No. 15-10341

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JEFFREY BARON, ET AL
Appellants,

vs.

DANIEL J. SHERMAN, ET AL
Appellees,

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
Docket No. 3:09-CV-988

APPELLANT, JEFFREY BARON'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record for Appellant, Jeffrey Baron, certify that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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• Quantec, LLC	Paul Raynor Keating 173 Balmes 2/2 08006 Barcelona SPAIN Tel. 34.93.368.0247 Fax. 34.93396.0810

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/s/ Leonard H. Simon
Leonard H. Simon

STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests an oral argument under Fed. R. App. P. 34(a). The Appellant believes this case meets the standards in Rule 34(a)(2) for oral argument in that:

a. This appeal is not frivolous;

b. Some of the dispositive issues raised in this appeal, in particular the unique issues of: (1) whether Receivership fees and expenses can be charged against parties and assets that were not within the jurisdiction of the trial court; and (2) the related due process issues, have not been authoritatively decided within this Circuit; and

c. As described in this brief, the decisional process may be significantly aided by oral argument.

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Cases

No table of authorities entries found.**Other Authorities**

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Appellant Jeffrey Baron respectfully submits this Appellant's Brief showing the following in support of reversing the *Order on Receivership Professional Fees*:

STATEMENT OF JURISDICTION

Appellant initiated this appeal by timely filing a *Notice of Appeal to United States Court of Appeals for the Fifth Circuit* on April 16, 2015. Record Excerpt 2. This appeal is from a final order of the District Court. On March 27, 2015, the district court below ("DC") issued a Memorandum Opinion and Order and an Order administratively closing case. Record Excerpts 12 and 10, respectively. This constituted a Final Order over which this Court has jurisdiction pursuant to 28 U.S.C. §1291. All of the interlocutory orders entered in this case are now also final and appealable, including the orders in Record Excerpts 3-9 and 11.

ISSUES PRESENTED

1. Whether the DC violated the Fifth Amendment when it prevented Jeffrey Baron from accessing to his funds to pay counsel during contentious, complex proceedings.

2. Whether charging fees against property that was wrongfully seized without jurisdiction and without probable cause violates the Fourth or Fifth Amendments.

3. Whether the precedent of this Court and the Supreme Court precludes charging expenses of an unlawful receivership against property over which the court lacks subject matter jurisdiction.

4. Whether the decision in *Netsphere I* was clearly erroneous in determining that the DC had the equity jurisdiction to award fees and expenses against the assets of Baron, Novo Point and Quantec, where the Court had determined that the DC lacked subject matter jurisdiction in the first instance

5. Whether the DC can ignore controlling precedent from the Supreme Court and this Court in awarding fees to a vacated receiver and his professionals without a showing that the fees conferred a benefit to the estate.

6. Whether the DC is permitted to disregard this Court's mandate in *Netsphere, Inc. v. Baron*, in awarding excessive fees and expenses to Vogel and the professionals hired by him and to Sherman, the party who moved for the receivership.

7. Whether a vacated receiver, as a matter of law, can charge the estate for work that he and his professionals performed vindicating their personal interests, including services involved in prosecuting fee applications to the DC and defending them.

8. Whether the lower court, on remand, is permitted to engage in proceedings and actions that are not specified in this Court's mandate

9. Whether, as a matter of law, fiduciaries can receive broad releases of liability without an agreement for such releases and without disclosure of their activities and when the lower court lacks jurisdiction to grant such releases.

10. Whether the lower court violated the Fifth Amendment and abused its discretion by forcing Jeffrey Baron to respond to and defend over 16,000 pages of fee applications on a seven day schedule while preventing him access to his funds to pay counsel or experts.

11. Whether certain findings made by the DC, in the absence of any supporting evidence, is an abuse of discretion.

12. Whether it was an abuse of discretion for the DC to award fees under patently defective applications that do not satisfy prevailing law on the requirement for proving up allowable fees and expenses against receivership assets.

13. Whether the DC was clearly erroneous in adopting certain enumerated findings of fact, many of which were made without hearing any evidence or conducting a hearing, and based on applications that are not verified.

STATEMENT OF THE CASE

A. Introduction

This case has often been described as a "train wreck" by many familiar with its history. What began as a simple partnership dispute was pushed off the tracks when a bankruptcy trustee of a corporate chapter 11 case, Daniel J. Sherman ("Sherman") and his attorneys, Munsch, Hardt, Kopf & Harr PC ("MHKH") dissatisfied with an effectuated settlement with Appellant Jeffrey Baron ("Baron"), met ex parte with District Judge Royal Furgeson, under circumstances that are nearly unimaginable and convinced Judge Furgeson, in an off the record ex parte meeting, to have all of Baron's assets placed into a receivership,[1] despite those assets not being the subject of the litigation, for the express purpose of preventing Baron from objecting to their fees and their looting the Ondova bankruptcy estate.

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[1] After review, this Court reversed, holding that "a court lacks subject matter jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy." *Netsphere,* at 703 F.3d at 306, 310.

