No. 10-11202

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs
v.
JEFFREY BARON,
Defendant-Appellant
v.
ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

Cons. w/ No. 11-10113
NETSPHERE INC., Et Al, Plaintiffs
v.
JEFFREY BARON, Et Al, Defendants
v.
QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants
v.
PETER S. VOGEL,
Appellee

Appeal of Order Adding Non-Parties Novo Point, LLC and Quantec, LLC as Receivership Parties

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

RESPONSE TO VOGEL SEALED MOTION TO HAVE THE PROPRIETY OF HIS ACTIONS CONFIRMED AND MOTION FOR EVIDENTIARY HEARING

TO THE HONORABLE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW Appellants, and subject to the preliminary Fifth Amendment objection and motion previously filed in this appeal, make this response with respect to the 9-02-11 SEALED MOTION noticed in the PACER system on 9-6-11 and filed by Appellee Mr. Peter S. Vogel to confirm propriety of intention not to make tax filings. [10-11202, 11-10113] [6897932-0].

I. ARGUMENT AND AUTHORITY

Vogel offers no legal authority to support the relief he requests. Like Vogel's motion with respect to his willful defaulting on multiple international arbitration proceedings and resulting willful loss of the assets of the estates of Novo Point, LLC, and Quantec, LLC,[1] Vogel again seeks a preemptive finding from the Court that his actions which are clearly neglectful and improper under the law, have been proper.

Background of Vogel, his firm Gardere, and Jeff Baron

As early as in 2001, Jeff Baron consulted personally with Peter Vogel with respect to Vogel defending Baron in litigation regarding Baron's company, Ondova. At the time, Baron disclosed material that was expressly confidential and revealed the way domain names were acquired by the company– with a view to Vogel defending a lawsuit pending at the time with respect to a disputed domain name. (Ex. I). In 2003, Baron shared more confidential information with Dawn Estes, a colleague of Vogel's at Vogel's firm Gardere, again in confidence, and

[1] Addressed by Appellants in Document 00511598319 filed 9/9/2011.

again with a view to Gardere representing Jeff and Ondova. Once again, material that was expressly confidential was disclosed. As a matter of law, Vogel and his law firm were under a strict duty to maintain the confidentiality of Baron's disclosures. *See Nolan v. Freeman*, 665 F.2d 738, 739 n.3 (5th Cir. 1982). However, in 2004 Baron found himself being sued by Gardere on exactly the same type of claim with regard to the confidential information that he had disclosed to Vogel and Gardere. In that suit, Gardere was adverse, representing the opponent of Baron and Ondova, Mike Emke, (*Emke v. Compana*) prosecuting Emke's claim of ownership of the "servers.com" domain. In 2005 this happened again, with Gardere suing Baron over the same type of claim. (*Rolfing Sports*, Ex. I). In 2006, this happened yet again. (*FabJob, Inc*). Once again, Gardere was suing on the same type of claim. Gardere had become a specialist in suing Baron and Ondova for alleged domain registration violations. The suits relied in large part upon the confidential information Baron had conveyed in confidence to Vogel in seeking the legal services of Gardere. Notably, the *Emke* dispute was still in litigation at the time Vogel was employed as special master. Notably, too, the *Emke* dispute became subject of new litigation in the Ondova bankruptcy where Vogel and Gardere in their receiver roles ostensibly undertook the representation of the interests of Baron against the interests of their former client Emke with respect to the very same dispute they had represented Emke over against Baron and Ondova, and once again took a position of clear conflict of interest and duties. Vogel and Gardere then turned on its former client Emke and assisted Sherman (the Chapter

11 Ondova trustee) to allege the *Emke suit*—in which Gardere had represented Emke— was actually a fraudulent transaction between Emke and Baron.

Pursuant to Federal law, all of the interconnecting conflicts should have been disclosed by Vogel before he was employed as special master in the District Court proceedings below. Federal Rule of Civil Procedure 53(b)(3) strictly requires that a court may issue an order appointing a special master only after the master files an affidavit disclosing any ground for disqualification under 28 U.S.C. §455. However, Vogel willfully failed to make the disclosures and affidavit mandated by law, and bypassed rule 53(b)(3).[2] Then, while acting as special master, after the case fully and finally settled and all that remained was for the District Judge to sign the stipulated dismissal that had been signed by all parties to the suit, Vogel held secret consultations with Sherman with respect to having himself (Vogel) appointed receiver over Baron. SR. v5 p238. Sherman had previously agreed in writing to settle all claims against Baron, and agreed to the stipulated dismissal of

[2] There are more Vogel conflicts than raised above. There are small, but not insignificant examples, such as Vogel's motion (granted by the District Court) as receiver to pay himself for work as special master out of receivership assets (although no prior order had suggested such fees or allocation). And, there are larger examples, for example, involving Sherman's work to "advise" an individual, Joey Dauben, to submit a 'claim' against Baron for Vogel to pay as receiver. The Dauben 'claim' was set up to be a claim against Baron for approximately $1,000,000.00. (Dauben had never previously asserted any such claim against Baron). Research by Baron's counsel uncovered that if the 'claim' had been paid, the money would not have gone to Mr. Dauben. Instead, the money would have gone instead go to pay off a judgment was taken against Mr. Dauben's company in 2009-2010. That judgment was taken by, and money from the judgment's recovery was due to be paid to– none other than Vogel's firm Gardere. Accordingly, in a direct conflict of interest to their receivership roles, Vogel and Gardere would have thus been a primary beneficiary of the newly 'discovered' million dollar Dauben claim against Baron. After the matter was exposed in a motion for stay filed by Baron, Vogel and Sherman promptly dropped all mention of Dauben.

all claims, but decided to go back on his agreement after Baron objected to an attorney's fee application filed for Sherman's attorneys' fees filed in the Ondova bankruptcy. After Vogel's then undisclosed off-the-record meeting with Sherman, Sherman filed a motion to have Vogel appointed receiver over Baron, and Vogel then almost immediately personally filed an order signed by Judge Furgeson appointing Vogel receiver *ex parte*. After Baron appealed the *ex parte* receivership, Vogel (still employed as special master in the case), immediately filed a motion to have himself appointed receiver over the assets of Novo Point, LLC, and Quantec, LLC. R. 1717. Vogel later filed additional motions to have himself appointed as receiver over more than a dozen additional independent legal entities from around the country and around the world.

FILING TAX RETURNS AND PAYING TAXES: <u>IT'S THE LAW</u>

It should come as no surprise that as a matter of Federal law, Vogel is required by law to timely file the tax returns and pay the taxes for every entity over which he has been appointed (by his own motions) receiver. E.g., 26 U.S.C. §§ 6012(b)(3), 6151(a). Notably, the Internal Revenue Code ties the duty to pay federal income taxes to the duty to make an income tax return. *See* 26 U.S.C. §6151(a) ("[W]hen a return of a tax is required. . . the person required to make such return shall .. . pay such tax"). Accordingly, Vogel must pay the tax due on the income attributable to the receivership entities' property because §6012(b)(3) requires him to make a return as the "assignee" of the property. This law is clear

and well established. *See e.g.*, *Holywell Corp. v. Smith*, 503 U.S. 47, 52 (1992).

VOGEL AND TAXES: What Is Happening

Because the fees he seeks as receiver are so massive in relationship to the assets placed into his hands as receiver, Vogel has a conflict of interest. The receivership fees he has billed for himself and his firm come from the same receivership *res* that would be used to pay Federal income taxes. Since Vogel has taken almost all of Baron's savings account funds in receivership fees (a staggering fee of around one million dollars), and seeks to be paid over a million dollars more, his bills directly compete for funds with taxes owed for 2010 and 2011. Vogel has thus been faced with the choice of paying Federal taxes, or having funds available to pay his multi-million dollar 'fees' billed as receiver. Vogel has chosen the latter. Accordingly, **Vogel has (1) refused to file a single tax return for any receivership entity since becoming receiver in 2010, (2) has refused to pay any Federal taxes, (3) has refused to set aside funds for payment of taxes, (4) has refused to make *any* quarterly tax reports, and (5) has refused to pay any quarterly estimated taxes.**

While Vogel has billed for filing multiple receivership reports of epic volume, (touching the most minute minutia), Vogel has noticeably **omitted from his reporting all mention of the amounts of Federal tax liability**. Thus, in a very odd report of financial outlook with respect the entities controlled by Vogel as receiver, the financial picture entirely omits mention of liability for taxes. Rather,

the primary liability reported is the reported liability to Vogel for more than a million dollars of additional fees billed by Vogel and his firm.

Accordingly, **in direct and gross violation of his fiduciary duties to the companies, Vogel has failed to file the companies' tax returns and has failed to pay any taxes, and has failed to set aside any funds for the payment of taxes.** The results will obviously be disastrous for the companies.

VOGEL NOW SEEKS TO BE RELIEVED OF LIABILITY FOR HIS GROSS VIOLATIONS OF DUTY

What Vogel is really seeking is a court order he can later use to absolve himself of liability for his gross violation of his fiduciary duties as receiver. Vogel notably offers no legal authority as to why his personal legal duty to file Federally mandated tax reports should be suspended by Court decree.

Vogel Seeks to Blame Baron and Baron's Counsel

In what has become a recurring mantra for Vogel, he seeks to excuse all of his obligations by blaming Baron and his counsel.

Vogel Attempts to Blame Baron's Appellate Counsel

As a justification for failing to report or pay taxes for any of the more than dozen entities Vogel had placed under his own receivership Vogel seeks to blame Baron's appellate counsel. Vogel alleges that counsel made "False statements about foreign assets". Even if that were true, it has nothing to do with Vogel's failure to report or pay taxes for the multiple entities he is receiver over. If Vogel was misled by some false statements about Baron's holdings, the tax reports of

those holdings would be incorrect to the extent of the misinformation. But even if Vogel's claims about counsel were true (as discussed below they are not), it has nothing to do with **Vogel's gross and total failure to file tax reports or pay taxes**. Also disturbing about Vogel's claims with respect to counsel making 'false statements' is the extent to which Vogel's failure to disclose reaches or crosses the border of affirmative fraud on this Court. As discussed below, Vogel has offered this Court Fundamentally misleading representations of the conference quoted by Vogel. First, with respect to Mr. Barrett, Barrett was never retained by Baron as his attorney. Rather, Barrett was hired to assist undersigned at two hearings before the district court. Vogel quotes Barrett as revealing supposed off-shore accounts, but, what Vogel did not disclose is that Barrett *expressly* explained this 'knowledge' was based on what he *believed* Schepps said on the record in the District Court and on the record at a prior meet and confer conference. Those records speak for themselves and there was never any such statements about any money in any offshore account. The record is clear that Barrett was merely expressly offering a purely hearsay opinion based upon what he erroneously *believed* was said in prior meetings. See Exhibit M. Since Vogel has copies of those prior meetings, he fully aware of Barrett's error. Yet, Vogel passes off Barrett's known erroneous hearsay as a material 'disclosure' by Baron's counsel. Vogel's motion approaches the line of direct deception in making statements such as (on page 11) that "Barrett states that he was aware of several offshore accounts, including one that might contain $400,000.00." Barrett, however, stated the

opposite, expressly stating on the record he did **not** think there was any money in any offshore account. See Exhibit M. On one hand there is what Vogel represents Barrett said. On the other hand is what the record reflects Barrett said. The variance is material—especially in the context where Vogel is a receiver, acting as an officer of the Court.

