

Civil Action No. 3:12-cv-00367-F (O)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

JEFF BARON,

Appellant,

v.

CHAPTER 11 TRUSTEE DANIEL J. SHERMAN

Appellee

Appeal from the United States Bankruptcy Court
For the Northern District of Texas, Dallas Division
Bankruptcy Petition No. 09-34784-sgj11

LETTER BRIEF IN RESPONSE TO MAY 16 2012 ORDER

Respectfully submitted,

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May 25, 2012

VIA EMAIL (and PACER)

Hon. Judge W. Royal Furgeson, Jr.
United States District Judge
1100 Commerce Street, Room 1359
Dallas, Texas 75242-1001

Re: *Civil Action No. 3:12-cv-00367-F (O)*

Your Honor,

This briefing addresses the issues relevant to the instant appeal. Accordingly, the scope of this briefing is limited to the record on appeal before the Court. The facts and issues relevant from the perspective of the Vogel receivership are not addressed here, and no attempt is made to respond or present a countervailing argument to the issues beyond the limited matters at issue in this appeal.

Accordingly, the contents of this brief are as follows:

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ISSUES ADDRESSED

QUESTION 1. How Ondova Limited Company owns the domain name servers.com?

QUESTION 2. What it means to registrar a domain name and what it means to own it?

ARGUMENT

QUESTION 1. How Ondova Limited Company owns the domain name servers.com?

ANSWER: The Court has requested that a theory be briefed to support a certain outcome— Ondova owning the domain name servers.com. That theory, while not endorsed by Appellants, responsive to the Court’s briefing directive is as follows: If the bankruptcy code’s ‘ipso facto’ clause negation provision, that is expressly limited in application to rights lost by entities which themselves invoke bankruptcy protection, could be amended by the Court and revised to also encompass entities in which a bankrupt debtor held stock; and the Court were to proclaim a new law that overrules the substantive state law contract rights of non-bankruptcy entities when a debtor in bankruptcy holds stock in those entities, the Court could then declare void the substantive rights of Baron vesting under state law. The Court could then institute a second law that the assets of entities ordered into receivership by the Bankruptcy Court are ‘transmuted’ into assets of the bankruptcy estate so that the domain name servers.com would be owned by Ondova.

FURTHER BRIEFING: The Ondova Bankruptcy Judge entered an order placing Servers, Inc. into receivership because it found Servers, Inc. was in default of its obligations regarding the domain name Servers.com. R. 255. Accordingly, because of Servers, Inc.’s default and the imposition of a receiver, as a matter of Texas and Nevada state law, pursuant to the agreement between the parties the domain name servers.com reverted to Baron and

Emke and they became 50/50 owners of the domain name. The Ondova bankruptcy estate retains its 50% ownership interest in Servers, Inc., however, as a matter of Texas and Nevada state law, Servers, Inc. no longer owners “servers.com”. Notably, the Emke settlement transferred most of the rights to “servers.com” to a new entity (Servers, Inc., a Nevada corporation). R. 246-9. **Your Honor’s receiver, Peter Vogel, and his firm Gardere, should be able to provide insight on this as Gardere at some point represented Emke in his suit *against Baron and Ondova*** (a litigation which was active when Vogel was appointed by Your Honor, without a conflicts affidavit as mandated by law, as special master over the Ondova/Netsphere lawsuit).

Ondova and Emke owned the new corporation’s stock 50/50. Id. No one disputes Ondova’s right to ownership of the Servers, Inc. stock. However, the Emke settlement expressly reserved an interest in the domain name for Emke and Baron personally. Id. Pursuant to the agreement, Baron and Emke reserved a security and reverter interest in the domain name, reverting ownership on the condition that the corporation was ever placed into receivership. Id. Specifically the Emke settlement agreement provides:

“In the event of insolvency, receivership and/or other default of the jointly owned company, the domain name <servers.com> shall revert to Jeff Baron and Mike Emke, to be owned jointly and equally. To this degree, these two principals shall maintain a first lien and security interest in the domain name superior to any other investor, equity holder or creditor.” R. 247.

As stated above, on October 18, 2011, the Ondova Bankruptcy Court Judge entered an order placing Servers, Inc. into receivership because it found Servers, Inc. was in default of its obligations regarding the domain name Servers.com. R. 255. Accordingly, because of Servers, Inc.’s default and the imposition of a receiver over the company, as a matter of Texas and Nevada state law, pursuant to the agreement between the parties, the domain name servers.com reverted to Baron and Emke and they became 50/50 owners of the domain name. The Ondova bankruptcy estate retains its 50% ownership interest in Servers, Inc., however, as a matter of Texas and Nevada state law, Servers, Inc. no longer owns “servers.com”.

QUESTION 2. What it means to registrar a domain name and what it means to own it?

ANSWER:

(1) To register a domain name is to list an identity as the holder of a domain name for administrative purposes within the private DNS system. Registration is the technical means set up for administration of the global domain name structure and the DNS system is the technical structure for administering domain names.

(2) To own a domain name is to hold title to that name and to be vested with the power under law to control a bundle of rights relating to that name, including to ultimately direct the use, management, and enjoyment of the domain name, and including the right to convey those rights to others. In other words, owning title of a domain name is having legal rights in and to the property that are recognized at law as being superior to the legal interest in the property of all others.

FURTHER BRIEFING: There is no inherent correlation between ownership of title of a domain name and the registration of a domain name. **Title relates to the right to control and alienation of the property whereas registration relates to the technical administration of the property within the domain name management system as currently implemented.** Just as holding a dog's leash is irrelevant to ownership of a dog, so is holding registration of a domain name. There should be nothing astounding about this principle. For example, a book can be copyright in the name of the author, X. X can then freely transfer his or her ownership of the copyright to Y. The book can recite "copyright 2012 by X", while the copyright owner is actually Y. Thus, most domain investment portfolios typically have a third party or subsidiary hold the DM (domain name) registrations to maintain the privacy of domain portfolio ownership. This Court has had prior experience with this concept in the case of Dauben. Dauben, Inc. provided a privacy service. That is, the company held a portfolio of names as registrant without acquiring an ownership interest in the domain names themselves. Similarly, Ondova provided the same service to its customers, holding domain names as registrant on behalf of the domain name owners to protect the owner's privacy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

CERTIFIED BY: /s/ Gary N. Schepps

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