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ATTORNEY FOR JEFFREY BARON

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**
	§	**Chapter 11**
Debtor.	**§**	

EMERGENCY MOTION TO WITHDRAW AS COUNSEL AND CONTINUANCE OF HEARING ON FEES

Stephen R. Cochell, hereby moves to withdraw as counsel for Jeffrey Baron and for continuance of hearing on fees, and in support, states:

1. On September 27, 2012, counsel was appointed by Judge Furgeson to represent Jeffrey Baron in the bankruptcy and district court proceedings for the *limited* purpose of representing Mr. Baron on the Joint Chapter 11 Plan filed by the Trustee and the Receiver. [Dist. Dkts. 1056 ¶ 2, 1066 ¶ 1].
2. On September 28, 2012, counsel entered an appearance for Mr. Baron in this proceeding for the limited purpose of representing Mr. Baron on the

Chapter 11 Liquidating Trust Plan. An Expedited Discovery Scheduling Order was entered by the Court. [Dkt. 858].

3. On November 11, 2012, counsel filed a Motion for Appointment as Counsel for Jeffrey Baron on Attorneys Fees. [Dist. Dkt. 1087]. The District Court has not granted or denied the Motion for Appointment as Counsel for Jeffrey Baron on Attorney's Fees.

4. The proceedings before this court have convinced counsel that the Court will not entertain arguments from counsel, who has no history with the Court. Given the Court's preference for local counsel, it is clear that it is not in Mr. Baron's best interests for counsel to continue representing Mr. Baron in this case. Similarly, counsel has accomplished the purpose of the representation, to represent Mr. Baron and raise objections to the Liquidating Trust.

5. Rule 1.15 of the Texas Rules of Professional Conduct provide, in pertinent part, that:

> (b) Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless:
>
> > (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
> >
> > (7) other good cause for withdrawal exists.

GOOD CAUSE EXISTS FOR WITHDRAWAL AS COUNSEL

6. Good cause exists for withdrawal where, as here, the Court has clearly denied motions to compel discovery and other motions outlining discovery

abuse based on her experience and history with counsel, who have appeared before her on hundreds of occasions whereas the Court has no experience with the undersigned counsel, who is not a bankruptcy lawyer and who practices in Houston. The Court stated, in pertinent part, that no one "ever accused them of these things in decades, and you're suddenly making incredibly damaging, demeaning, besmirching allegations." 12/3/12 Hearing Tr. At 52. The Court further stated that the allegations were "careless." *Id*.

a. On the contrary, counsel offered to provide evidence to Court regarding excluded bidders at the Confirmation Hearing if the Court allowed him a brief continuance, and offered the Court a declaration of a witness after the hearing, but prior to the Court's ruling. The Court was apparently unwilling to accept the representations of counsel as an officer of the Court.

b. Similarly, the Court imposed discovery conditions that effectively excluded counsel for Baron and his expert witnesses from receiving "Attorneys Eyes Only" information. This action was unprecedented, without good cause, and was a comment on the Court's perception of counsel's lack of credibility as an officer of the Court. The evidence at hearing from Dr. Lindenthal and Mr. Baron, as well as the recently disclosed email of Eric Rice underscored the importance of electronic evidence in conducting due diligence in valuing domain names.

c. Once the Declaration of Eli Pearlman was presented, the United States Trustee believed there was evidence to support the allegations. Counsel filed motions to compel, a Show Cause and other motions to obtain the Court's attention that the very court-ordered evidence being withheld by the Receiver might reveal deficiencies in the process requiring discovery.

d. The Court's comment to Mr. McPete was also deeply disturbing:

> MR. McPETE: And so I hear Ms. Lambert and mr. Fine say, well, this reqally is sort of non-harm/no-foul because they're not interested in bidding, but I'm not sure that's entirely the case. This I think would have been very relevant for the Court to have heard about –
>
> THE COURT: That's not –
>
> MR. McPETE: --during the confirmation process.
>
> THE COURT: That's not exactly what Mr. Fine said. He said they were not so much interested in the cybersquatting nature of the portfolio.
>
> MR. McPETE: I—
>
> THE COURT: That he had many, many conversations with them, and after that, you know, that sounded like the reason that they were not interested in going forward.

MR. McPETE: I heard him say that, but that's not borne out by the email. And the e-mail we have in writing, we can see what the gentleman said.

