, thus avoiding any ethical issue. It was only when Mr. Urbanik insisted and made clear that under no circumstances was he in any way a party to the proceedings, that the ethical issue became acute.

As explained in a recent opinion of the Fourteenth District Court of Appeals in Houston *(IN RE: GEORGE E. GUIDRY, DWIGHT W. ANDRUS, III AND DWIGHT W. ANDRUS INSURANCE, INC.*, No. 14-10-00464-CV):

> In denying the motion to disqualify, the trial court may have determined that allowing Jefferson to occupy dual roles as trial lawyer and fact witness would not cause the Brokers actual prejudice. To the extent that the trial court made this determination, we conclude that the court clearly abused its discretion. *See In re Bahn*, 13 S.W.3d at 874 (concluding that **lawyer's dual roles as trial lawyer and fact witness would cause actual prejudice to opposing party**).

V. FEDERAL, NOT STATE APPLICATION OF ETHICAL VIOLATION

The majority of Mr. Sherman's offered cases are not relevant to the motion to disqualify because " [A] District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it. *Sanders v. Russell*, 5 Cir. 1968, 401 F.2d 241, 246 ". *Woods v. Covington Cty. Bank*, 537 F.2d 804, 810 (5th Cir. 1976). Motions to disqualify are substantive motions affecting the rights of the parties and are determined under federal law. *In re Dresser Industries, Inc.*, 972 F.2d 540, 543 (5th Cir. 1992).

The consideration in disqualification is not a state remedy. While state ethics violation is key, the Court must consider the motion governed by the ethical rules announced by the national profession and in the light of the public interest and the litigants' rights. *In Re Dresser*, and *see Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 171 (5th Cir. 1979).

## VI. OBLIGATION TO THE COURT AND PROCESS, NOT TO CLIENT

Rule 3.08 protects against two diverse interests— (1) To protect the client being represented by preventing his own attorney from acting against the client's interests as a witness and (2) To protect the fairness of the judicial process.

In our case, the second interest is invoked.

As explained by the Fifth Circuit:

> "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." Indeed "a District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it."

*McCuin v. Texas Power & Light Co.*, 714 F. 2d 1255, 1264 (5th Cir. 1983)

## VII. CONCLUSION

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 relief requested 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.

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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