Vogel Attempts to Blame Jeff Baron

The conference Vogel quotes from was ordered preliminary to filing any motions to satisfy meet & confer requirements and was not a hearing or a deposition. At the pre-filing conference Baron was represented by counsel and the rules of ethics require counsel for the receiver not to seek direct communication with Baron as a represented party. Baron asserted his Fifth Amendment right to be represented by counsel when Vogel's counsel attempted to directly engage him. Vogel quotes that exchange out of context, as if Baron was in court or in a deposition and was refusing to disclose the underlying information. Notably, **Baron's counsel repeatedly offered to provide any information Mr. Baron had access to if Vogel would simply provide a written list of requested information. See Exhibit L.** Vogel declined to ever request information because, as Vogel is fully aware, Baron turned over his records at the beginning of the receivership. **Accordingly, Vogel's representations that Baron refused to provide information is a clear violation of Vogel's duty of full disclosure to this Court.** Vogel *misleadingly* represented to this Court that Baron refused to provide

information. Vogel wholly failed to disclose that Baron's counsel, on the record, repeatedly offered to provide all information Baron had access to if Vogel would simply provide a written list of requested information. Vogel's failure to disclose is clearly material.

Vogel has all of the Records of Novo Point, LLC., and Quantec, LLC.

Vogel received all of the books and records of Novo Point, LLC, and Quantec, LLC., when he seized the companies operations in December, 2010.[3] He has had full control of their business operations since that date. Yet, Vogel has failed to file any tax report, neither for 2010 taxes, nor for each quarter of 2011. Similarly, Vogel appears to have taken no formal actions (other than a couple of phone calls) to secure the records of other receivership companies. For example, Vogel does not appear to have even served subpoenas on the more than dozen companies' registered agents etc. Accordingly, Vogel's failure to file tax reports and pay taxes due is attributable to no party other than Vogel.

When Vogel Failed to File, Baron Personally Sought to Have Tax Returns Filed

Out of concern that Vogel was neglecting his duties, and in an attempt to secure compliance with the federally mandated reporting requirements, Jeff Baron personally went to Grant Thornton to hire them to file the tax returns. (The firm had already been paid over $50,000.00 to prepare the reports.) Baron was informed that the firm would consider representing Baron, and filing on his behalf

[3] Vogel also has Baron's records— they were turned over at the start of the receivership. Those records included Bank's bank records, and the receiver seized Baron's accounts at the start of the receivership.

returns, **if Vogel gave his permission**. Upon information and belief Vogel was contacted and instructed Grant Thornton not to file any returns. Notably, Vogel paid Grant Thornton over $50,000.00 in fees to prepare tax reports. Vogel has also refused to provide Baron any funding to pay a tax attorney to file returns, and Vogel has refused to provide the necessary information and reports from the companies to enable Baron to file even his own tax returns. Accordingly, not only has Vogel failed to fulfill his legally mandated duties to report and pay federal taxes, but he has affirmatively obstructed Baron's attempts to secure the filings.

WHEREFORE, Vogel's motion to have his conduct approved by this Court should be in all things denied and overruled.

Respectfully submitted,

/s/ Gary N. Schepps

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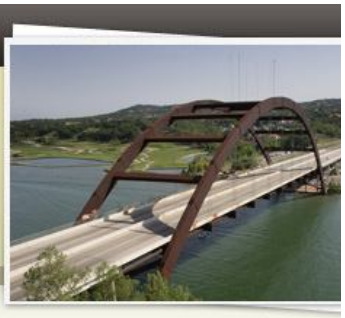
COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

This is to certify that this motion 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
COUNSEL FOR APPELLANT

Exhibit A



Special Master Appointed to Conduct Global Mediation in Bankruptcy Case

Nov 2

A special master was recently appointed by the Northern District of Texas in *NetSphere v. Baron* (*In re Ondova Ltd. Co.*), No. 3-09CV988-RF. The underlying Chapter 11 bankruptcy case involves numerous parties, offshore entities and several related lawsuits. After the bankruptcy court held four status conferences related to the parties' global settlement agreement (GSA), approved by the bankruptcy court on July 28, 2010, the bankruptcy judge made a "Report and Recommendation" to Senior District Court Judge Royal Furgeson which detailed the status of the GSA and recommended the appointment of a special master to mediate claims arising from the conduct of one of the parties.

In large part, the bankruptcy court's concern regarding the GSA arose from what the court termed Baron's "Cavalcade of Attorneys." Throughout the bankruptcy proceedings, Baron "has continued to hire and fire lawyers" and has instructed these lawyers to file pleadings against matters resolved by the agreement. The court also expressed concern that such constant turn-over in the "dozens of sets of lawyers" hired by Baron has generated "significant fees . . . to a level that is more than a little disturbing." The court noted that this behavior "smacks of the possibility of violating Rule 11" or, "more troubling," the possibility that "Baron may be engaging in the crime of theft of services."

Although the bankruptcy court's report indicates that there was "substantial consummation" of the settlement agreement by most parties, the court nevertheless "has had lingering concerns at each of the status conferences regarding Jeffrey Baron's commitment to completing his obligations under . . . and possibly taking actions to frustrate . . . [the settlement agreement]." The court also expressed concern that Baron's practice of continuously switching legal counsel may pose a risk to the bankruptcy estate and expose other parties to the GSA to unwanted administrative expense.

The bankruptcy court informed Baron that he would no longer be allowed to hire additional attorneys. He was given the option to retain his current legal counsel throughout the remainder of the bankruptcy litigation or proceed *pro se*. Further, the bankruptcy court recommended the Northern District of Texas appoint a special master to conduct a global mediation between Baron and "various attorneys who may make a claim" for reimbursement against the amount of $330,000 set aside by the bankruptcy court as a "security deposit" against the financial risks posed against the bankruptcy estate by the fees incurred by Baron's attorneys.

After consideration of the bankruptcy court's report, the Northern District of Texas adopted the bankruptcy court's recommendation in its entirety and appointed a special master to the case. Although the case is still pending, Judge Fergeson's Order may be viewed here. The bankruptcy court's Report and Recommendation is available at 2010 Bankr. LEXIS 3575 or 2010 WL 4226285 (N.D. Texas).

Tags: special masters, mediation

Tags: Mediation, special masters

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7/1/09 Hearing

haven't physically been the one.

THE COURT: I realize.

This is great testimony. You are supposed to know everything about your company, and you register the names, and you know nothing. Why should I allow you to continue to run the companies? Why don't I put a receiver in your place to take control of all of these matters and run your company for you since you don't seem to understand how it runs or who runs it or what's being done with it?

THE WITNESS: I think it's just regarding particular domain names and what's happened with them. It's difficult to come off the top of my head and explain what's happened to any particular name.

THE COURT: What about putting someone in control of your companies? Putting a receiver in control so that I can know that things are being done correctly?

THE WITNESS: I prefer that I continue to be able to run the company. But what you decide to do is what you decide to do.

MR. KRAUSE: Your Honor, may I address the Court? I have proposed a discovery master to help alleviate some of these issues. I'm not aware of any basis to appoint a receiver for these companies. There is no one making an application for that.

Exhibit B

Exhibit C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE INC., MANILA INDUSTRIES, INC.; and MUNISH KRISHAN	§	
Plaintiffs,	§	**CIVIL ACTION NO. 3-09CV0988-F**
vs.	§	
JEFFREY BARON and ONDOVA LIMITED COMPANY,	§	
Defendants	§	

ORDER APPOINTING SPECIAL MASTER

IT IS HEREBY ORDERED AS FOLLOWS:

Pursuant to Rule 53 of the Federal Rules of Civil Procedure the Court appoints Peter S. Vogel, a practicing attorney whose address is 1601 Elm Street, Suite 3000, Dallas, Texas 75201, whose telephone number is (214) 999-4422, to serve as Special Master (hereinafter "Master") in this case.

GENERAL

The Master shall receive production of proprietary source code, if any, owned by Defendants pursuant to the terms of the Amendment to Preliminary Injunction signed by this Court. Defendants shall submit a written statement to Plaintiffs' counsel describing the nature and purpose of the proprietary source code in sufficient detail so as to permit Plaintiffs' counsel to evaluate whether such source code is relevant. With respect to any source code submitted, the Master shall determine, whether such source code should be

produced to Plaintiffs' counsel under a highly confidential designation based upon whether such source code is relevant or likely to lead to the production of relevant evidence.

In addition, the Master shall generally assist the Court, upon further request of the Court, regarding electronic evidence.

The Master has and shall exercise the power to regulate all proceedings in every hearing conducted before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under this Order.

The Master shall be empowered to recommend to the Court sanctions which may be imposed by the Court against any party for their conduct during the course of any hearing being conducted by the Master or any proceeding being supervised by the Master.

When a party so requests, the master shall designate a Court Reporter to attend the hearing and prepare the official transcript. The parties may procure the attendance of witnesses before the Master by the issuance and service of process as provided by the Federal Rules of Civil Procedure.

When the Master makes a decision in the case, either the Master or the appropriate attorney shall prepare a proposed order for entry. The proposed order shall be circulated to the Master and all attorneys of record. After allowing three (3) days for response, the Master shall forward his recommended order to the Court. The Court may confirm, modify, correct, reject, reverse or recommit any ruling or decision made by the Master as it may deem proper and necessary in the particular circumstances of the case.

COSTS

Defendants shall deposit into the Master's Trust Account, on or before the 15th day of July, 2009, the sum of $5,000.00 to be retained in the Master's Trust Account pending disbursement necessitated by fees and expenses incurred by the Master appointed herein.

The Master shall submit itemized statements to the Court, with copies to the parties, detailing the work done, the hours spent, routine costs incurred, and other expenses. The Defendants shall pay these fees, costs and expenses and the Master shall be empowered to debit the trust for payment of same.

In the event that the sums in the Master's Trust Account should become inadequate to cover the anticipated fees and expenses of the Master appointed herein, the Master may request the Court to order the deposit of additional sums by the Defendant. The Defendant shall, within five days of such order, deposit the additional sums into the Master's Trust Account.

The Court sets the rate of the Master's compensation at $615.00 per hour. The Master shall also be reimbursed for reasonable expenses.

This Order may be amended or altered as the Court may deem appropriate.

SO ORDERED.

This 9th day of July, 2009.