This relatively simple dispute was manipulated in a myriad of ways by Sherman's lead lawyer, Raymond Urbanik ("Urbanik"), who, Baron believes, was desperately attempting to generate revenues for his firm so that he could maintain his job with MHKH.[2] Three days after Baron lodged an object to the fee application filed by MHKH in the Ondova case, Urbanik, in a desperate attempt to block said objection and all future objections to his firm's fees, caused to be filed an admittedly unlawful appointment of a receiver over not only all of the assets of Baron but also over Baron himself. After seizing over $10 million of Baron's money,[3] using most of it to pay themselves, Vogel, Sherman, MHKH, Gardere and Dykema Gossett PLLC ("Dykema") failed to pay a single penny to any creditor in the receivership or in the Ondova case, which is now administratively insolvent.

Seeking to correct this wrong, this Court courageously reversed Vogel's appointment and the millions of dollars in fee payments. Now, three years

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[2] Urbanik is no longer working for MHKH, and the "word on the street" is that Urbanik was forced to leave.

[3] "Baron" is used shorthand here for Baron, Novo Point and Quantec.

later, Baron has not received back any of his money or property, with the exception of some exempt assets. The shocking story of how this could have occurred is discussed herein.

B. The Underlying Litigation

A controversy arose over a joint venture between Jeffrey Baron and related entities, including Ondova Limited Company ("*Ondova*"),[4] and Munish Krishan and two of his related entities, including Netsphere, Inc. ("*Netsphere Parties*"). Litigation ensued.

On May 28, 2009, the Netsphere Parties filed a suit against Baron/Ondova in the district court below ("*Netsphere DC Case*"), alleging that Baron/Ondova breached a settlement agreement. Baron/Ondova alleged that the Netsphere Parties were in breach by refusing to pay the $4 million required under the terms thereof.[5]

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[4] Ondova is a domain name registration company that maintains necessary information for the operation of domain names on the internet.

[5] ROA.139-152

Neither Novo Point, LLC nor Quantec, LLC (the "LLCs") were named parties in the *Netsphere DC Case*,[6] nor were there allegations as against them.

Ondova filed chapter 11, and Sherman was appointed as the trustee. Sherman hired the law firm MHKH, who designated Urbanik as lead counsel.

C. The Parties Settled All Controversies

In June 2010, the parties reached a global settlement, which was documented in a *Mutual Settlement and Release Agreement* (the "*GSA*").[7]

The GSA provided for Baron's affiliated companies to retain over 230,000 income producing Internet domain names and additional revenue,[8] and it was intended to provide Baron a fresh start, to pay Ondova's administrative and unsecured creditors in full, to resolve the Ondova Chapter 11

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[6] 708 F.3d 296, 311 (hereinafter *Netsphere I*)

[7] ROA 1692-1841-entire GSA.

[8] ROA.1696 ($1.250,00 + deferred payment of $600,000 to Village Trust); ROA.1700 (describing PokerStar Revenue which amounted to approximately $500,000); ROA.1697 (describing division of approximately 700,000 domain names)

Case through a conversion or dismissal, and to return control of Ondova to Baron.[9] Most importantly for Baron, the GSA was intended to resolve the Netsphere DC Case and other lawsuits through joint stipulations of dismissal **with prejudice**.[10] The GSA annexed four dismissals with prejudice, one of which, Exhibit "K", was a "Stipulated Dismissal With Prejudice" of the Netsphere DC Case.[11]

The GSA provided for payments to Ondova in the approximate amount of $1,700,000.00, which, along with other funds on hand, was sufficient to pay all administrative claims and unsecured creditors in full.[12]

The GSA was approved by the BC on July 28, 2010.[13] Thereafter, in August and September 2010, the assets were transferred and the cash was

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[9] ROA.4102 (Sherman's counsel testified: "The negotiation was to pay the debts and give the keys back to Baron. But that didn't happen".)

[10] *See See* ROA.1705 - requirement of MHKH to file the Stipulated Dismissal. *See also:* ROA. 1788-1796.

[11] See ROA.1804-1813 for a fully executed copy of Exhibit K.

[12] ROA.1696, 1700 (payments from Village Trust to Chapter 11 Trustee); SROA.?? (Monthly Operating Report), ROA. In September 2010, after receiving payment under the GSA Sherman held over $2 million in cash to pay the estimated $800,000 in scheduled claims. Ondova should have emerged from bankruptcy with approximately $1 million in cash to finance its reorganized operations.)

paid to Ondova. Baron and his affiliated entities fully complied with the GSA.[14] All four dismissals were executed by the parties and delivered to MHKH no later than the early part of September 2010. Under section 10 of the GSA, MHKH was directed to file all four dismissal documents promptly after receipt of same.[15] MHKH, without explanation or authority, failed to file the dismissal as to the Netsphere DC Case.