THE COURT: So I should accept the e-mail of someone I've never heard of versus an officer of this Court?

MR. McPETE: I'm just saying, this we have in writing. We only have Mr. Fine's representations on what was said on a call in which I didn't participate, I didn't even know about it.

THE COURT: Okay. Right now, I'm giving Mr. Fine a whole lot more credence than you. Okay? This is one of those situations where reputation matters.

MR. McPETE: I'm not sure why --

THE COURT: Okay?

MR. McPETE: --I would have a bad reputation, Your Honor, I'm not Mr. Baron. I'm not Mr. Baron's counsel.

12/3/12 Hearing Tr. At 39-40. (emphasis supplied)

e. Simply stated, it appears that the reason for the Court's refusal to compel discovery appears to be based on the Court's experience with counsel and concern for the *reputations* of local counsel, and a lack of experience and lack of trust in counsel for Baron as an attorney and officer of the Court. Thus, it is in Mr. Baron's best interest that counsel withdraw and retain a local attorney whose status as an officer of the Court will not be questioned or whose representations will be

rejected because he has had not appeared before the court on numerous occasions and therefore, has no reputation with the Court. Further details are set out below.

7. During the last day of the Confirmation Hearing, the Court allowed testimony of Stevan Lieberman, an attorney for Trans, Ltd. the "winning bidder" to testify that his clients were good faith purchasers for value.
   a. Mr. Lieberman initially refused to testify about the ownership of Trans and its relationship with Special Jewel, the second highest "bidder."
   b. Mr. Lieberman disclosed that he was also counsel for Special Jewel[1], and further represented Domain Group Holdings, an insider to this transaction. This did not appear to be coincidence.
   c. Counsel for Baron moved to strike his hearsay testimony but the Court proceeded, over objection, to hold an *ex parte* hearing outside the presence of all counsel, except for the United States Trustee, who participated in the hearing.
   d. Counsel for Baron requested discovery of the bidders to protect the integrity of the bankruptcy process. The Court denied this motion.
   e. Counsel for Baron filed a Motion on the appearance of impropriety resulting form the Court's *ex parte* proceeding. Without findings or explanation, that motion was denied.

[1] It is unclear why the hearsay representations of an out-of-state lawyer was accepted at face value despite the irregularity of appearing and refusing to testify.

f. It is unclear why this witness came before the Court requesting an *in camera* meeting with the Court where, as here, counsel for the Receiver presumably talked to this witness and told him that he had to disclose Trans' ownership to obtain good faith purchaser status.

g. It is unprecedented to interrupt a witness' testimony for an ex parte hearing and conduct an ex parte hearing. Giving one party in interest special treatment and the privilege of an *ex parte* hearing appears calculated to have been to provide counsel and advice to assist the party in interest to acquire the Domain Names and/or provide the type of testimony designed to acquire a favorable ruling from the Court.

8. On November 19, 2012, counsel requested the Court grant a continuance to allow further discovery and the presentation of evidence that (1) the auction process was critically flawed and (2) the Receiver excluded *bona fide* bidders from the auction by failing to return phone calls emails seeking information about the auction. The Court denied Baron's motion. [Dkt. 994].

9. On November 20, 2012, Baron filed a Motion to Clarify and offered to present a sworn declaration regarding the allegation of exclusion of bidders for the Court's consideration.

10. On November 21, 2010, the Court entered its Findings of Fact and Conclusions of law and also transmitted the Findings of Fact and

Conclusions of Law to the District Court as a report and recommendation. [Dkt. 944, 947]. Mr. Baron was not permitted to object to the findings before they were transmitted as a report and recommendation to the District Court.