W. ROYAL FURGESON, JR.
U.S. DISTRICT JUDGE

Ondova trying to seize any monetization funds. Now, what you bring to my attention -- And I'll wait to see what happens in bankruptcy. But what you do bring to my attention is I don't have control of those monetization funds and I don't have control of that money. And if there are third parties that have beneficial interests, I need to really consider whether or not I will appoint a receiver in this case. I already have a receiver. I have a special master, I mean. I might make him the receiver as well, and I might put all of those funds into the trust account of the master and make him a special receiver. Because if I've got beneficial claims of ownership, I can't let those funds escape. And so I want everybody to know I'm very worried that there is money out there that has been and is being and will be generated by the domain names that are now under Mr. Baron's control perhaps as a beneficial representative of other people, and I don't have any control over those. And if I've got claims from past attorneys, intervenors and so forth, I need to get a hold of those funds, and I need a receivership. So I'm telling everybody that right now. Of course, the plaintiffs are going to have damage claims, and those funds shouldn't disappear in that regard. So I want everybody to be thinking about this, but my view is I may have to create Mr. Vogel as not only a special master but

as a receiver. I'll have to talk to him first. He has never heard this idea before and it might alarm him

MR. VOGEL: Your Honor, I'll do whatever you ask me to do.

THE COURT: When this case comes back to me, I'm considering you as receiver and getting you to give notice to all monetization funds that receive money now or in the past or in the future from Mr. Baron's domain names and put them in a receivership until we can figure out who the owner is.

MR. VOGEL: Whatever you direct, your Honor.

MR. MACPETE: On that particular score, I would say two things in response to Mr. Lurich. Number one, I absolutely disagree with him that the representation was not made to this Court, both your Honor and Judge Lynn.

THE COURT: That's okay. Second.

MR. MACPETE: Worse than that, as I told you at the beginning of the hearing, I have had Mr. Baron on cross examination now for four hours in the bankruptcy court. It resumes again tomorrow at 9:30. During that four hours of testimony, Mr. Baron testified essentially that he committed a fraud on my clients in conjunction with the settlement agreement and on this court in connection with the preliminary injunction. Let me explain how that is.

13:11 been cut off to the Friedman Figer trust account as a result of the games Mr. Baron is playing. There is not money to pay him or Mr. Vogel or the forensic people.

THE COURT: What we're going to do is -- That probably is another reason why I am going to make Mr. Vogel a receiver, and he can use whatever investigative tools he needs to figure out where the domain names are, set aside monetization funds with fund companies and use court orders to seize those funds. So there will be money there. You know, all we're doing is just greatly complicating this. If everybody could just sit down and talk about this, it could be different. Now I have a criminal lawyer on the payroll and Mr. Rasansky is sitting out there wanting money. I have Mr. Rasansky and Ms. Aldous sitting out there with their entitlements. Really, this is one time where somebody ought to sit down and say how do we get this thing resolved.

MR. MACPETE: He's still looking for the magic answer, your Honor, and we talked with the bankruptcy counsel over the Labor Day weekend about the possibility of trying to sit down and work something out prior to this hearing tomorrow when he resumes the stand and whether the bankruptcy judge may appoint a Chapter 11 trustee or dismiss his bankruptcy case, and we have gotten no response back. We have tried, but we're not getting

circumstance and the judge gives a reason, they are not res judicata for anything else but that matter alone.

THE COURT: Let me make sure you understand -- I think Judge Jernigan and I are going to talk. I just feel like it's the best thing in the world. Judge Jernigan is a very experienced judge, and so she and I are going to talk, and I'm going to read everything I have been given up to date, but I am going to sit down -- Maybe I'll take her to lunch, and she and I are going to talk about this.

MR. KEIFFER: Can I have an opportunity to file a reply relative to their points with regard to the 137 application because I think they are massively overstated as this Court admonished not to do.

THE COURT: How soon can you do that?

MR. KEIFFER: Next week is very heavy in trials and the week after that, but I can probably get to you by Monday, a quick retort with regard to those points on 137(d) and its application here as well as the functional situation we have here where somehow it is seen that judicial economy can bypass, as this Court has admonished everyone else here, the rules and procedures that are out here.

THE COURT: Well, you know, surely you have good help in your firm.

MR. KEIFFER: I'm afraid my firm is relatively

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

IN RE:	§	
	§	
ONDOVA LIMITED COMPANY,	§	Case No. 09-34784-SGJ-11
DEBTOR.	§	
	§	
	§	
NETSPHERE, INC., ET AL.,	§	
PLAINTIFFS,	§	
	§	
VS.	§	Civil Action No. 3-09CV0988-F
	§	
JEFFREY BARON, ET AL.,	§	
DEFENDANTS.	§	

REPORT AND RECOMMENDATION TO DISTRICT COURT (JUDGE ROYAL FURGESON): THAT PETER VOGEL, SPECIAL MASTER, BE AUTHORIZED AND DIRECTED TO MEDIATE ATTORNEYS FEES ISSUES

The undersigned bankruptcy judge makes this Report and Recommendation to the Honorable Royal Furgeson, who presides over litigation related to the above-referenced bankruptcy case styled *Netsphere v. Baron*, Case # 3-09CV0988-F (the "District Court Litigation"). The purpose of this submission is: (a) to report the status of certain matters pending before the bankruptcy court, that are related to the District Court Litigation; and (b)

Exhibit G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE INC., MANILA INDUSTRIES, INC.; and MUNISH KRISHAN Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. 3-09CV0988-M
JEFFREY BARON and ONDOVA LIMITED COMPANY, Defendants	§	

ORDER TO MEDIATE DISPUTES REGARDING ATTORNEYS FEES

Based on Bankruptcy Judge Stacey G. C. Jernigan's October 12, 2010 Report and Recommendation that Peter S. Vogel, Special Master, be Authorized and Directed to Mediate Attorneys Fees Issues this Court hereby issues the following Order:

As soon as practical Peter S. Vogel is ordered to mediate all claims against Jeffrey Baron on behalf of this Court and the In Re: Ondova Limited Company, Bankruptcy Case No. 09-34784-SGJ-11 for legal fees and related expenses, and within 30 days of the date of this Order all lawyers who have claims for legal fees against Jeffrey Baron shall submit confidential reports of fees, expenses, and claims to Peter S. Vogel at 1601 Elm Street, Suite 3000, Dallas, Texas 75201 or by email at pvogel@gardere.com. At the date of this Order the attached list and Schedule F (Creditors Holding Unsecured Nonpriority Claims) includes all known claims for attorneys fees and expenses.

ORDERED this 19th of October, 2010.

W. ROYAL FURGESON, JR.
SENIOR U.S. DISTRICT JUDGE

Exhibit H

LIST OF ATTORNEYS WHO MAY HAVE CLAIMS AGAINST JEFFREY BARON

Gerrit Pronske (Pronske and Patel)
Mike Nelson
Dean Ferguson
Jeff Hall
Gary Lyon
David Paccione
Mark Taylor
Fee Smith (law firm)
Friedman and Feiger
Stephen Jones

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE INC., MANILA INDUSTRIES, INC.; and MUNISH KRISHAN	§	
Plaintiffs,	§	
vs.	§	**CIVIL ACTION NO. 3-09CV0988-M**
JEFFREY BARON and ONDOVA LIMITED COMPANY,	§	
Defendants	§	

AMENDED ORDER TO MEDIATE DISPUTES REGARDING ATTORNEYS FEES

Based on Bankruptcy Judge Stacey G. C. Jernigan's October 12, 2010 Report and Recommendation that Peter S. Vogel, Special Master, be Authorized and Directed to Mediate Attorneys Fees Issues this Court hereby issues the following amended Order:

As soon as practical Peter S. Vogel is ordered to mediate all claims against Jeffrey Baron on behalf of this Court and the In Re: Ondova Limited Company, Bankruptcy Case No. 09-34784-SGJ-11 for legal fees and related expenses, and within 30 days of the date of this Order all lawyers who have claims for legal fees against Jeffrey Baron shall submit confidential reports of fees, expenses, and claims to Peter S. Vogel at 1601 Elm Street, Suite 3000, Dallas, Texas 75201 or by email at pvogel@gardere.com. At the date of this Order the following attorneys have claims for attorneys fees and expenses:

Gerrit Pronske (Pronske and Patel)
Mike Nelson
Dean Ferguson
Jeff Hall
Gary Lyon
David Paccione
Mark Taylor
Fee Smith (law firm)
Friedman and Feiger
Stephen Jones

ORDERED this 25th of October, 2010.

W. ROYAL FURGESON, JR.
SENIOR U.S. DISTRICT JUDGE

Exhibit H[2]

Exhibit I

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

ONDOVA LIMITED COMPANY D/B/A COMPANA, LLC,

Plaintiff,

vs.

ROLFING SPORTS, INC.

Defendant,

vs.

JEFFREY BARON,

Third-Party Defendant.

CASE NO. 3:05-CV-2411-K
ECF

THE HON. ED KINKEADE

MAGISTRATE JUDGE STICKNEY

BRIEF IN SUPPORT OF PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S JOINT MOTION TO DISQUALIFY DEFENDANT'S COUNSEL

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BRIEF IN SUPPORT OF PLAINTIFF'S AND THIRD-PARTY DEFENDANT'S JOINT MOTION TO DISQUALIFY DEFENDANT'S COUNSEL

Plaintiff, Ondova Limited Company, d/b/a Compana, LLC ("Compana"), and Third-Party Defendant, Jeffrey Baron ("Mr. Baron"), by their attorney, and pursuant to, *inter alia*, FED. R. CIV. P. 7(b), and LR 7.1, herewith submit their brief in support of *Plaintiff's and Third-Party Defendant's Joint Motion to Disqualify Defendant's Counsel*, filed with the Court contemporaneously herewith.

INTRODUCTORY STATEMENT

1. Sometime in 2001 or 2002, Mr. Baron, acting as Compana's President, contacted Peter S. Vogel, of the Gardere law firm,[1] seeking representation in connection with Compana's business of acquiring newly-deleted domain names, using proprietary and confidential methods, which allowed Compana to secure generic and descriptive domain names of interest, in advance of its competitors. See *Declaration of Jeffrey Baron Under Penalty of Perjury*, attached to *Appendix to Brief in Support of Plaintiff's and Third-Party Defendant's Joint Motion to Disqualify Defendant's Counsel* ("Appendix") at pp. 3-4. Upon information and belief, Attorney Vogel then served as Chairman of Gardere's e-Litigation, e-Commerce, and Computer Technology Practice Groups, and Mr. Baron and Attorney Vogel had several conversations, as well as a personal meeting at Gardere's office, concerning the proposed representation. *Appendix* at p. 4, ¶ 3.

2. During these conversations, Mr. Baron disclosed confidential information to Attorney Vogel regarding Compana's domain name registration activities, and the issues faced in connection therewith, involving both claims by third parties against Compana, and claims Compana had against others. *Id.* Attorney Vogel listened, and appeared willing to accept the engagement, but Mr. Baron

[1]Upon information and belief, the subject firm has operated under the names, Gardere Wynne Sewell & Riggs, LLP, Gardere & Wynne, LLP, and Gardere Wynne Sewell, LLP, during the relevant period, and shall be referred to hereinafter as "the Gardere firm," or "Gardere."

ultimately decided not to engage Gardere, primarily due to cost concerns. *Id.* Nonetheless, the door to Gardere's future representation of Compana was left open, and Mr. Baron expected that his discussions with Attorney Vogel would be held in strict confidence, as attorney-client communications. *Id*.