D. The unjustified and illicit attack upon Jeffrey Baron

In October 2010, Sherman and Urbanik began aggressively soliciting new claims[16] from other lawyers that had formerly represented various parties in the Netsphere litigations.[17] Sherman invited lawyers who had not made claims and had been paid in full, to make claims in the Ondova

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[13] ROA.1683-1689 (Order Approving Settlement Agreement)

[14] *See* ROA.24596, SROA??sherman testimony10-28-2010, ROA.26117-26118.

[15] ROA.1704-1705.

[16] The bar date for making claims in the bankruptcy had long passed. ROA.1429-1430.

[17] The 10 year long dispute involved over 40 parties and over 100 lawyers.

bankruptcy for "substantial contribution" to the Ondova estate.[18] Sherman and Urbanik even recruited these lawyers to assist in the solicitation of more lawyers. They eventually succeeded in getting two firms to make claims against Baron and Ondova. This was a "far cry" from the dozens of lawyers Sherman and Urbanik represented to the BC, the DC and the Fifth Circuit that Baron was "hiring and firing" without paying them.[19] These representations were false, and in the end, only one law firm made a claim that was actually allowed by the court. [20]

In September 2010, Sherman and Urbanik began to misrepresent before the BC and DC that Baron was engaged in disruptive conduct and was attempting to nullify the GSA.[21]

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[18] ROA.24588-24590 (declaration of Jay Kline and Blake Beckham).

[19] (ROA.24654, 24649, 35392, 3898-"nineteen lawyers",)

[20] SROA.??(bankruptcy docket)

[21] ROA.5979-5983; *See* Argument I-G-1, infra, at p __.

E. The BC's issuance of a show cause order against Baron and its Report and Recommendation to the DC

Bankruptcy Judge Jernigan issued an order on September 17, 2010, commanding Baron to appear and show cause why he was not in contempt of the BC's order approving the GSA, which directed the parties to fulfill all of their respective obligations under the GSA.

On September 22, 2010, the BC commenced a three-day evidentiary hearing at which Baron and other parties, including Sherman, testified.[22] At the end of the hearing, the BC did not find that Baron was guilty of breaching the GSA or moving assets offshore, and no order was entered finding or concluding that Baron was in contempt.[23] Ultimately, this Court came to the same conclusions. *See* Argument I-F-1, infra, at p 82.

During the course of the hearing, Sherman, Vogel and their lawyers recommended to the BC that Vogel be appointed "mediator" to mediate the claims that Sherman solicited.

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[22] ROA.24660

[23] ROA.24654-24662

On October 13, 2010, the BC issued a Report and Recommendation to the DC. Notably, despite Appellees' misrepresentations to the DC and this Court, the BC did not recommend the appointment of a receiver, and Sherman and his attorneys were **not** under any mandate of the BC to pursue any receivership action.[24] These deceptions undermined the efficacy of the decision of the Court in *Netsphere I*. See Argument I-F-1, *infra,* at p 82.

On October 19, 2010, the DC entered an order adopting the BC's Report and Recommendation,[25] and appointed Vogel as a mediator.[26]

Baron complied with the DC's order to mediate the former attorneys' alleged claims. However, Sherman and Vogel alleged Baron was not cooperating with the mediator and was obstructing the mediation efforts. These allegations were subsequently debunked by Sherman, himself.[27]

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[24] ROA.1842-1852

[25] ROA.1027

[26] ROA.1028 (Order amended on Mary 25, 2010 – ROA.1032)

[27] ROA.26083; ROA.3986-3988.

F. Baron's receivership was instituted and perpetuated with malice and wrongful purpose on the part of Sherman, Trustee, his attorneys and Vogel.

1. Sherman and MHKH hatched the receivership in retaliation for Baron objecting to MHKH's Fee Application, and Vogel aided and abetted their scheme

The idea of placing Baron into a receivership was conceived by Urbanik, Vogel and Sherman when, on November 19, 2010, Baron objected to the Third Fee Application filed by MHKH in the Ondova chapter 11.[28] That same day, in retaliation, Urbanik, in cooperation with Sherman and Vogel, spent 2 ½ hours drafting the motion to put Baron into receivership and to specifically appoint Vogel, who was then special master and mediator in the case.[29]

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[28] ROA.24650 (*See* docket 521); ROA.10659-10660. At the point in time Sherman decided to place Baron into a receivership, there were enough funds in the Ondova bankruptcy estate to pay in full all Administrative Claims, Priority Claims and Unsecured Claims. However, as we sit here today, not one creditor in the Ondova case has been paid with the exception of MHKH and Sherman, Sherman's accountant and certain other administrative creditors. The Ondova estate is and has been administratively insolvent for over 3 years..

[29] ROA.317; ROA.10659-10660.

The next day, on November 23, 2010, instead of seeking the further involvement of the BC and giving Baron an opportunity to be heard, Urbanik and Sherman, in conspiracy with Vogel, unilaterally spent two and a half hours planning to place Baron into a receivership.[30]

2. The meretricious circumstances surrounding the entry of the Receivership Order on November 24, 2010.

On November 24, 2010, Urbanik and Sherman had an ex parte meeting with Judge Furgeson, sometime before 1:15 p.m.[31] at which he signed the Order Appointing Vogel Receiver (the "Receivership Order").[32,] However, the DC's docket sheets do not reflect that a hearing ever occurred.[33] It was an ex parte, off-the-record, secret meeting, unreported to the public. Unex-

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[30] ROA.10659–10660.

