

The Honorable Christopher Alston
Chapter 7
Hearing date: February 17, 2017
Response date: February 10, 2017
Hearing Time: 9:30am

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re:

JAYAKRISHNAN NAIR,
Debtor

CHAPTER 7

BK CASE NO.: 15-12626- CMA

RESPONSE DECLARATION OF
JAYAKRISHNAN NAIR IN RESPONSE AND
OBJECTION TO SYMMES' APPLICATION
FOR FEES AND COSTS

I, JAYAKRISHNAN NAIR, declare and state as follows:

1. I am over eighteen years of age, fully competent to testify to the matters set forth herein and am fully familiar with the pleadings and records herein.
2. I am the Debtor in the above action.
3. As of circa October 2014 I had a cash-positive real estate portfolio of five homes in Seattle's premium eastside neighborhoods holding a net worth of approx. \$ 2 Million in equity and a net

1 income of about \$3,000 per month, about \$25,000 in checking accounts, ~\$90,000+ in 401(k)
2 retirement accounts, and above all, private equity in a promising startup "Ratner Biomedical
3 Inc." that has exclusively licensed paradigm-shifting PNS regenerative technologies from Johns
4 Hopkins University that could change the world of Neurosurgeries and most immensely benefit
5 millions of suffering patients worldwide. My circumstances were an antithesis to most other
6 debtors' that have filed for and received bankruptcy protection.
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- 8 4. I was not facing ANY foreclosure or adversary legal action at the time from any creditors,
9 enjoyed good access to credit through multiple credit cards and was in generally excellent
10 financial condition. The only unsecured creditors I had were the active credit cards I used and a
11 couple of ex-parte small claims court judgments from old tenants on small rental disputes.
12 5. One of my investment properties (13506 34th AVE SE Mill Creek WA 98012) had been
13 financed in 2006 through a first mortgage from Wells Fargo and a secondary loan from First
14 Tech Credit Union (originally for \$100,000 but paid down to \$71K). During the well known
15 Housing Market Crisis at the turn of the decade, this property went "underwater". First Tech
16 Credit Union ("FTCU") sent me a letter circa August 2012 stating that the loan had been charged
17 off. They also closed the checking account I held with them that had all my billpay accounts.
18 6. I had been in the east coast and dealing with my mother's heart surgery, and while I setup the
19 billpay on another payment platform for all mortgages and utilities etc, I accidentally missed out
20 on the HOA dues for some properties. After returning to WA state in 2014, I learnt that some of
21 the HOAs had taken ex-parte judgments in my absence without notice or service (about 90% of
22 which were collection fees, which I contested with their management). Other than these HOAs
23 and First Tech, I was not in any adverse legal actions with any other creditors.
24 7. In Oct 2014, I heard from my tenants at the Mill Creek home that there was a foreclosure notice
25 stuck on the door. I was surprised as I was keeping up on the known mortgages and investigated
26 and found that as the properties prices went back up, FTCU was trying to foreclose on the debt

1 they had charged off several years ago. I contacted FTCU and asked for a payment agreement to
2 clear the charged off debt. They agreed to \$915/mo to pay off the 71K and sent me an email
3 confirming the offer after much negotiations that went till March. I accepted by email response
4 and set up the plan payments. But on April 10th 2015, just three weeks remaining into the
5 foreclosure date, they reneged on the offer and said they will go through with the foreclosure
6 unless the entire 71K amount was paid.
7

8 8. As I was a member of a legal insurance network named ARAG, I searched for a Real Estate
9 attorney and found one Mr. Symmes on what was promised as a covered matter [Ex A]. I told
10 Mr. Symmes that I had about \$25K in checking account and that I could withdraw another \$46K
11 from my 401(k) to payoff FTCU to prevent the sale. I specifically wrote to him [Ex B] that I was
12 only engaging him for the purpose of negotiating a settlement or continuance of sale with First
13 Tech for about 60 to 90 days, and that I had other options better than a bankruptcy. But Mr.
14 Symmes advised that by filing a Chapter 13 "emergency strategic barebones filing" as he called
15 it, would not only stop the sale but also give him time to negotiate a settlement for up to 50%
16 less than the charged off balance, as he claimed to have recently done for another client with
17 FTCU. He said that I could avoid 5K in early withdrawal penalties on the 401(k) and potentially
18 tens of thousands of dollars in a negotiated settlement.