11. The Court denied the November 20, 2012 motion to clarify in its Findings of Fact and Conclusions of Law. [Dkt. 944].
12. On November 27, 2012, counsel for Baron filed a Notice of Appeal of the Court's Order Confirming Chapter 11 Plan and objected to the Court's recommendation to the District Court. [Dkt. 955, 962].
13. On December 2, 2012, counsel for Baron filed a Motion for Post-Hearing Discovery [Dkt. 985] that was denied by the Court. [Dkt. 994]
14. On December 2, 2012, counsel for Baron filed an Emergency Motion for Stay of Order Pending Appeal [Dkt. 985], which attached the Declaration of Eli Pearlman.
15. On November 28, 2012, the Court issued an order setting hearing for the following Monday, December 3, 2012. [Dkt. 960]
16. On November 28, 2012, the Fifth Circuit Court of Appeals entered an Order indefinitely staying the sale until such time as the Fifth Circuit issues a decision. [Dist. Dkt. 1091].
17. On December 1, 2012, counsel filed a Notice of Withdrawal of Motion for Stay of Order Pending Appeal. [Dkt. 983].
18. On December 3, 2012, the Court held an unscheduled status conference and proceeded to criticize counsel for not reaching a decision on

withdrawal of the Motion for Stay Pending Appeal and, at the urging of counsel for the Trustee, threatened monetary sanctions against counsel for withdrawing a motion because it was moot.

a. The Court also criticized counsel for "besmirching" the reputation of counsel for the Receiver by filing motions for contempt, motions for continuance and production of court-ordered discovery. On each of these motions, the Court denied such motions without holding the Receiver accountable for failing to comply with court-ordered discovery.

b. Indeed, the Receiver never denied failing to produce court-ordered discovery, but simply recounted the number of documents produced and the short time period for production of documents.

c. The Court criticized counsel for making allegations of discovery abuse "without evidence" although the Receiver never denied that he failed to produce the court-ordered documents. In fact, the Show Cause Motion was supported by an extensive Declaration of Counsel setting out the documents requested, the numerous attempts to urge the Receiver's counsel to produce the documents. [Dkt. 917]. In other motions, counsel filed discovery motions attaching emails and reasons in support of continuance and further discovery. [Dkt. 895, 929].

d. If the Court had directed counsel for Receiver to timely produce documents, counsel would have been able to identify the testimony

of witnesses such as Eli Pearlman or Eric Rice, another individual who apparently was denied information that he deemed necessary to participate in the bidding.

e. Counsel requested post-hearing discovery---not for the purpose of besmirching the reputation of opposing counsel, but for the purpose of determining whether the sales, auction and bidding process was properly conducted.

f. During the hearing, counsel invited the Court's attention to the fact that counsel for the Receiver did not directly deny allegations that he failed to return Mr. Pearlman's phone calls. Instead, he presented an affidavit of Michael Hambourger, an IT person for Dykema, stating that Hambourger checked the area codes for all of Los Angeles and numerous other area codes in the Los Angeles area, including the 310 area code. There are two major area codes in Los Angeles—310 and 424. Incredibly, Mr. Hambourger did not check the 424 area code for calls from Mr. Pearlman. While one may conclude that there was incompetence in attempting to prove that Mr. Fine did not receive a phone call from Mr. Pearlman, it would have been far easier for Mr. Fine to simply deny, under oath, that he did not receive voicemails from Mr. Pearlman. Mr. Fine apparently did not do so for a good reason, and resorted to the Hambourger affidavit. Mr. Hambourger filed an affidavit purporting to contradict Mr. Pearlman's affidavit that

Mr. Fine did not receive phone calls from Mr. Pearlman. Of the dozen or so area codes "examined" by Mr. Hambourger, including San Bernadino and San Diego, he failed to investigate calls from one of two major area codes for Los Angeles where Mr. Peralman is located---area code 424. This does not pass the "smell" test or any notion of good faith.

g. It is notable that Mr. Fine asserted that the two emails from Mr. Pearlman went into SPAM mail. Most law firms have a policy that *requires* their lawyers receiving SPAM messages to check their email notices, which identify the sender, in this case, eli@elplawfirm.com. When a lawyer gets what might be a SPAM notice from another lawyer, it is reasonable to expect that they would check the SPAM to make sure that they did not overlook an important email. The Dykema SPAM email notice gives each lawyers the ability to open their email just as though they had received it normally. In other words, they can either open their mail, or *refuse* to open their mail. Simply stated, Mr. Fine received an email from an email from a lawyer and did not open the email. Even giving a lawyer the benefit of the doubt, "overlooking" one email from a law firm could potentially be excused as a mistake; to "overlook" two emails sent from the same lawyer defies coincidence and cannot be accepted at face value.