[31] ROA.10659-60,;For email sent by Mr. Ubanik to ICANN reporting time Receivership Order entered *See* ROA.14569-71. Urbanik, another lawyer from MHKH, Sherman and probably Vogel met Judge Ferguson sometime before 1:15 p.m. With no motion on file, and without notice being given to Baron or his counsel, these lawyers presented Judge Ferguson with the Receivership Order, and Judge Ferguson signed it, apparently at 1:15 pm. (ROA.14736–37).

[32] ROA.1136-1149. Billing Statements of MHKH. ROA.6778-6779 – See entries of RJU and DLR for 11/24/10. The time records indicate that Urbanik and another lawyer at MHKH attended a hearing on the Receivership Motion

[33] ROA.36

plainably, the Motion to Appoint a Receiver had not even filed until several hours later, without any notice to Baron or a hearing.[34] The metadata information on the pdf version of the Receivership Motion filed with PACER shows that the motion was **created at 2:07 p.m**, nearly 50 minutes after the Receivership Order was apparently presented to and signed by Judge Furgeson.[35] According to the PACER time stamp, the motion was **filed at 3:40 p.m. CST, at least 2 ½ hours after the secret meeting with Judge Furgeson occurred and the Receivership Order was signed**.[36]

The Receivership Motion was unverified, was unsupported by any declarations or affidavits, and was filed as an "emergency" motion, notwithstanding that there were no emergency circumstances that existed or that

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[34] ROA.1033-1037.

[35] *See* Unsworn Declaration of Gary N. Schepps describing forensic examination of the documents. ROA.14569. This can be independently verified by downloading a copy of the Receivership Motion from PACER, going to "Properties" in the "File" tab of Adobe Acrobat.

[36] At 3:54 p.m., Urbanik sent an email to ICANN, the international internet registry, in which he reported that, at **1:15 p.m. CST** on November 24, 2010, the Receivership Order had been signed by the DC and Vogel had been appointed receiver. ROA.14736–38.

were even reported in the motion.[37] No transcript of any hearing or meeting in chambers with Judge Furgeson exists. No notice was given to the BC or to Baron. No record of such ex parte meeting or hearing appears on the docket. These events are both extraordinary and troubling.

In the ex parte motion for the appointment of a receiver, Sherman and Urbanik disingenuously argued that because Baron was violating the DC's mediation order and breaching the GSA, and that the DC needed to appoint Vogel as receiver to so that Vogel could "step into the shoes" of Baron and perform the obligations that Baron was supposedly breaching.[38] Sherman later **admitted under oath that he manufactured these assertions, and that Baron never even had any obligation to Sherman or Ondova**. Both Sherman and Vogel knew that the lawyers caused the mediation to fail, but deliberately misled the DC into believing that it was Baron who had caused the mediation to fail.[39]

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[37] ROA.1033-1037.

[38] ROA.1036.

[39] ROA.26113-26114, 26118, 26083; ROA.3986-3988.

3. Vogel immediately seized Baron's files and fired Baron's AV rated lawyer.

In a "blitzkrieg", Vogel immediately seized all of Baron's funds--more than $1.9 million,[40] impounded his exempt assets as well, confiscated all of his legal documents and seized 26 entities that were alleged to be owned or controlled by Baron.[41] At the same time, Vogel fired Baron's "AV" rated trial counsel.[42]

4. Vogel threatens Baron and then appoints himself Baron's counsel.

Incredibly Gardere sent Baron a threatening email on December 2, 2010, stating:

> The receiver is furthermore instructing you as follows: First, you are expressly prohibited from retaining any legal counsel. Should you retain any legal counsel, Vogel may move the Court to find you in contempt of the receivership Order.

ROA.29040

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[40] By March 2011, Vogel had confiscated approximately $1,900,000 in Baron's personal cash, and about $600,000 of the LLCs' cash. SROA.??

[41] ROA.1169-1172

[42] ROA.3348-3351.

Incredibly, Vogel then instructed Baron that Vogel himself was appointed by the court to be Baron's lawyer[43] and mandated that Baron's request to the court for independent trial counsel be denied.[44] As absurd as this seemed, Sherman's counsel later explained to the court

> "And the reason why the Court has put in place a receivership is to address Baron's desire for due process which is a pretty extreme desire for due process."

ROA.34877

5. Vogel dismisses Baron's objection to MHKH's fee application.

Meanwhile, on December 1, 2010, one week after Vogel was appointed, he accompanied Sherman to the BC, where he announced that he had supplanted Baron and his interests, and withdrew Baron's objection to MHKH's fee application.[45] MHKH and Urbanik had achieved their objective: Baron's objection to their fee application was removed, and Baron

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[43] At an on-the-record meeting with Baron, Vogel proclaimed "I am the counsel for Jeff Baron. And that is what the judge said." ROA.29048.