19 9. In my initial email response as well as in most of the subsequent conversations, I
20 VEHEMENTLY voiced my concern against a bankruptcy filing as I was in good standing with
21 my other secured creditors (except the HOAs) and had no unsecured creditors other than a
22 couple of small claims judgments. In [Ex B] I wrote ".. I can list and sell the home in the
23 currently hot market, without having to go through the bankruptcy... Please note that I am now
24 in a position to afford payments". I had absolutely no knowledge about the bankruptcy or court
25 matters and had no idea about how costly or stressful it would be to become, and if I had even an
26 inkling of that from Mr. Symmes, I would have had to be clinically insane and suicidal to take

1 this route (but I am not) to dig my hard earned family's nest egg into a hole of \$200,000 plus in
2 totally avoidable costs and losses.

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4 10. I had sent all the information about my schedules and assets before Mr. Symmes filed the
5 Chapter 13, and he had full knowledge that I would not qualify for a Chapter 13 based on the
6 debt limit. However, he deliberately cajoled me into a SPURIOUS filing in bad faith knowing
7 that the estate was well over the debt limit for Chapter 13 and was illegal to do so.

8 11. Furthermore, Mr. Symmes even sent an email [Ex. C] stating that he suspected the Chapter 13
9 Trustee would want to dismiss the case, which shows he knew about the debt limit and that he
10 would be making a spurious filing. His initial estimate [Ex C] for the total costs for the
11 bankruptcy filing was a mere \$850 for the filing fee and his legal fees (he claimed ARAG only
12 gave a discounted rate), which I already paid up front. Currently he is asking for more than
13 \$18,000 in addition to his estimate, or an overestimate of 2400%, on top of his initial quote for
14 his fees for this matter. This Modus Operandi fits the very definition of a bait and switch scam.

15 12. Contrary to what Mr. Symmes has claimed, I was not facing any other foreclosures from any
16 other lenders and also, since the filing of bankruptcy, I have kept up payments to most lenders
17 including Provident Funding, First Tech (per the payment plan), Wells Fargo, Washington
18 Federal etc [Ex D: Bank of America Bill Pay Records to First Tech, Wash Fed and Prov
19 Funding since the filing of original Ch 13]. I did not need the bankruptcy to protect the estate as
20 the estate generates enough cash flow to sustain itself. Furthermore I have been reimbursed over
21 \$50,000 since the filing by investments made into Ratner Biomedical which are more than
22 sufficient for my personal expenses. Contrary to what the Honorable Court has been
23 unfortunately led to believe by some attorneys, I have not had any gambling losses since the
24 filing and my poker exploits during WSOP summers in Las Vegas have actually contributed a
25 small amount of winnings to the estate. I have not benefited from this bankruptcy filing in any
26 way other than avoiding one single foreclosure from FTCU, which could have been handled

1 very differently either through an injunction for specific performance or through simply paying
2 off the balance. No other lenders were threatening any foreclosure action at the time this
3 COMPLETELY UNNECESSARY bankruptcy was filed, and as can be seen from Mr. Symmes'
4 letter to First Tech [Ex E]
5

6 13. Following Mr. Symmes' failure to engage and negotiate any sort of settlement or payment with
7 First Tech as he had promised as the grounds for the filing, I searched for and found Mr. Jerry
8 Walker, who also sent a letter to First Tech [Ex F].

9 14. Contrary to what Mr. Symmes states in his response, he had full disclosure of all my financials
10 from my emails PRIOR to the initial (deliberately wrongful) filing [Ex A,B,C,G,H]. He was also
11 advised that I had been yet to file some of the previous years' tax returns as I had no taxable
12 income while working as an entrepreneur and the passive income was offset by depreciation.
13 However, in his email [Ex G] Mr. Symmes set the expectation to me that it was not a big issue
14 for the filing and there would likely be no hearing etc, and the costs would be limited to \$850.

15 15. What was originally promised as a way to save tens of thousands of dollars have now instead
16 cost my family untold trauma and a financial shipwreck to my stable and sound Six Million
17 dollars estate that only owed a quarter of its worth to bona fide secured creditors (who were
18 mostly all except FTCU in good standing), and merely negligible unsecured credit.