h. The Court expressed its sentiment that Mr. Fine's reputation and integrity had not previously been questioned before this Court. Unfortunately, Mr. Fine's problems with emails and phone calls is not an isolated issue. There was a similar issue with Mr. Fine and Gary Schepps, where Mr. Fine filed an affidavit concerning his efforts to contact Mr. Schepps by looking at the docket, calling an old phone number and purportedly talking to a receptionist and being told that Mr. Schepps was no longer at that office, and others were unable to reach Mr. Schepps. [Dist. Dkt. 1052-2]. Counsel is informed and understands Mr. Schepps claimed that the affidavit was a "sham" because that Mr. Fine has known Mr. Schepps for over *twenty* years and has both his cell number and new office number and used both numbers to contact Mr. Schepps on the Baron matter. While Mr. Fine's affidavit on the Schepps matter may have technically been true in that he did knowingly called an old, discontinued number listed on the docket for Mr. Schepps, that kind of affidavit was, at best, incomplete and misleading. The Court's attention is invited to related pleadings, as well as Mr. Schepps' affidavit filed with the District Court in this case. [Dist. Dkt. 1052-2; 1052 & 1038].

i. Baron's counsel also noted that the email for Eric Rice, which had not been produced in discovery, was highly relevant to Baron's argument that the auction and sales process was seriously flawed

because the Receiver set up a process that denied qualified, motivated bidders adequate information to conduct due diligence. The United States Trustee agreed. [12/3/12 Hearing Tr. At 41]. In both Mr. Pearlman's ("something odd is going on here") and Mr. Rice's (have to be "crazy" to bid without "industry standard" information) emails, they raised their belief that the so-called bidding process was fatally flawed. In both instances, there appears to be a pattern of stonewalling potential bidders and refusing to respond to their emails in a way that appears calculated to exclude bona fide bidders from the auction.

j. The Court immediately defended Mr. Fine and accused counsel of carelessly "besmirching" the reputations of Mr. Fine, Mr. Sherman, and Mr. Vogel. [12/3/12 Hearing Tr. at 52]. While the Court stated the defense of these lawyers was based on prior history with the attorneys pre-dating this case, such personal prior judgments about lawyers constitutes bias in favor of a party, and against another party. In the instant case, there was *objective* evidence that supported Baron's allegations of discovery misconduct that supported a continuance at the very least, and sanctions for failing to timely produce documents. When the objective evidence ran up against the Court's pre-existing biases and prejudices, the Court's bias in favor of local bankruptcy lawyers with reputations, trumped the evidence. This is seen

starkly, for example, when Mr. Fine offered a different version of facts than were offered by Mr. Rice's email. The Court retorted—that is just the Bidder's email showing what the bidder said, against Mr. Fine's word of what they said. Id. at 39-40. Mr. Fine's reputation and hearsay prevailed, and the Court ruled that counsel for Baron essentially cannot be trusted with further motions without preconditions being met.

k. The United States Trustee's position was that the allegations regarding Mr. Pearlman's declaration raised issues that required further investigation. [12/3/12 Hearing Tr. at 16-17, 40-41]

l. The Court then oddly held that the United States Trustee, and only the United States Trustee had standing to conduct either informal investigation or post-hearing discovery of the allegations against the Receiver. [Dkt. 994].

m. However, testimony shows that the Trustee's Office itself recommended the Liquidating Trust to the Trustee and the Receiver and supported the Chapter 11 Plan throughout these proceedings, and refused to take any position regarding the denial of Baron's due process, or the flaws in the sales and auction process until counsel for Baron presented the Court with a sworn declaration from Mr. Pearlman. Moreover, the United States Trustee participated in an ex parte hearing when it should have objected to any ex parte communications with a witness during

testimony.[2] Baron respectfully submits that the Trustee's Office is *conflicted* in pursuing an investigation where, as here, the Trustee's participation in the November 9th auction and the *ex parte* hearing reflects the Trustee's intrinsic involvement in the auction.

n. The United States Trustee reported that Mssrs. Rice and Pearlman represented Vision Media, which no longer was interested in the Domain Names.