[44] In response to request for Baron to have counsel, Vogel stated: "Fine. You requested. Request denied." ROA.29049.

[45] The "fix" was obviously in; ROA.3928.

would never again be permitted to object to MHKH's fees in the Ondova case.

G. The DC authorizes Vogel to take control of the LLCs, over which the DC had no subject matter jurisdiction.

When Vogel confiscated the LLCs' assets, they owned approximately 230,000 valuable domain names, which, according to Sherman, had value in excess of $100,000,000.00.[46]

Seeking additional assets for his receivership, Vogel moved the DC to "clarify" the Receivership Order to persuade the DC that it had intended to include the LLCs despite no indication that the DC had such intentions.[47] The DC granted the order and Vogel took possession and control of the LLCs.[48] Both companies are limited liability companies formed under the laws of the Cook Islands, and they are in good standing. Both companies are owned entirely by the Village Trust, which is a trust created under the

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[46] ROA.2145

[47] ROA.1175.

[48] ROA.3392-3399.

laws of the Cook Islands. Baron is a primary beneficiary of the Village Trust. The LLCs form the principal assets of the Village Trust; therefore, the value of the LLCs are of substantial importance to Baron, forming the corpus from which he hopes to derive any benefit out of the Village Trust.

H. Vogel and the DC deny Baron the constitutional right to hire competent legal counsel of his choosing and the DC forces Baron to conduct a hearing on his Motion to Vacate Order Appointing Receiver and in the Alternative, Motion for Stay Pending Appeal without adequate counsel.

Many of the criticisms of Baron made by the *Netsphere I* panel are based on an Order Denying Emergency Motion to Vacate Order Appointing Receiver and in the Alternative, Motion for Stay Pending Appeal (the "Order Denying Vacate or Stay Motion"), entered by the DC on February 4, 2011.[49]

[49] ROA.4881-4901

1. Events leading up to the entry of the Order Denying Vacate or Stay Motion

Vogel confiscated Baron's assets, legal documents and records immediately upon his appointment as receiver and fired his trial counsel. Meanwhile, Vogel and Gardere threatened Baron with contempt if he even attempted to engage trial counsel and told Baron that Vogel, himself was the only attorney that Baron was permitted to have.[50]

Nevertheless, shortly after the Receivership Order was entered, Baron's volunteer appellate counsel, Gary Schepps, filed an Emergency Motion to Vacate Order Appointing Receiver and in the Alternative, Motion for Stay Pending Appeal (the "*Vacate or Stay Motion*"),[51] which the DC set for hearing in early January 2011. Schepps promptly advised the DC that he was not equipped to handle the matter and that Baron needed experienced and specialized counsel to conduct discovery and prepare to defend the very

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[50] ROA.1169-1172; ROA.3348-3351; ROA.29040; ROA.29048.

[51] ROA.1160-1172; *see also* ROA.1169–1172 (Declaration of Jeff Baron).

serious charges that were being asserted by Sherman. ROA.2176-2180. Said motion was denied. ROA.3013–3016.

The hearing on the Vacate or Stay Motion was held on January 4, 2011. ROA.34447. Schepps appeared at the hearing with an associate, Peter Barrett, who assisted Schepps and agreed that he would not be compensated for his efforts. Barrett refused to make an appearance for Baron. Then, after a very unusual colloquy between Barrett and the DC, the DC unilaterally declared that. Barrett was there for all purposes.[52]

Barrett attempted to represent Baron while telling the DC that this was one of the most complex litigations he had ever seen in his life and that he was not equipped to handle it. (ROA.34670).

2. Baron's due process rights were violated when the DC refused to permit him to engage competent counsel

Deprived of all his assets, forbidden from entering into agreements, forbidden from hiring counsel, and the DC having denied his requests to engage counsel, Baron, at this very stressful and important hearing, was

[52] ROA.34462; ROA.34462-34466; ROA.34466

forced to accept the representation of a lawyer who was, by his own admission, incompetent, and incapable of providing an adequate defense for Baron.

3. The Order Denying Vacate or Stay Motion was not an appealable order, and it has no effect

Following the hearing, the DC entered the Order Denying Vacate or Stay Motion on February 3, 2011, which included vitriolic findings of fact, mostly unsupported by the record, and occasionally supported by testimony at the hearing, where Baron was denied due process. [53]

The panel in *Netsphere I* seized upon this interlocutory order as a basis for determining that Baron engaged in "vexatious" litigation tactics. *Netsphere*, 703 F.3d at 304. However, the order was neither appealable nor before the Court. *E.g., London Records v. De Golyer*, 217 F.2d 574, 574–75 (5th Cir. 1954). In fact, the order was never appealed, and was not ripe for consideration by the Court *Netsphere I*.

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[53] ROA.4881–48923

I. Baron promptly appealed the receivership orders and all fee orders, expeditiously prosecuted the appeals, and never acquiesced in the payment of Receivership expenditures.