19 16. The total administrative expenses and legal costs stemming from the filing of bankruptcy have
20 ballooned from Mr. Symmes' initial \$850 estimate from [Ex C] to more than \$100,000 to-date
21 (including \$20,000+ from just himself), in addition to loss of rental income and other losses to
22 the estate from the Chapter 7 conversion that are already to the tune of \$50,000+. First Tech's
23 original payoff amount of \$71,000 has now ballooned to \$114,000 with their own legal costs
24 despite me making regular monthly payments per the payment plan. If this is not the highest
25 extremity of incompetence (if not malicious self dealing) it is hard to imagine what would it
26 indeed be.

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2 17. Mr. Symmes failed to advise about the true costs of the filing and my estate has paid a heavy
3 price for trusting his counsel. This self-sustaining, net cash positive estate never needed or
4 benefited from this bankruptcy filing. Furthermore, Mr. Symmes failed to educate me about the
5 costs of converting to a Chapter 11 and presented it merely as a procedural matter. Mr. Symmes
6 never talked about the reporting requirements or other restrictions that I had to be taking on with
7 the conversion until the conversion was already over. If I had known about the true ramifications
8 I would have never accepted either the original filing or the conversion to Chapter 11. I still had
9 several options available to me even in Chapter 13, such as dismissing the case and paying off
10 First Tech from my retirement funds, a fact that Mr. Symmes himself acknowledges in his
11 response that I had brought to his attention.

12 18. Mr. Symmes fiduciary duty was towards the estate as a counsel to Debtor-in-Possession *see*
13 Bowles, Schaaf and Stosberg, "Ghosts of Individual Chapter 11 Debtors (Parts I and II)," 25
14 ABI L. J. 46 (December/January 2007) & 26 ABI L. J. 36 (February 2007). The DIP is more of
15 a quasi-trustee than it is the pure equivalent of a state law trustee, having certain obligations that
16 rise to the level of fiduciary duties, as well as obligations that relate to its status as a debtor in
17 bankruptcy. Representing the DIP/debtor client entails counseling the "debtor part" of the client
18 on exercising its rights and responsibilities as defined under the Bankruptcy Code and advising
19 the "DIP part" of the client requires an understanding of and facilitating the exercise of the
20 DIP's fiduciary duties of loyalty, care, and impartiality. It also requires the lawyer's refusal to
21 participate in the client's proposed violation of its fiduciary duties. Therefore, regardless of
22 whether or not Mr. Nair entertained any uninformed and naive desire to protect his retirement
23 funds at the cost of prolonging the bankruptcy until raising enough funds to pay off First Tech,
24 it was still Mr. Symmes' fiduciary duty towards the estate to allow a dismissal from Chapter 13.

25 19. Mr. Symmes' application for fees should be judged on the merit of whether or not he has
26 maintained the fiduciary standard to the estate by first allowing a spurious and illegal Chapter 13

1 filing (despite being given all the financial information that clearly shows the estate is over the
2 debt limit for Chapter 13) and then an incredibly costly conversion to Chapter 11, while on both
3 cases the estate had easy, cheap and simple alternate options such as dipping into the retirement
4 funds or refinancing from the two million dollars of net equity in real estate. Mr. Symmes'
5 counsel has indeed already cost losses that are orders of magnitude higher than any of the
6 alternate options I would have pursued on my own had I not been unfortunate enough to retain
7 his counsel (even without adding a penny from his fees). See, e.g., *Brown v. Gerdes*, 321 U.S.
8 178 (1944) (counsel in bankruptcy cases seeking compensation from court are held to fiduciary
9 standards); *ICM Notes Ltd. v. Andrews & Kurth LLP*, 278 B.R. 117, 126 (S.D. Tex. 2002),
10 *aff'd*, 324 F.3d 768 (5th Cir. 2003); *In re Taxman Clothing Co.*, 49 F.3d 310 (7th Cir. 1995); *In*
11 *re Perez*, 30 F.3d 1209 (9th Cir. 1994); *In re JLM Inc.*, 210 B.R. 1926 (2d Cir. B.A.P. 1997)
12 (holding both management and debtor's counsel have fiduciary duties to bankruptcy estate in
13 chapter 11 case when debtor's counsel disobeyed new management directions and objected to
14 attempt to dismiss case where new management was unperfected secured creditor seeking to
15 secure its position to detriment of bankruptcy estate). See also *DIP's Attorney*, *supra* n. 3.