19. This position, however, is not supported by evidence subject to cross examination and is irrelevant to the *process*. First, court-ordered discovery was denied of all documents relating to correspondence of interested purchasers. Secondly, the point is that counsel, not the United States Trustee, should be conducting discovery of witnesses on behalf of Mr. Baron. Attempting to use the United States Trustee as a substitute for conducting discovery violates Mr. Baron's right to due process and meaningful discovery of evidence relating to the sales, auction and bidding process

20. However, the United States Trustee has expressed limitations to her obligation to investigate. Counsel is informed that the United States Trustee cannot review matters already decided by the Court, even if the

[2] From the hearing transcript, it appears that the United States Trustee spoke to Mr. Pearlman on the same phone call as Mr. Fine. If that is correct, counsel is concerned that other parties, such as Mr. MacPete or the undersigned counsel were not included in the call.

relief denied was denied as a result of misleading or even false information.

FINANCIAL BURDEN ON COUNSEL SUPPORTS WITHDRAWAL

21. Counsel also moves to withdraw because the District Court has not granted appointment of counsel for Mr. Baron on matters concerning attorney's fees. Rule 1.15(b)(6) provides that a lawyer may withdraw if the representation will result in an unreasonable financial burden on the lawyer.

22. It is clear that where, as here, counsel was appointed for a specific purpose and that purpose has been accomplished, withdrawal should be allowed. Counsel was not appointed to represent Mr. Baron on fee issues, and would have submitted a dramatically different budget and request for retainer if advised that he could not enter an appearance in the bankruptcy court. [Dist. Dkt. 1087]. Unlike the large law firms representing the Receiver and the Trustee, counsel is a solo practitioner who cannot advance expert witness fees in cases where the courts may defer payment for months.

23. Counsel is willing to represent Baron on these matters but is faced with continuing to work seven days a week, ten to fourteen hours a day on this case, and serving clients in other cases. Counsel expected to work hard, review documents and take depositions on an expedited basis in this case, but did not expect the kind of discovery problems and the need to file

motions to obtain evidence for and on behalf of his client. The schedule has taken a physical toll on counsel. Counsel cannot proceed to hire co-counsel unless or until the bankruptcy and district court assures that funds will be made available to pay counsel within some reasonable time.

CONCLUSION

24. Moreover, it also appears that this Court has a closed mind to any argument or evidence offered by counsel for Baron. Accordingly, counsel must also withdraw in the best interests of his client. It appears that counsel with a long personal history with the Court—a point of reference specifically noted by the Court in its decision making—would better serve Mr. Baron.

25. Counsel for Baron also requests the Court grant a continuance for Mr. Baron to seek appointment of counsel by the District Court to represent him on matters concerning approval of the Trustee's attorney's fees.

WHEREFORE, Stephen R. Cochell moves to withdraw as counsel for Jeffrey Baron. Mr. Baron requests that he be allowed a continuance to allow Judge Furgeson to appoint counsel to represent Mr. Baron with respect to opposing the attorney's fee applications.

Very respectfully,

/s/ Stephen R. Cochell
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CERTIFICATE OF SERVICE

This is to certify that, on December 11, 2012, a copy of this Motion was served on all counsel through the Court's ECF system.

/s/ Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF CONFERENCE

This is to certify that, on December 10, 2012, counsel conferred with counsel for the Trustee by email regarding his questions about the motion, but did not receive a response. Counsel called Mr. Hunt and left a message with him and with his secretary indicating that counsel would file the motion if he did not receive a response. Counsel further conferred with Lisa Lambert, Assistant United States Trustee, who requested counsel defer filing the motion to allow her the opportunity to confer with counsel for the Trustee and Receiver.

/s/ Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF COMPLIANCE

This is to certify that counsel has complied with the Court's directive that motions be supported by evidence. Based on the order, counsel does not believe that an affidavit of Mr. Baron is required, as the issues set out above are legal in nature, factual averments are not within his personal knowledge, and the averments are supported by either pleadings of record,

transcripts or declarations of other witnesses.

/s/ Stephen R. Cochell
Stephen R. Cochell

CERTIFICATE OF JEFFREY BARON

This is to certify that I have reviewed the Motion of Counsel to Withdraw as Counsel and for Continuance, and believe that the Motion is supported by facts set out in the pleadings and declarations attached thereto. I am deeply concerned about the favoritism shown to local counsel for the Trustee and Receiver and bias against my appointed counsel. I reluctantly consent to the withdrawal of Mr. Cochell and request the release of funds to enable my retaining counsel of choice to represent me in any further matters that may arise in this case. My address is: P.O. Box 111501, Carrollton, Texas 75011.

/s/ Jeffrey Baron
Jeffrey Baron