Baron promptly appealed the Receivership Order and over the course of the next two years, filed ten additional appeals plus one petition for writ of mandamus promptly appealing from numerous orders entered by the DC, predominantly dealing with the award of fees and expenses to Vogel, Sherman and their respective professionals, as set forth in the Table attached as Appellants' Record Excerpt 16. These eleven appeals and one original proceeding were consolidated, and resolved on December 18, 2012, when this Court released its opinion in *Netsphere.*

J. Sherman, Vogel and their Lawyers Branded Baron a "Vexatious" Litigant in Retaliation for Objecting to their Fee Applications and appealing the Receivership Order and Fee Orders.

Appellees immediately embarked upon a malevolent effort to brand Baron a "vexatious litigant". However, the only conduct Baron was "guilty" of engaging in was to contest MHKH's fee application with the

BC, appeal the Receivership Order, and object to the fee applications filed by Sherman, Vogel and their respective retinue of professionals.[54] In all, Baron appealed 69 unfavorable and improvident decisions of the DC, all of which were reversed by this Court in *Netsphere I*.

1. Baron's success in his litigation has come at great cost to him and his family.

Like a persistent whistleblower, Baron has withstood a seemingly impossible struggle, and he and his family have been unjustly vilified and have suffered immensely. Baron has been castigated, defamed and bludgeoned repeatedly and relentlessly by a retinue of highly capable large-firm lawyers, Vogel, Gardere, Sherman, and MHKH, who were paradoxically Baron's fiduciaries. Because Baron had the temerity to defy their will, these sophisticated and vicious professional litigants punished Baron for his defiance by falsely branding him a "vexatious litigant".

Without money or adequate counsel, Baron's efforts to combat these professional litigants' lies and misrepresentations has been nearly impossi-

[54] Peter Vogel is a partner in Gardere.

ble. However, despite their relentless and scurrilous attacks on Baron for four years, they ultimately failed.

2. Despite Vogel and Sherman's defamatory rhetoric that Baron was vexatious, they never sought to enforce any litigation abuse prevention statute or rule.

While Appellees manufactured controversy after controversy to blame on Baron in order to provide cover while they breached their obligations under the GSA and depleted Baron's assets to pay their fees, their lies were unsupportable. Like wailing banshees, Appellees groused and whined about Baron and his alleged vexatious behavior, but never once filed a single motion requesting that the DC or BC determine that Baron's counsel violated 28 U.S.C. § 1927, by engaging in vexatious conduct, or that Baron and/or his counsel engaged in conduct sanctionable under Federal Rule 11, or that Baron and/or his counsel engaged in the kind of conduct that would justify the imposition of sanctions utilizing the inherent power of a DC or BC to sanction litigants under *Chambers v. Nasco, Inc.*[55] *Likewise,* Appellees

[55] 501 U.S. 32 (1991).

never attempted to have Baron designated as a "vexatious litigant" under Chapter 11 of the Texas Civil Practice & Remedies Code.[56] Indeed, Baron has never been held to be in contempt of any order of any court.[57] In the absence of any record citations to "bad behavior" on Baron or his counsel's part, in the absence of any order holding Baron in contempt, and in the absence of any attempt to have these issues properly adjudicated under any of the litigation abuse prevention statutes and rules available to Appellees, these allegations cannot be, and never should have been, taken seriously by the panel in *Netsphere I*.

Sherman, MHKH and Vogel invoked a receivership over Baron, one of the most draconian remedies available under law, without even attempting

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[56] The purpose of a "vexatious litigant "designation is to prevent litigants who file repeated frivolous lawsuits, as plaintiff, to continue doing so, as explained by this court in *Baum v. Blue Moon Ventures, LLC*, 513 F.3D 181, 189 (5th Cir. 2008). Baron has not been accused of filing a single lawsuit. Instead he has only defended himself. The fact that he was forced to hire numerous lawyers to defend against the multitude of complex proceedings brought against him in numerous jurisdictions, does not meet the standards required by this court for a litigant to be charged with being "vexatious litigant".

[57] The panel in *Netsphere I* recognized this fact ("At oral argument in the appeal, it seemed conceded that no clear order existed"). *Netsphere,* 703 F.3d at 311. *See* Section E, *supra,* at __.

a lesser sanction or seeking the advice and consent of the BC. Had Appellees complaints had an ounce of legitimacy, they would have sought relief through any of the wide array of remedies available to them, instead of by means of an ex parte meeting with a district judge under dubious circumstances, where Baron had no opportunity to be heard or otherwise defend himself against the false charges.

3. Vogel and Sherman resort to making false statements to deceive courts in an effort to denigrate and destroy Baron.

Sherman and Vogel resorted to manufacturing a litany of demonstrable lies to this Court, the DC and the BC which are chronicled in greater detail in Argument I-F, infra, at p 82.

K. Vogel, Sherman and their legal professionals' self-serving efforts induce Judge Furgeson to extend the receivership when the cash exceeded threefold the amount of claims.