3. Based in part on his favorable experiences with Mr. Vogel, Mr. Baron contacted Gardere again in November 2003, and had a series of conversations, electronic mail exchanges, and facsimile communications with Dawn Estes, another partner in the firm, which continued through early-December 2003. *Appendix* at p. 4. The purpose of these communications was to engage Gardere's services in connection with several contractual disputes involving Compana's method of acquiring newly-deleted domains, and Mr. Baron asked that Gardere consider representing Compana on a contingency basis therein. *Id.* Attorney Estes agreed to evaluate the matters, explaining that she would review and discuss the subject contracts with other members of Gardere, prior to making a final determination. *Id*. At the same time, Attorney Estes emphasized that Gardere was well-positioned to assist Compana with all of its legal needs, touting the qualifications of the firm's e-commerce and intellectual property attorneys, including Attorney Vogel's credentials. *Id*.

4. During these communications, Mr. Baron explained, in depth, Compana's domain name business; Compana's method of registering newly-deleted domain names, and the problems Compana faced in the business, including those relating to the contracts at issue. *Appendix* at p. 5. In addition to his verbal disclosures to Attorney Estes, Mr. Baron provided her with copies of the aforementioned contracts, each of which was marked "confidential" and/or included non-disclosure provisions. *Id.* See *also*, *Appendix* at pp. 9-16. These contracts formed the essence of Compana's business model at the time and contained detailed descriptions of the methods Compana used to

acquire newly-deleted domain names, and the purpose of such acquisitions. *Appendix* at p. 5. Identifying portions of Mr. Baron's electronic mail messages to Attorney Estes in this regard, appear in the *Appendix* at pp. 9-16. Certain details have been redacted, to preserve the confidentiality of this material. *Appendix* at p. 5.

5. Following further discussions, on December 9, 2003, Attorney Estes mailed a letter to Mr. Baron, indicating that Gardere had decided not to represent Compana in the subject contractual disputes. *Appendix* at p. 5. A copy of this letter, redacted to preserve confidential information, appears in the *Appendix* at pp. 17-19. The letter indicated that Gardere would not charge Compana for fees or expenses incurred in connection with its work, given the decision the firm had made. *Appendix* at pp. 5, 18. The letter did **not** indicate, however, that Gardere might use or disclose the confidential information and material Mr. Baron had provided, and the provided material was not returned. *Appendix* at pp. 5, 18. Thus, Mr. Baron and Compana continued to expect that these disclosures would be held in strict confidence, as attorney-client communications.

6. As set forth in Plaintiff's *Complaint*, at ¶ 17, on October 6, 2005, Defendant filed a complaint with the National Arbitration Forum, pursuant to ICANN's *Uniform Dispute Resolution Policy* ("UDRP"), asserting that Defendant held exclusive rights in the words, "Golf Hawaii," which Compana had registered as a domain; accusing Compana of "cybersquatting," namely acquiring and using the domain name in bad faith; assailing Mr. Baron's character; disparaging Compana's business model, and, demanding transfer of the <golfhawaii.com> domain to Defendant. *Id.* See *also*, *Appendix* at p. 6. Upon reviewing the UDRP complaint, Mr. Baron was shocked to learn that it was prepared and filed by Gardere, and he promptly advised counsel of his belief that the action was an egregious betrayal of the confidences entrusted thereto. *Appendix* at p. 6, ¶ 7.

7. Based on Compana's concerns, undersigned counsel wrote to Gardere the same day the UDRP complaint was received, advising of the conflict of interest; placing the firm on notice that Compana did not consent to Gardere's representation of Defendant in the UDRP proceeding, and requesting that the UDRP Complaint be withdrawn. *Appendix* at p. 6; *Appendix* at p. 21. Compana's counsel also telephoned Attorney Beverly Bell Godbey, the responsible partner in the Gardere firm, to discuss the conflict of interest issue. *Appendix* at p. 6. However, these entreaties were rebuffed. *Id*. Rather than responding substantively to Compana's concerns, Attorney Godbey simply provided counsel with a copy of Attorney Estes' letter of December 9, 2003, apparently believing it sufficient to justify the firm's assault against Compana, and Mr. Baron's character and motives, in the UDRP proceeding. *Appendix* at pp. 6, 25-26. Compana's counsel disagreed, and continued to write Attorney Godbey regarding the issue, but these communications were ignored. *Appendix* at pp. 6-7, 26-33. Nonetheless, Gardere did not file further documents in the UDRP dispute, although it was permitted to do so, and Mr. Baron hoped the firm had come to accept that it had a conflict of interest and must refrain from additional action against Compana in the case. *Appendix*, at p. 7.

8. When the UDRP proceeding was decided in Defendant's favor on November 28, 2005, and Compana filed the present action to clear its name and prevent transfer of the <golfhawaii.com> domain, Compana's counsel wrote Gardere, on December 8, 2005, reminding of the conflict, and indicating that Compana would file a motion to disqualify Gardere and its involved attorneys, should the firm enter an appearance on Defendant's behalf. *Appendix* at pp. 7, 34. Nonetheless, on January 3, 2006, Gardere filed an *Answer* for Defendant herein, with counterclaims against Compana, and a third-party claim against Mr. Baron personally, alleging, *inter alia*, that

Compana's business model is unlawful; that it acquired and has used the <golfhawaii.com> domain name in "bad faith," and that Mr. Baron and Compana are jointly liable for substantial damages to Defendant as a result. *Appendix* at pp. 7-8. See *also*, *Defendant Rolfing Sports, Inc.'s Counterclaim, and Third Party Complaint*, at ¶¶ 9, 11, 12, 13, 14, 15, 19, 27, 28, 31, 34, 36, 39, 40, 42, 43, 46, and 49.

9. The proprietary, confidential, trade-secret protected methods used by Compana to acquire the <golfhawaii.com> domain, in March 2003, when it became newly available for registration, and Compana's motives for the acquisition, were the same methods and motives disclosed to Attorney Vogel in 2001 or 2002, and Attorney Estes in November/December 2003. *Appendix* at pp. 7-8. Additionally, the contract involved in the <golfhawaii.com> acquisition was identical or substantially similar to the agreements reviewed by, and discussed with and among Gardere, the same year the acquisition occurred. *Id.* As a result, Attorneys Vogel and Estes, and presumably, other members of the Gardere firm, are thoroughly familiar with Compana's business model; its related trade secrets, and its intended uses for the domain names it has registered. *Id.* Accordingly, Compana and Mr. Baron are concerned that the information and material disclosed to Gardere's attorneys will be used against them in this proceeding; will be (or have been) disclosed to Defendant; and/or will vest Gardere, and consequently, Defendant, with an unfair advantage in this case, based on information divulged in confidence to partners of the firm, in the course of seeking legal advice. *Appendix* at pp. 7-8. Additionally, there is a strong appearance of impropriety in Gardere's representation of a client adverse to Compana in a case involving the same subject matter for which Mr. Baron and Compana sought Gardere's advice.

10. Gardere's aforesaid conduct violates the ethical standards followed by this Court with

respect to actions against former clients, and prospective clients, with whom attorney-client relationships have formed, privileges have attached, and/or from whom confidential information has been received. Moreover, the relationships formed with Attorneys Vogel and Estes, and the confidences obtained by each, are imputed to every partner and associate in the Gardere firm. Accordingly, Gardere, and all of its partners and associates, must be disqualified from further representation of Defendant herein. In support whereof, the following is shown:

ARGUMENT

I. GARDERE, AND ALL OF ITS PARTNERS AND ASSOCIATES, MUST BE DISQUALIFIED AS DEFENDANT'S COUNSEL IN THIS CASE.

In this Circuit, a motion to disqualify counsel is the proper method by which to call a court's attention to an alleged conflict of interest, or other breach of an attorney's ethical duties. *In re American Airlines, Inc.*, 972 F.2d 605, 610 (5th Cir. 1992), *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 912 (1993).[2] While "disqualification of counsel is an extreme remedy that will not be imposed lightly," *Admiral Insurance Company v. Heath Holdings USA, Inc.*, No. 3:03-CV-1634-G (N.D. Tex. August 9, 2005) (available at 2005 U.S. Dist. LEXIS 16363),[3] a court is nonetheless "obliged to take measures against unethical conduct occurring in connection with any proceeding before it," *In re American Airlines*, 972 F.2d at 611 [quoting *Woods v. Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976)],[4] and courts in the Fifth Circuit are particularly sensitive

[2]See *also*, *Musicus v. Westinghouse Elec. Corp*., 621 F.2d 742, 744 (5th Cir. 1980); *FDIC v. Cheng*, *et al*, No. 3:90-CV-0353-H (N.D. Tex. 1992) (available at 1992 U.S. Dist. LEXIS 20824).

[3]See *also*, *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1262-63 (5th Cir. 1983) [citing *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d. 1020, 1025 n. 6 (5th Cir.), *cert. denied*, 454 U.S. 895 (1981)].

[4]See *also*, *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 376-77 (S.D. Tex. 1969).

to preventing conflicts of interest. *Matter of Consolidated Bankshares, Inc*. 785 F.2d 1249, 1256 (5th Cir. 1986); *In re American Airlines*, 972 F.2d at 611.[5]

A. The Applicable Standards.

Motions to disqualify counsel are governed by state and national ethical standards adopted by the district court, and applied under federal law. *Horaist v. Doctor's Hosp*., 255 261, 266 (5th Cir. 2001)[citing *FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir. 1995)]; *In re American Airlines*, 972 F.2d at 610. The rules promulgated by the local court, under 28 U.S.C. § 2071, provide the most immediate source of guidance, but are not the sole authority governing motions to disqualify. *U.S. Fire Ins. Co.,* 50 F.3d at 1312; *In re Dresser Industries, Inc*., 972 F.2d 540, 543 (5th Cir. 1992). The applicable state code of professional conduct is also an appropriate source of ethical rules,[6] but federal courts must also consider motions to disqualify under the ethical rules announced by the national profession, in light of the public interest and the litigant's rights. *In re Dresser Industries, Inc*., 972 F.2d at 543 (holding that the Fifth Circuit's source for the ethical rules of the national profession is the American Bar Association). Moreover, a finding that an ethics rule has been violated, without more, is not sufficient to support disqualification. *U.S. Fire Ins. Co.,* 50 F.3d at 1314. A court also must take into account the social interests at stake, by considering whether a conflict has (1) the appearance of impropriety in general, or (2) a possibility that a specific

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[5]Indeed, the Fifth Circuit has "squarely rejected [a] hands off approach in which ethical rules 'guide' whether counsel's presence will 'taint' a proceeding," holding instead that a rigorous, "careful and exacting application of the rules in each case," must be employed to "separate proper and improper disqualification motions" based on alleged conflicts of interest *In re American Airlines, Inc.,* 972 F.2d at 611.