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17 20. Furthermore, Mr. Symmes never negotiated any settlement agreement with First Tech and was
18 primarily only interested in getting me to file bankruptcy. I was never advised that his primary
19 area of practice was Bankruptcy and not real estate. Once into the bankruptcy he continued his
20 bait and switch game into trapping me into converting to the Chapter 11 and not let me get out
21 so he can milk the most out of my solvent estate in bogus legal fees for a completely
22 unnecessary bankruptcy that he manipulated my ignorance and misguided me into in the first
23 place. When I advised [Ex H] in July 2016 that I now have about 90K that is needed to payoff
24 First Tech and therefore wished to have the Chapter 11 dismissed, he responded by stating that it
25 was not that easy and even if I had the money to pay off First Tech, I still was forced to stay in
26

1 Chapter 11 until more requirements such as filing prior years zero-dollar tax returns were met
2 etc, or else that the creditors and US Trustee may "force you into a chapter 7" [Ex H].
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4 21. It is completely incorrect that without the automatic stay of the Bankruptcy the estate would
5 have undergone any foreclosures from lenders other than First Tech. In fact the truth is the
6 opposite: the bankruptcy filing left me bereft of liquidity and have forced me to situations where
7 I am unable to keep up with payments that I had otherwise done, due to loss of rental income
8 and additional overhead from administrative expenses and legal costs. The monthly operating
9 reports corroborate the fact that I have built a highly cash positive real estate portfolio and
10 therefore it never needed any bankruptcy protection from any lender other than First Tech,
11 which could have been resolved easily outside of Bankruptcy. Therefore Mr. Symmes is liable
12 to the estate for all the losses it incurred in connection with this unnecessary filing. See Food
13 Management Group, 380 B.R. at 709-715, where a bankruptcy court refused to dismiss a lawsuit
14 for breach of fiduciary duty and fraud on the court against DIP counsel seeking damages far in
15 excess of DIP counsel's fees.

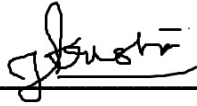
16 22. Mr. Symmes' counsel has led to incredible hardship, losses and costs to the estate that are orders
17 of magnitude higher than the alternate options. In a Chapter 11 matter, Mr. Symmes had the
18 fiduciary duty to the estate and to the DIP to advise the true costs of filing the bankruptcy or
19 converting to chapter 7, when it is clearly apparent that the debtor could easily refinance or
20 liquidate one of his assets to payoff the charged-off debt and stay free and clear of a bankruptcy
21 in his record. However, by exploiting my trust and the complete lack of experience or legal
22 knowledge about what bankruptcy entails, Mr. Symmes deliberately led my estate down a path
23 of financial peril for his own self enrichment. It is plainly obvious that any reasonable or
24 sensible person in my shoes (and I certainly believe I am one) would not have voluntarily taken
25 on this crown of thorns and put it on his head, and accept to a possibility of losing control of his
26 multi-million dollar estate or losing a large chunk of his hard earned fortune when all of it can

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be avoided by simply making an early withdrawal from a retirement account. Therefore I humbly believe it would be a travesty of justice to further exacerbate the trauma and losses that my family and estate have suffered solely due to my stupid mistake of blindly trusting Mr. Symmes' professional competence and integrity, by adding to it by further making me reward him an additional \$20,000 for his disservice in manipulating my trust into pushing my estate down a financial chasm of \$200,000.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED THIS 10th day of February 2017

By : 
JAYAKRISHNAN NAIR

PROOF OF SERVICE

I, Shashi Vijay, declare as follows:

1. I am a citizen of the United States and of the State of Washington, living and residing in King County, over the age of 21 years, not a party to the above-entitled action and competent to be a witness.

2. On January 27, 2017, I caused to be served a true and correct copy of the Notice of Appearance via CM/ECF system which will send notification of such filing to the following parties:

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Jayakrishnan Nair Affidavit

Page 10 of 11

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6 I declare under penalty of perjury under the laws of the State of Washington and the United
7 States that the foregoing is true and correct to the best of my knowledge.

8 DATED this 27th day of January 2017

9
10 /s/ Shashi Vijay
11 Shashi Vijay