Although the cash that Vogel seized from Baron at the onset of the receivership exceeded threefold the total amount of claims, Vogel, Sherman and their respective legal counsel consistently obstructed and thwarted

Baron's numerous attempts to secure payment for the receivership claimants by placing sufficient money into the registry of the court and terminate the receivership. The examples below are a small sample of such malicious, self-serving efforts.

Four months after the institution of the Receivership, in March, 2011, Vogel had $1.9 million of Baron's personal funds plus $900,000 belonging to the LLCs, while the total claims against the Receivership amounted to $926,160.53.[58]

Recognizing this, the DC embarked upon a course to terminate the receivership, and *sua sponte* ordered Vogel "to show cause why the Receiver should not place the monies [Vogel] gained access to in the registry of the Court and terminate the receivership over Baron."[59] On March 2, 2011, Judge Furgeson noted:

> Additionally, it is reported that thus far Vogel has gained access to 20 out of the 25 accounts containing the Baron Funds, totaling approximately $1.9 million. . . . The primary purpose of the Court's Re-

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[58] SROA.??(vacated order)ROA.5360,

[59] (SROA.?? vacated order).

> ceivership Order, was to gain access to Baron's funds to ensure that the unpaid attorneys claims against him could be resolved so that the bankruptcy action could be closed and the parties' settlement could be complied with. It appears that Vogel has gained access to an amount that will likely cover all of the outstanding unpaid attorneys' claims.

Id. [60]

At a hearing on the order to show cause on March 11, 2011, Urbanik and Sherman vehemently objected to terminating the receivership, making a host of arguments which have been largely found to be false. [61]

Ultimately, Judge Furgeson, in the face of these large firm law firm machines making largely unanswered, vociferous arguments, obviously did not have the courage of his convictions to carry through with what he knew was the right thing to do: pay any legitimate creditors for whose benefit the receivership had allegedly been implemented, and dismiss the

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[60] *Id.* At that time, after payments of over $500,000 in professional fees to himself and MHKH, Sherman still held $1,275.080.59 for the Ondova estate and receivables net of doubtful accounts amounted to $756,379.73; ECF Doc 586, Case No. 09-34784-SGJ, at 6 (SROA.??)

[61] ROA.34788, 34796.-34799, 34803, 34813,34827, 34831 (hearing transcript of march 2011). Baron did not have adequate counsel, properly funded, to counter these vicious attacks and help Judge Furgeson to carry out his intended course of action.

receivership, and based largely on these false, self-serving arguments, the DC reversed course and decided to allow the receivership to continue indefinitely.[62]

Meanwhile, Vogel and his counsel, Gardere, filed motions to sell more of the LLCs' assets and to liquidate Baron's exempt IRA accounts,[63] which they fervently argued was necessary in order to obtain even more money for themselves.

Baron then offered another solution. He offered to obtain a loan to fund the claims and end the receivership. Accordingly, Baron requested the DC for permission to obtain a loan.[64] The DC initially granted Baron's request on May 9, 2011 but, again Vogel and Gardere objected to Baron's attempt to resolve the Receivership, moving the DC to reconsider—

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[62] ROA.5763.

[63] ROA.5593, SLROA (Docket 480).

[64] ROA.7829-7830. *See* also ROA.6859-6868.

incredibly, filing such motion *ex parte*, under seal.[65] Again, the DC reversed itself upon Vogel and Sherman's relentless urging.

L. This Court issued its *Netsphere I* Opinion on December 18, 2012, and found that the entry of the Receivership Order was an abuse of discretion and reversed the entry of the Receivership Order.

The Panel in *Netsphere I* held that the imposition of the receivership was an abuse of discretion. The penultimate ruling of the Court was that:

> The judgment appointing the receiver is REVERSED with directions to vacate the receivership and discharge the receiver, his attorneys and employees, and to charge against the cash in the receivership fund the remaining receivership fees in accordance with this opinion.

Netsphere I, 703 F.3d at 315.

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[65] ROA.8099-8101; SLROA (docket 581); Baron's objection to the ex parte, sealed order is found at ROA.9130-9135.

M. Two hours after the Court issued the *Netsphere 1* Opinion, Baron was thrown into an involuntary bankruptcy proceeding in an attempt by his opponents to moot this Court's ruling.

Approximately two hours after this Court issued its Opinion in *Netsphere*—long before the issuance of the mandates on April 19, 2013—and in violation of the Receivership Order, which was not immediately dissolved following the *Netsphere* Opinion, eight of the attorney participants in the receivership action (the "Petitioning Attorneys"), led by Gerrit Pronske, filed an involuntary bankruptcy petition under Chapter 7 of the Bankruptcy Code, against Baron ("*Baron Involuntary Bankruptcy*").[66]

Notwithstanding the *Netsphere* Opinion and mandate, The DC ordered that no assets of Baron would be returned to Baron during the pendency of the Bankruptcy. [67]

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[66] ROA.1147-1148 (injunction against bankruptcy); (SROA.?? Invol docket). The case was filed in the United States BC for the Northern District of Texas, Dallas Division under case no. 12-37291.

[67] ROA.27906-27907. 27670-27671.