[6]See *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993)("[a] federal court may . . . hold attorneys accountable to the state code of professional conduct"). See *also*, *Dyll v. Adams*, 3:94-CV-2734-D (N.D. Tex. April 29, 1997) (available at 1997 WL 22918).

impropriety will occur, and (3) a likelihood that public suspicion from the impropriety outweighs any social interests which will be served by the lawyer's continued participation in the case." *Id.* [quoting *Dresser*, 972 F.2d at 544]. See also *Woods*, 537 F.2d at 810; *U.S. Fire Ins. Co.,* 50 F.3d at 1312.

1. The Canons Applied in this District and Division.

The United States District Court for the Northern District of Texas, Dallas Division, considers the following ethical canons in determining whether disqualification of an attorney is appropriate,: (1) the ABA Model Rules of Professional Conduct, (2) the Texas Disciplinary Rules of Professional Conduct, and (3) the local rules of the Northern District of Texas. *Admiral Insurance Company,* 2005 U.S. Dist. LEXIS 16363.[7] The Model Rules embody "the national standards utilized [in] this Circuit in ruling on disqualification motions," *U.S. Fire Ins. Co.,* 50 F.3d at 1312, while the Texas Rules are relevant because they govern attorney conduct within Texas generally, and because the Local Rules and Texas Rules are identical. *Id*.[8] The relevant provisions of these canons in the present case are TEX. DISCIPLINARY R. PROF. CONDUCT, Rules 1.05(b), 1.09(a)(2), 1.09(a)(3), and 1.09(b) (the "Texas Rules"), and MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.9(a), 1.9(c), 1.10(a), 1.18(a), 1.18(b) and 1.18(c) (the "Model Rules").

a. The Texas Rules

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[7]See *also*, *U.S. Fire Ins. Co.,* 50 F.3d at 1312; *Advanced Display Systems, Inc. v. Kent State University*, No. 3:96-CV-1480-BD (N.D. Tex. November 29, 2001) (available at 2001 U.S. Dist. LEXIS 19466); *Senior Living Properties LLC Trust v. Clair Odell Insurance Agency*, No. 3:04-CV-0816-G (available at 2005 U.S. Dist. LEXIS 8993).

[8]LR 83.8(e) provides that: "[t]he term 'unethical behavior,' as used in this rule, means conduct undertaken in or related to a civil action in this court that violates the Texas Disciplinary Rules of Professional Conduct." *Id.*

Texas Rule 1.09, incorporated herein by LR 83.8(e) sets forth the general rule in this Division regarding prohibited conflicts in actions against former clients, as follows:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> * * *
>
> (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
>
> (3) if it is the same or a substantially related matter.
>
> (b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09.

Texas Rule 1.09(a)(2) also references Texas Rule 1.05, which prohibits a lawyer's use of confidential information obtained from a former client to that former client's disadvantage. See TEX. DISCIPLINARY R. PROF. CONDUCT, Rules 1.09(a)(2) and 1.05(b)(2). Thus, on its face, Texas Rule 1.09 forbids a lawyer from appearing against a former client if the current representation, in reasonable probability, will involve the use of confidential information, or if the current matter is substantially related to matters in which the lawyer has represented the former client. *Id.; In re American Airlines,* 972 F.2d at 615. Additionally, while referring to "former clients," the Rule applies in circumstances where no attorney-client relationship has been formed, to protect prospective clients, who seek an attorney's advice, *In re American Airlines,* 972 F.2d at 612 [citing TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09, Comment 4A; HAZARD & HODES, THE LAW OF LAWYERING § 1.9.111 (1991)]. Finally, these prohibitions are imputed to every partner and associate in the conflicted lawyer's firm. TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09(b).

b. The Model Rules.

The American Bar Association's Model Rule 1.9 is identical to Texas Rule 1.09 in all important respects. Model Rule 1.9 provides, in pertinent part, that:

> (a) A lawyer who has formally represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> * * *
>
> (c) A lawyer who has formally represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client.

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9. Like the Texas Rules, the Model Rules impute conflicts under Model Rule 1.9 to all lawyers associated in a firm with the conflicted attorney. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a).[9] Moreover, as with the Texas Rules, the proscriptions of Model Rule 1.9 apply to prospective clients, as well as "former clients," pursuant to Model Rule 1.18(b). MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18(b).

Model Rule 1.18, encaptioned, "Duty to a Prospective Client," has no counterpart in the Texas Rules, and does not appear in the body of federal law in this Circuit governing conflict of interest situations. Model Rule 1.18 reads, in pertinent part, as follows:

> a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the

[9]See *also*, *Admiral Insurance Company,* 2005 U.S. Dist. LEXIS 16363; MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18(c).

> lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> > (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
> >
> > (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
> >
> > > (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> > >
> > > (ii) written notice is promptly given to the prospective client.

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18. The Rule indicates, when read in conjunction with Model Rules 1.9 and 1.10(a), that an attorney who has received information from a prospective client (whether privileged or not), may not thereafter use that information to the prospective client's disadvantage, and the prohibition extends to all lawyers in the conflicted attorney's firm. MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.18(b); 1.9(c), and 1.10(a). Moreover, if an attorney has received information from a prospective client that could be harmful if used against the prospective client in a substantially related matter, neither the lawyer, nor his partners or associates, may represent the prospective client's adversary in that matter, absent the current and prospective clients' express written consent, or prompt notice to the prospective client; *provided that* specified precautions were taken during the initial consultation(s), and that prompt steps were taken to isolate the conflicted attorney(s), before notice to the prospective client was

dispatched. MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.18(a) and 1.18(b).

Whereas, Model Rule 1.18 is new; has not been adopted in Texas, and has not been interpreted in federal jurisdictions with no corresponding state rule, and, whereas, in some respects, the Rule is inconsistent with the established law of this Circuit, its applicability to the present case is questionable. Nonetheless, it will be discussed further hereinbelow.

2. The "Substantial Relationship" Test.

In addition to the foregoing ethical canons and social considerations, the Fifth Circuit applies a "substantial relationship test" to disqualification motions grounded in an attorney's former representation of a client. This test is not derived from disciplinary rules, and is not dependent upon them; rather, it was developed, and exists, at common law.[10] *In re American Airlines*, 972 F.2d at 617 [citing *T.C. Theatre Corp. v. Warner Bros Pictures, Inc*., 113 F.Supp. 265 (S.D.N.Y. 1953); *Wilson P. Abraham Constr. Corp. v. Armco Steel Corp*., 559 F.2d 250, 252 (5th Cir. 1977); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 89 (5th Cir. 1976)]. Pursuant thereto, a party seeking to disqualify counsel on grounds of a former representation must establish: (1) an actual attorney-client relationship between the moving party and the attorney it seeks to disqualify and, (2) a substantial relationship between the subject matter of the former and present representations. *In re American Airlines*, 972 F.2d at 614 [citing *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1569 (5th Cir. 1989), *cert. denied sub nom*., *Northwest Airlines, Inc. v. American Airlines, Inc.*, 507 U.S. 912 (1993)].

With respect to the first element, it is well-established that the existence of an "actual

[10]Nonetheless, the substantial relationship test is incorporated in, or mentioned by, a number of the Model Rules and Texas Rules adopted thereafter. See *e.g.*, Model Rule 1.9(a) and 1.9(b), Model Rule 1.10(b), Model Rule 1.18(c), Texas Rule 1.06(b)(1), Texas Rule 1.09(a)(3).

attorney-client relationship" does not depend upon the payment of a fee. *Woolley v. Sweeney*, No. 3:01-CV-1331-BF (N.D. Tex. May 13, 2003) (available at 2003 U.S. Dist. LEXIS 8110) [citing *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 404 n. 15 (Tex. App. – Houston 1997). Indeed, the Rule applies in cases where an attorney-client relationship has not been formed: a lawyer may not "switch sides and represent a party whose interests are adverse to a person who sought in good faith to retain the lawyer." *In re American Airlines,* 972 F.2d at 612 [citing TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09, Comment 4A; HAZARD & HODES, THE LAW OF LAWYERING § 1.9.111 (1991)].

As for the second element, a "substantial relationship" may be found only after the moving party delineates, with specificity, the subject matters, issues, and causes of action common to the prior and current representations, and the court engages in a painstaking analysis of the facts and precise application of precedent." *In re American Airlines,* 972 F.2d at 612 (citing *Duncan,* 646 F.2d at 1029). The burden of establishing the substantial relationship is on the party moving for disqualification. 972 F.2d at 612. However, the former and current representations need not involve identical causes of action[11] – the two causes "need only involve the same subject matter in order to be substantially related." *In re American Airlines*, 972 F.2d at 625 [citing *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341 (5th Cir. 1981); *Duncan*, 646 F.2d 1020]. Nor must the movant establish that confidences were divulged in the prior representation – information provided by a former client is sheltered from use by the attorney against him, regardless of whether someone else may be privy to it. *In re American Airlines*, 972 F.2d at 620 [citing *Brennan's Inc. v.*

[11]Such a strict requirement would undermine the policy underlying the rules against conflicting representations – the preservation of the attorney-client relationship and the protection of a client's confidential information. *Senior Living Properties LLC Trust,* 2005 U.S. Dist. LEXIS 8993) [citing *In re American Airlines*, 972 F.2d at 619].

Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979)]. A lawyer who has represented a client in a substantially related matter must be disqualified whether or not he has gained confidences, and regardless of whether any advice rendered is relevant, in an evidentiary sense, to the present litigation. *In re American Airlines*, 972 F.2d at 618-19 [quoting *In re Corrugated*, 659 F.2d at 1346].[12] The prior matter need only be "akin to the present action in a way reasonable persons would understand as important to the issues involved." *In re Corrugated*, 659 F.2d at 1346; *Gibbs v. Paluk*, 742 F.2d 181 (5th Cir. 1984).

The substantial relationship test is governed by two irrebuttable presumptions. First, once it is established that the prior matter is substantially related to the present case, the court must irrebuttably presume that relevant confidential information was disclosed during the former period of representation. *In re American Airlines* 972 F.2d at 613; *Duncan*, 646 F.2d at 1028; *In re Corrugated*, 659 F.2d at 1347.[13] This is because, if the presumption were rebuttable – that is, if the attorney could attempt to prove he did not recall any disclosure of confidential information, or that no confidential information was in fact disclosed, the purpose of keeping the client's secrets confidential could be defeated. The confidences would be disclosed by the attorney during the course of rebutting the presumption, or if the presumption was considered rebutted, the client would be put into the anomalous position of having to show what confidences he entrusted to his attorney, in order to prevent them from being revealed. *In re Corrugated*, 659 F.2d at 1347. See *also*, *E.F. Hutton*, 305 F.Supp at 395 (attorney cannot defeat motion to disqualify by showing he received no

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[12]See also, *Burnett v. Olson*, No. 04-2200 (E.D. La. March 18, 2005) (available at 2005 U.S. Dist. LEXIS 4849).

[13]See *also*, *Admiral Insurance Company,* 2005 U.S. Dist. LEXIS 16363.

confidential information from the former client; to do so would engender a feeling that the attorney has escaped on a technicality).[14]

The second irrebuttable presumption governing the "substantial relationship" test is that confidences obtained by an individual lawyer will be shared with the other members of his firm. *In re American Airlines*, 972 F.2d at 614 [citing *In re Corrugated*, 659 F.2d at 1346; *Selby v. Revlon Consumer Products*, 6 F.Supp..2d 577,582 (N.D. Tex. 1997)]. One reason for this presumption is that it would be virtually impossible for a former client to prove that attorneys in the same firm have not shared confidences. Another reason is that it helps clients feel more secure. Finally, the presumption guards the integrity of the legal profession, by removing undue suspicion that the former client's interests are not being fully protected. See *In re Epic Holdings*, 985 S.W.2d 41, 49 (Tex. 1998). This irrebuttable imputation of conflicts is applicable under the substantial relationship test, "regardless of the size of the firm [or] how many separate offices it may maintain. *Senior Living Properties LLC Trust,* 2005 U.S. Dist. LEXIS 8993; *American Sterilizer Co. v. Surgikos, Inc*., No. 4089-238-Y (N.D. Tex. June 12, 1992) (available at 1992 U.S. Dist. LEXIS 21542, *14).[15] "Members of a law firm cannot disavow access to [the] confidential information of any one attorney's client." *In re Epic Holdings, Inc.,* 985 S.W.2d at 49.

Regardless of which ethical canon or federal common law standard is applied, Gardere's representation of Defendant in this matter comprises a violation.

B. Gardere's Representation of Defendant Violates the Texas Rules.

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[14]See *also*, HARVA RUTH DOCKERY, NOTE, MOTIONS TO DISQUALIFY COUNSEL REPRESENTING AN INTEREST ADVERSE TO A FORMER CLIENT, 57 Tex. L. Rev. 726 (1979).

[15]See *also*, *In re ESM Government Securities, Inc.*, 66 B.R. 82, 84 (S.D. Fla. 1986).

1. Gardere's Conduct Violates Texas Rule 1.09(a)(2).

Texas Rule 1.09(a)(2) "forbids a lawyer to appear against a former client if the current representation, in reasonable probability, will involve the use of confidential information gained from the prior representation," *In re American Airlines*, 972 F.2d at 615 [quoting TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09] and the Fifth Circuit has indicated that a former client may disqualify counsel simply by showing that the former attorney possesses relevant confidential information contemplated by Texas Rule 1.09(a)(2). *In re American Airlines*, 972 F.2d at 615. Moreover, "confidential information" is not limited to "privileged information," but encompasses ``all information relating to a client or furnished by the client, ... acquired by the lawyer during the course of or by reason of the representation . . .. " TEX. DISCIPLINARY R. PROF. CONDUCT, Rules 1.09(a)(2), 1.05(a).[16] Thus, a movant may disqualify counsel by "pointing to specific instances where it revealed relevant confidential information regarding its practices and procedures." *In re American Airlines*, 972 F.2d at 615 [citing *Duncan*, 646 F.2d at 1032].

In the present case, Mr. Baron and Compana have amply identified specific instances in which confidential information was revealed to Gardere's attorneys concerning Compana's business practices and procedures. Such information was revealed to Attorney Vogel in 2001 or 2002, in the course of several conversations, and upon information and belief, a personal meeting. *Introductory Statement* at ¶¶ 1-2; *Appendix* at pp. 3-4. Such information was also disclosed to Attorney Estes, and discussed by her with other attorneys at Gardere, over several weeks in November and December 2003 – the same year Compana acquired the <golfhawaii.com> domain. *Introductory Statement* at ¶¶ 3, 4, 9; *Appendix* at pp. 4-5, 8. As a result of these disclosures, Attorneys Estes and Vogel gained

[16]See *also*, *Clarke v. Ruffino*, 819 S.W.2d 947, 950-951 (Tex. App.– Houston 1991).

a thorough understanding of Compana's business model and related trade secrets, *Introductory Statement* at ¶ 9; *Appendix* at pp. 7-8, and Attorney Estes also acquired, reviewed, and discussed with other members of Gardere, specific, confidential, contracts pertaining to Compana's domain name acquisition activities. *Introductory Statement* at ¶¶ 3-4; *Appendix* at pp. 4-6, 10-16. The information revealed to Attorneys Estes and Vogel is relevant herein, because, *inter alia*, it pertained to Compana's method and motives for acquiring newly-deleted domains, and the domain name at issue was "newly-deleted" when acquired by Compana using these methods, for the same reasons, in 2003. *Introductory Statement* at ¶ 9; *Appendix* at pp. 7-8. Moreover, there is a reasonable probability that this information will be used against Compana and/or Mr. Baron herein, in contravention of Texas Rule 1.05, and Mr. Baron has expressed concern regarding this likelihood. *Appendix*, at pp. 7-8, 21-24, 26-35, 38-40, 43-44. Whereas, Texas Rule 1.09(a)(2) is equally applicable to information disclosed by prospective clients, *In re American Airlines,* 972 F.2d at 612 [citing TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09, Comment 4A; HAZARD & HODES, THE LAW OF LAWYERING § 1.9.111 (1991)][17], and its prohibitions are imputed to every partner and associate in the conflicted lawyer's firm, TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09(b), Gardere, and all its partners and associates are prohibited from continuing to represent Defendant in this case. *Abney v. Wal-Mart*, 984 F.Supp. 526, 528 (E.D. Tex. 1997); *Admiral Insurance Company*, 2005 U.S. Dist. LEXIS 16363.

2. <u>Gardere's Conduct Violates Texas Rule 1.09(a)(3)</u>.

[17]See *also*, TEXAS DISCIPLINARY R. PROF. CONDUCT, preamble, at ¶ 13 (". . there are some duties, such as of that of confidentiality, that may attach before a client-lawyer relationship has been established"); *Woolley,* 2003 U.S. Dist. LEXIS 8110 [citing *Vinson & Elkins,* 946 S.W.2d 381, 404 n. 15].

Texas Rule 1.09(a)(3) provides that "a lawyer who personally has formerly represented a client in a matter" may not, without prior consent, represent another person in "the same or a substantially related matter." TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09(a)(3). Conflicts under this Rule are imputed to all attorneys in the lawyer's firm, TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09(b), and the Rule applies to prospective, as well as former, clients. *In re American Airlines,* 972 F.2d at 612. Comment 4B to Texas Rule 1.09 provides that a "substantially related" matter, "primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person. It thus largely overlaps the prohibition contained in Paragraph (a)(2) of this Rule [i.e., a situation in which representation in reasonable probability will involve a violation of Rule 1.05's requirements concerning confidentiality]." TEX. DISCIPLINARY R. PROF. CONDUCT, Rule 1.09, Comment 4B (emphasis added).

As set forth *supra*, at p. 17, Gardere acquired confidential information regarding Compana, that is relevant to the present action, and could be used to Compana's and Mr. Baron's disadvantage, or to the advantage of Defendant herein. Whereas, Texas Rule 1.09(a)(2) concerns the "reasonable probability" that this information might be used, Texas Rule 1.09(a)(3), as clarified in Comment 4B, establishes Gardere's conflict, whether this information is likely to be used or not – as long as the information "could be used," a prohibited conflict exists, absent Compana's prior consent. Whereas, no such consent has been given, *Appendix*, at pp. 7-8, 21-24, 26-35, 38-40, 43-44, Gardere, and all

of its partners and associates, are forbidden from continuing to represent Defendant in this case.[18]

C. Gardere's Representation of Defendant Violates the Model Rules.

1. **Gardere's Conduct Violates Model Rules 1.9(c) and 1.18(b)**

Model Rule 1.9(c) indicates that "[a] lawyer who has formerly represented a client in a matter or whose . . . firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client . . ., or (2) reveal information relating to the representation . . . ." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9(c). This prohibition applies to prospective clients in this Circuit, and is also applied to prospective clients by Model Rule 1.18(b). MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18(b). The prohibition also extends to all attorneys in the subject lawyer's firm, under the plain language of Model Rule 1.9(c), Model Rule 1.10(a), and the law of this District and Division. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9(c), Rule 1.10(a); *Woolley,* 2003 U.S. Dist. LEXIS 8110, *32) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by [Model] Rules 1.7, 1.8(c), 1.9 or 2.2").

Attorney Vogel, Attorney Estes, and the additional Gardere lawyers with whom Attorney Estes discussed Compana's 2003 disclosures, could not be reasonably be expected to represent Defendant directly in this case without using (consciously or subconsciously), or revealing (intentionally or inadvertently), the information Compana disclosed, to Compana's disadvantage, or to the advantage of Defendant. Moreover, in such a situation, it would be unconscionable to

[18]See *Islander East Rental Program v. Ferguson*, 917 F.Supp. 504 (S.D. Tex. 1996) ("[i]n providing two distinct grounds for disqualification, the Rules expand the protections for former clients beyond those offered by the substantial relationship test").

expect Compana to rely on a "promise" that such information, though possessed by these attorneys, would not be used or revealed in an action filed against it by the same attorneys, regarding the same subject matter. There is a reasonable probability that this information will be used or disclosed, and/or has been already. Thus, Attorneys Vogel and Estes, and all other Gardere attorneys who have shared in, and discussed, Mr. Baron's revelations on Compana's behalf, are barred from representing Defendant herein, under Model Rule 1.9(c) and newer Model Rule 1.18(b), and Gardere's remaining partners and associates are similarly barred, by Model Rule 1.9(c), Model Rule 1.10(a), and the standards followed in this Circuit, District, and Division. MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.9(c), 1.18(b), and 1.10(a); *Woolley,* 2003 U.S. Dist. LEXIS 8110, *32.

2. Gardere's Conduct Violates Model Rule 1.9(a), Even When Model Rule 1.18 is Applied.

Model Rule 1.9(a) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent, confirmed in writing." MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9(a). This prohibition is imputed to all members of the involved lawyer's firm, under Model Rule 1.10(a). MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.10(a). Comment 3 to Model Rule 1.9 elucidates the meaning of "substantially related matter" as follows:

> Matters are "substantially related" . . . if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the

> property on the basis of environmental considerations . . . In the case of an organizational client . . . knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter . . . .

MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.9, Comment 3.

In the present case, Gardere's attorneys previously consulted with Compana over a period of several weeks, through its President, Mr. Baron, concerning Compana's acquisition of newly-deleted domains, obtaining extensive, private, trade secret-protected information and documents regarding the manner and methods through which such domain names were acquired; the motivations for such acquisitions; Compana's intended uses for the domains, and the problems Compana faced in the business. *Introductory Statement* at ¶¶ 1-4, 9; *Appendix* at pp. 3-6, 8, 10-16. An ultimate issue in this action is whether Compana's acquisition and use of one of these newly-deleted domain names, <golfhawaii.com>, was in bad faith, amounting to willful cybersquatting, under 15 U.S.C. § 1125(d), *et seq*., and warranting transfer of the domain to Defendant, with statutory damages for the alleged violation. This situation is analogous to the example specified in Model Rule 1.9, Comment 3, where an attorney formerly representing a client in connection with environmental permits may not later represent another client against him, in an action based on environmental considerations. Whereas, a number of specific facts gained by Gardere's attorneys in the prior matter are relevant to ultimate issues in this case, the respective matters are substantially related, and Model Rules 1.9(a), and 1.10(a) preclude Gardere's representation of Defendant herein.

Model Rule 1.18(c), if deemed applicable by the Court, does not alter the foregoing result. The Rule adds a requirement, for prospective clients only, that the information acquired in the

previous matter must be "significantly harmful" if used against the prospective client in the later case. Obviously, Compana would be harmed significantly by Gardere's use of the confidential information previously divulged, which included trade secrets relating to Compana's business model and domain name acquisition activities, and confidential agreements, with non-disclosure provisions, pertaining thereto.

Nor may imputation of the Model Rule 1.9(a) violation be avoided herein, through the procedures outlined in Model Rule 1.18(d). See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18(d). Compana has never consented in writing to Gardere's representation of Defendant in this matter, as required by Model Rule 1.18(d)(1), and the alternate requirements of Model Rule 1.18(d)(2) have not been met. First, given the extensive nature of Mr. Baron's prior disclosures to Attorneys Estes and Vogel, it cannot be credibly claimed that precautions were taken to limit these disclosures to information reasonably necessary for Gardere to determine whether it would represent Compana in the prior disputes. See MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.18(d)(2). Indeed, the evidence indicates that Attorney Estes, in particular, encouraged Compana to select Gardere for all its legal needs, and it should be assumed that the disclosures made were commensurate with this invitation. *Introductory Statement* at ¶ 3; *Appendix* at p. 4. Second, Gardere's attorneys in the present and prior matters practice within the same "section" of the firm, and while Model Rule 1.18(d)(2)(i) permits a "screen" under certain circumstances, there is no evidence that such a screen was timely employed, or that a screen would sufficiently protect the information and material disclosed. The Model Rules are not the sole authority governing motions to disqualify in this Circuit, and the screening procedure referenced in Model Rule 1.18(d)(2) is contraindicated by both the Texas Rules and the "substantial relationship" test employed by this

Court, which permit no exceptions to the irrebuttable imputation of conflicts under Texas Rule 1.09 and Model Rules 1.9 and 1.10(a).[19] Finally, written notice was not timely provided to Compana, as required by Model Rule 1.18(d)(2)(ii). As amply evidenced by the correspondence in the *Appendix* at pp. 21-46, initial notice of the conflict emanated from Compana's counsel, and was rebuffed by defense counsel for more than two months. *Id.*; *Appendix* at p. 8. Initially, Gardere responded by presenting a copy of its 2003 "disengagement letter," which advised that it would not be representing Compana in the prior matters, while remaining silent on the subjects of confidentiality and future conflicts. *Introductory Statement* at ¶ 7; *Appendix* at pp. 8, 25. It is apparent from this response that Gardere believed it had no obligations to Compana, due to its declination of the 2003 engagement, and that no notice was required. Later, Gardere apparently came to believe that initiating actions against Compana provided the requisite notice – a proposition antithetical to the letter and spirit of Model Rule 1.18(d)(2)(ii). See *Appendix* at pp. 36, 42. In sum, whether or not Model Rule 1.18 is applied by the Court, Gardere stands in violation of that Rule, as well as Model Rule 1.09(a).

D. Gardere's Conduct Cannot Withstand the Substantial Relationship Test.

Both elements of the substantial relationship test applied in this Circuit are met in the instant case. First, there was an actual attorney-client relationship between Compana and Attorneys Vogel and Estes of the Gardere firm. As stated previously, this element may be satisfied even when an attorney-client relationship has not been formed, but a person has sought in good faith to retain the

[19] *E.g.*, *Woolley,* 2003 U.S. Dist. LEXIS 8110, *32 ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2"); *Dyll,* 1997 WL 222918, at *2; *Selby,* 6 F.Supp..2d at 582; *American Sterilizer Co.,* 1992 U.S. Dist. LEXIS 21542, *14; *In re Epic Holdings, Inc.,* 985 S.W.2d at 49 ("Members of a law firm cannot disavow access to [the] confidential information of any one attorney's client").

lawyer. *E.g.*, *In re American Airlines,* 972 F.2d at 612. The rationale for this result was well-expressed in *In re Dupont's Estate*, 60 Cal. App. 2d 276 140 P.2d 866, 873 (1943):

> If a person in respect to his business affairs or troubles of any kind, consults with an attorney in his professional capacity, with a view to obtaining professional advice or assistance, and the attorney voluntarily permits or acquiesces in such consultation, then the professional employment must be regarded as established, and the communication made by the client, or advice given by the attorney . . . is privileged. An attorney is employed – that is, he is engaged in his professional capacity as a lawyer or counselor – when he is listening to his client's preliminary statement of his case, or when he is giving advice thereon, just as truly as when he is drawing his client's pleadings, or advocating his client's cause in open court. It is the consultation between attorney and client which is privileged, and which must ever remain so, even though the attorney, after hearing the preliminary statement, should decline to be retained further in the cause, or the client, after hearing the attorney's advice, should decline to further employ him. [citation omitted]. As has been pointed out in other cases, no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney, after hearing his statement of the facts decided to accept the employment or decline it.

Id.[20] Second, a substantial relationship exists between the subject matter of the former and present representations. As discussed, *supra*, at p. 21, an ultimate issue in this case is whether Compana's acquisition of the newly-deleted domain name, <golfhawaii.com>, in 2003 constituted "bad faith," a determination requiring examination of the circumstances of the acquisition, and Compana's

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[20]The same view is reflected in the following opinions, and many others: *Kearns v. Fred Lavery Porche Audi Co.*, 745 F.2d 600, 603 (Fed Cir. 1984); *Westinghouse Elec. Corp. v. Kerr-McGee Corp*., 580 F.2d 1311, 1319 and n. 12 (7th Cir. 1978) (fiduciary relationship between lawyer and client extends to preliminary consultation by prospective client with view to retention of lawyer though actual employment does not result); *Wilson P. Abraham Constr. Corp.,* 559 F.2d at 253; (attorney-client relationship existed between attorney and each co-defendant in a conspiracy case, due to necessity of consultation); *In re Yarn Processing Plant Validity Litig*., 530 F.2d at 90 (attorney-client relationship arose by imputation); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc*., 501 F.Supp. 326, 331 (D.D.C. 1980); *E.F. Hutton & Co.,* 305 F.Supp. at 388 (relation of attorney and client not dependent on payment of a fee or execution of formal contract); *Taylor v. Sheldon*, 173 N.E.2d 892, 895 (Ohio 1961) (disclosures made with a view to enlist attorney's services are privileged).

underlying motives therefor. The previous matters involved Compana's business of acquiring newly-deleted domain names; its proprietary method of such acquisition, and its motives therefor, and the <golfhawaii.com> domain was acquired using these methods, for the same motives. The prior matters were "akin to the present action in a way reasonable persons would understand as important to the issues involved," and accordingly, the second element of the substantial relationship test is met. *In re Corrugated*, 659 F.2d at 1346; *Gibbs v. Paluk*, 742 F.2d 181. Thus, it must be irrebuttably presumed that (1) relevant confidential information was disclosed to Attorneys Vogel and Estes in the former matters, *In re American Airlines* 972 F.2d at 613; *Duncan*, 646 F.2d at 1028; *In re Corrugated*, 659 F.2d at 1347,[21] and that (2) the confidences obtained by these attorneys will be shared with the other members of Gardere. *In re American Airlines*, 972 F.2d at 614; *In re Corrugated*, 659 F.2d at 1346; *Selby,* 6 F.Supp..2d at 582. Under this test alone, Gardere, and its partners and associates, must be disqualified from continuing to represent Defendant herein.

E. The Relevant Social Considerations Favor Gardere's Disqualification.

Gardere's representation of Defendant in a counterclaim against Compana, and a third-party complaint against Mr. Baron, in which the very practices Compana disclosed to Attorneys Vogel and Estes, and for which Compana sought Gardere's assistance, are condemned as unlawful, warranting damages and injunctive relief, has a strong appearance of impropriety in general. Moreover, the possibility that confidences revealed will be disclosed, or will be used to Compana's and Mr. Baron's disadvantage, or to the advantage of Defendant, represent a real possibility that specific improprieties will occur. Finally, Gardere's conduct will arouse public suspicions of impropriety that greatly outweigh any social interests served by its continued participation in this case.

[21]See *also*, *Admiral Insurance Company,* 2005 U.S. Dist. LEXIS 16363.

Both Compana and Mr. Baron have the right to expect that their credibility will not be impugned by their former attorneys in a substantially related matter, or by other members of the attorneys' firm. *Selby,* 6 F.Supp.2d at 582. Moreover, it would be unfair to force Compana or Mr. Baron to fight Defendant's counterclaims and third-party complaint under the specter of unfairness that has befallen this case. Should Defendant ultimately prevail, Compana and its officer will always wonder whether Defendant was advantaged by information obtained by Gardere during a relationship considered sacrosanct by the Court. Additionally, Compana and Mr. Baron will raise the disqualification issue on appeal if they are on the receiving end of an adverse judgment. A reversal on this issue might require Defendant to relitigate this case from the beginning with new counsel, paying for legal expenses to prosecute and defend against this case twice. Plaintiff and Third-Party Defendant would likely also incur additional expense. Meanwhile, this case is in a very early stage of litigation and Gardere's role thus far has been limited to filing an Answer. Accordingly, for the protection of all parties, Gardere, and all of its partners and associates, should be disqualified from continuing in this matter. *Burnett,* 2005 U.S. Dist. LEXIS 4849, at *22.

F. CONCLUSION.

IN VIEW OF THE ABOVE, Plaintiff and Third-Party Defendant request that Defendant's current attorneys of record, and all partners and associates within the Gardere firm, be disqualified from representing Defendant herein, and that the Court award the movants' reasonable attorney's fees and expenses for preparing, filing, and prosecuting the present *Motion*.

RESPECTFULLY SUBMITTED:

February 7, 2006

By : s/Gregory H. Guillot

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ATTORNEY FOR PLAINTIFF, ONDOVA LIMITED COMPANY, d/b/a COMPANA, LLC AND THIRD-PARTY DEFENDANT, JEFFREY BARON

Certificate of Service

I, Gregory H. Guillot, do hereby certify that a true and correct copy of the foregoing document was served via CM/ECF upon Beverly B. Godbey, Gardere Wynne Sewell LLP, 1601 Elm Street, Suite 3000, Dallas, TX, counsel for Plaintiff, on this, the 7th day February 2006.

s/ Gregory H. Guillot
Gregory H. Guillot

without ever intending to pay them the full amounts that they charge, and then terminating them when they demand payment, this court is troubled that there are possibly criminal implications for Jeffrey Baron.

The bankruptcy court has announced that it will not allow this pattern to occur any further in these proceedings, and Jeffrey Baron will not be allowed to hire any additional attorneys. Mr. Baron has been told that he can either retain Gary Lyon and Martin Thomas through the end of the bankruptcy case (which this court does not expect to last much longer) or he can proceed *pro se*. The bankruptcy court has further warned Mr. Baron that if he chooses to proceed *pro se* and does not cooperate in connection with final consummation of the Global Settlement Agreement, he can expect this court to recommend to His Honor that he appoint a receiver over Mr. Baron, pursuant to 28 U.S.C. §§ 754 & 1692, to seize Mr. Baron's assets and perform the obligations of Jeffrey Baron under the Global Settlement Agreement.[11]

III. RECOMMENDATION.

As alluded to above, the bankruptcy court's concerns over the above hiring and firing of lawyers by Mr. Baron is multi-faceted (*e.g.*, Rule 11 implications; frustration of the Global

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[11] The bankruptcy court is concerned that it would not have the power to appoint a receiver over Mr. Baron, due to language in section 105(b) of the Bankruptcy Code.

Exhibit J

Exhibit K

filed its Report and Recommendation with this Court. On October 19, 2010, this Court adopted the Bankruptcy Court's Report and Recommendation in its entirety.

2. The Bankruptcy Court's Report and Recommendation addressed Mr. Jeffrey Baron's continuing and disturbing pattern of hiring and firing attorneys. In the Bankruptcy Court's Report and Recommendation, the Bankruptcy Court stated that it would no longer tolerate such behavior and that it would not allow Mr. Jeffrey Baron ("Baron") to hire any additional lawyers. In fact, the Bankruptcy Court gave Baron two options: (1) retain Gary Lyons and Martin Thomas through the end of the Bankruptcy Case, or (2) proceed *pro se*. If Baron chose the latter opinion, the Bankruptcy Court advised Baron that it would recommend to this Court that it appoint a receiver over Mr. Baron and all of his assets.

II. RECENT DEVELOPMENTS

3. At a hearing on Wednesday, November 17, 2010, Martin Thomas advised the Bankruptcy Court that he was terminating his legal representation of Mr. Baron. Mr. Thomas advised the Bankruptcy Court that he had not been paid, that Mr. Baron had filed a grievance against him and that Mr. Baron had committed to attend the hearing on November 17, 2010 but failed to show up. The failure of Mr. Baron to show up on November 17, 2010 was disruptive for several reasons including that Mr. Baron was advised by Mr. Thomas that he needed to attend in order to raise objections to the Trustee's Motion for Authority to Reject Executory Contracts with The Internet Corporation for Assigned Names and Numbers ("ICANN") filed by the Trustee ("ICANN Motion") in the Bankruptcy Case, at Mr. Baron's request, on November 3, 2010. Mr. Thomas had advised Mr. Baron that he was withdrawing and would not make the objections Mr. Baron was requesting be made to the ICANN Motion. Mr. Thomas has recently advised the Trustee that he himself has had to engage counsel to handle matters with Mr. Baron.

4. Additionally, on November 19, 2010, one of Mr. Baron's other attorneys, Gary Lyon, advised the undersigned counsel for the Trustee that Baron has hired a new attorney to represent Baron in connection with matters pertaining to the Bankruptcy Case. That attorney is

Motion conference labeld

Exhibit L

13:52 anything that waives his Fifth Amendment privilege. And
13:52 we would like to cooperate with you fully and we'd like
13:52 to respond in writing if you just give me a list of the
13:52 information that you want. And if there's any resources
13:52 that I need to fully to respond, for example, an
13:52 accountant or something like that, you know, I'll let
13:52 the receiver know. And it might just be an easier thing
13:52 than having some kind of an inquisition/deposition. And
13:53 that will be a super cooperative type of a deal. You
13:53 know, I know there's a lot of tension and maybe some
13:53 animosity. And that might diffuse things.
13:53 And -- and you know, the judge said he
13:53 wants us to work together to the fullest extent possible
13:53 and turn over a new leaf and, you know, make a second --
13:53 second first impression and whatever. And that's what
13:53 we'd like to do if -- if -- if we can work together on
13:53 that basis. It will still get you the information in
13:53 a -- you know, in a less threatening setting. We've got
13:53 five attorneys here questioning Jeff. And you know, it
13:53 will still get you what you want.
13:53 MR. GOLDEN: Let me tell you what we're
13:53 going to do in the next few days. The judge stated at
13:53 the last hearing that we should file a motion for the
13:53 disbursement of attorneys fees to the unpaid attorneys.
13:54 And you know, we've collected up those declarations and

14:53 1 get renewed and the money losing ones that Jeff Harbin
14:53 2 and the others think should not be renewed don't get
14:53 3 renewed. But since we don't have that other source of
14:53 4 funding, we're left with no other choice. I mean, the
14:53 5 judge has made it clear how this is going to go.
14:53 6 And so I go back to the original -- one
14:53 7 of the purposes of this meeting is to collect the
14:53 8 information on those assets. And -- and I've been sort
14:53 9 of taking up Peter Loh's time who has got the specific
14:53 10 questions that I guess we'll either get the Fifth
14:53 11 Amendment for or we won't. But I'll just end by saying
14:54 12 that I urge you to make this easier so it takes less --
14:54 13 takes less professional fees in order to collect up
14:54 14 these funds so that you don't have to suffer the tax
14:54 15 consequence of the IRAs, you don't have to lose the
14:54 16 domain names. But again, it's going to be your choice.
14:54 17 MR. SCHEPPS: That's why I'm suggesting
14:54 18 that we work together and let's cooperate. Give me the
14:54 19 questions that you want, let me take a look at it. If I
14:54 20 need some resources to get your -- your questions
14:54 21 responded to, you know, I'll come to the receiver and
14:54 22 ask for that.
14:54 23 MR. GOLDEN: Why can't you do it now?
14:54 24 Why can't you take a break with Mr. Baron and you're
14:54 25 going to decide one way or the other. If the answer is

16:16 Stan Broome gets without Stan Broome agreeing?

MR. BARRETT: No. I agree.

MR. GOLDEN: So that's the --

MR. BARRETT: I agree.

MR. GOLDEN: And there's -- there's approximately 25 different declarations we have. So we're talking 25 different law firms.

MR. BARRETT: Right, right. I think -- I think it has to be equitable for both sides. I mean, every claim needs to be really scrutinized and nothing can be taken at face value. But you know, every -- every lawyer has to be given the opportunity to present their -- their bill and explain the circumstances under which they -- they arrived at that bill and provide documents -- supporting documentation.

MR. GOLDEN: All right. I'm looking at Exhibit 7 here. This is an e-mail Gary Schepps sent to Peter Loh February 22, 2011 7:21 p.m. It says here -- this is last night -- To the best of my knowledge, there is no secret bank account with money overseas.

But to the best of your knowledge, that's not a true statement, right?

MR. BARRETT: I think there's accounts, I just don't think there's any money in them.

MR. GOLDEN: Well, there's not a lot of

money.

MR. BARRETT: There's not a lot of money.

MR. GOLDEN: But what he's saying here is to the best of my information, there is no secret bank account with money overseas. You believe that there's somewhere between five and ten accounts?

MR. BARRETT: Well, three and five accounts, something like that.

MR. GOLDEN: All right. But this is why I can't seem to be able to work with Gary Schepps on these issues because this is a lie. So we're trying to get to the bottom of the Cook Islands funds. And then he's sending a lie and then not showing up today.

MR. VOGEL: And calling them secret when, in fact, you know about them. So it's not much of a secret, is it?

MR. MACPETE: But just so we have a clear record, you're nodding your head. But I don't want to say that that means you're agreeing.

But do you agree that that statement from Mr. Schepps that there are no secret bank accounts overseas with money in them, that's a false statement?

MR. BARRETT: Yes. And I thought that -- and while I recall that -- saying that, if I'm not mistaken, he represented at the last hearing that there

were and we would get you that information. If I'm not mistaken --

MR. VOGEL: He told Judge Furgeson?

MR. BARRETT: Yes.

MR. GOLDEN: And that's why just hours before this meeting begins, about 14 hours before --

MR. BARRETT: I think we took a break and we went in and we talked and -- we talked, Mr. Schepps, myself, and Mr. Baron talked. And --

MR. VOGEL: On the 17th?

MR. BARRETT: Yes, on the 17th. And my recollection was it was a situation where, look, if there's -- if there's nothing to hide, don't hide it, you know.

MR. GOLDEN: Right.

MR. BARRETT: So we came back in and said, there's some accounts, we'll get you the information.

MR. GOLDEN: That's my recollection. I'm certain that the February 17th record will reflect that.

MR. BARRETT: Okay. All right.

MR. GOLDEN: And so that's why we're a bit frustrated -- more than frustrated when 14 hours before the start of this meeting today, as part of an excuse to not show up to the meeting, Mr. Schepps made

16:20 this statement. And so --
MR. VOGEL: State the statement.
MR. GOLDEN: -- my question to you is:
16:21 The statement that reads, quote, To the best of my
knowledge, there is no secret bank account with money
overseas, unquote, is a false statement?
MR. BARRETT: That's a false statement.
MR. GOLDEN: Not only is there one or
more bank accounts with money overseas, but Mr. Schepps
does have knowledge of that?
MR. BARRETT: Yes. And I believe he
stated on the record that he did at our last meeting.
MR. GOLDEN: So when he says later on,
You have my 100 percent cooperation on this, that's
clearly disingenuous because, in fact, it is -- it
follows something that is an untrue statement.
MR. BARRETT: Disingenuous is a good
characterization.
MR. MACPETE: In fact, when we're talking
about accounts overseas that have some amount of money
in them, there are accounts in the Cook Islands that
have some amount of money in them, correct?
MR. BARRETT: That's correct.
MR. MACPETE: And there's at least one
account in Switzerland that has money in it, correct?

15:10 1 And the example I gave was Cook Islands assets. And he
15:11 2 said, well, you're going to meet face to face with
15:11 3 Mr. Schepps and you're going to find out that
15:11 4 information and you're going to ask the questions and
15:11 5 you're going to get the answers to the questions on the
15:11 6 Cook Islands assets. So now I'm here. We're going to
15:11 7 ask the questions. And to the extent we leave here
15:11 8 without answers to those questions, that's the report
15:11 9 we're going to give back to the judge, that we came and
15:11 10 we did not end up getting the answers to those
15:11 11 questions. So you can do it any way you want. You can
15:11 12 say, well, the judge ordered Mr. Baron to do it, but he
15:11 13 didn't order the attorneys to do it. You can take that
15:11 14 up with the judge. But I'm saying that I was ordered to
15:11 15 come here and ask those questions and get those answers.
15:11 16 And the fact that I'm going to leave without the
15:11 17 answers, it is not my own doing. It's because of the
15:11 18 lack of cooperation that I'm getting from Mr. Baron and
15:11 19 his counsel.
15:11 20 MR. SCHEPPS: Okay. Well, we just want
15:11 21 to make the statement that we've offered to cooperate
15:11 22 numerous times. We've offered to provide the
15:11 23 information if you would just provide us with what the
15:11 24 questions are, and we can respond to your questions.
15:12 25 But we would like an agreement that our responses don't