2. An Order for Relief is entered.

On June 26, 2013, the BC entered an Order for Relief in the Baron Involuntary Bankruptcy, which was reversed on January, 2 2014.[68] Thus, as a result of the Baron Involuntary Bankruptcy Case, Baron remained in financial lockdown.

3. The Appeal and reversal of the Order for Relief

Baron perfected an appeal of the Order for Relief to the DC on July 8, 2013. The DC entered a final judgment on January 2, 2014, reversing the Order for Relief, accompanied by an Amended Memorandum Opinion and Order.[69] This judgment and opinion was appealed to this Court. *See Schurig Jetel Beckett Tackett, et al. v. Baron*, Fifth Circuit Appellate Case No. 14-10092. The "the judgment of the [DC] was affirmed with regard to vacating the fee order and reversed with regard to dismissing the involuntary-bankruptcy action," and was "remanded to DC for remand to BC for a trial on whether

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[68] *Baron v. Schurig*, No. 3:13-CV-3461, 2014 WL 25519, at *1 (N.D. Tex. Jan. 2, 2014, Lindsay, J). Baron would ask this Court to take judicial notice of this opinion, which is included in Appellants' Record Excerpt 20.

[69] *Id.*

a bona-fide dispute exist[ed] as to creditors' fees." *In the Matter of Jeffrey Baron*, 593 Fed.Appx. 356, 362 (5th Cir. 2014). The parties ultimately settled, and this Court dismissed the appeal as moot.[70]

N. The Netsphere I panel denies all pending motions and issues 8 mandates

This Court denied all petitions for rehearing on April 4, 2013, and issued eight Mandates on April 19, 2013, which were filed with the DC on April 24, 2013.[71]

The DC was obliged to follow the following mandate of this Court:

1. the DC would be required to meaningfully discount receivership professional fees from what would have been reasonable under a proper receivership;

2. the amount of all fees and expenses would have to be reconsidered by the DC;

3. any other payments made from the receivership fund might also be reconsidered as appropriate;

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[70] *See* ECF Doc 00512912971 in Appellate Case No. 14-10092. Baron would ask this Court to take judicial notice of this order, which is included in Appellants' Record Excerpt 21, *See* footnote __, supra.

[71] Each of the Mandates dealt with one or more of the 11 consolidated appeals in *Netsphere I*. ROA.27774-27788. *See* Chart included as Appellants' Record Excerpt16.

4. the new determination by the DC of reasonable fees and expenses to be paid to the receiver, should the amount be set at more than has already been paid, would be paid from the $1.6 million in cash on hand as of November 2012;

5. to the extent the cash on hand was insufficient to satisfy fully what is determined to be the reasonable charges by Vogel and his attorneys, those charges would go unpaid;

6. no further sales of domain names or other assets would be permitted;

7. non-cash assets in the receivership were to be "expeditiously released to Baron or the entity owning same[72] under a schedule to be determined by the DC for winding up the receivership; and

8. The judgment appointing the receiver was reversed with directions to vacate the receivership and discharge the receiver, his attorneys and employees, and to charge against the cash in the receivership fund the remaining receivership fees in accordance with this opinion

Netsphere I, 703 F.3d at 313-314 & 315.

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[72] On December 31, 2012, the *Netsphere I* panel issued an order of clarification ("Order of Clarification"). In the Order of Clarification, the panel stated:

> "Our utilization of a shorthand reference to Baron did not in any way affect the ownership of assets that were brought into the receivership. Assets are to be returned as appropriate to Baron or other entities that were subject to the receivership."

ROA.26174

O. The Advisory on past and pending Receiver disbursements

On January 2, 2013, two weeks after the issuance of the *Netsphere* Opinion, the DC issued, *sua sponte*, an *Advisory on Past and Pending Receivership Disbursements* ("*Advisory*") in the Netsphere DC Case.[73] The DC specifically stated and concluded the following:

- The fees incurred by Vogel and the Gardere law firm in representing Vogel as his counsel will be re-evaluated and paid at fifty percent (50%).
- The fees incurred by the Dykema law firm in representing Vogel will be reevaluated and paid at ninety-five percent (95%).
- All payments to the Trustee or Trustee's counsel will be entirely disgorged and must be paid back to the Receivership.
- All other miscellaneous requests for payments, including for experts, will be reviewed on an individual basis at a later date.

[73] ROA.26284–26286.

(ROA.26285). Prior to the Advisory, no briefing was requested, no status conference was held or evidence considered in a hearing.[74]

P. The DC puts the process of re-determining the Receiver's professional fees and expenses on an exceedingly fast track.

Judge Furgeson's retirement was imminent. With his last day on the federal bench—May 31, 2013—quickly approaching, Judge Furgeson put the re-determination of fees matter on an exceedingly fast track.[75] On April 5, 2013, Judge Furgeson entered a Scheduling Order, which set the following deadlines:

1. All final fee applications had to be filed on or before Wednesday, April 17, 2013 (the "2013 Fee Applications")..
2. Baron was given eight days to file objections to the same.[76]
3. The pre-trial hearing on the fee applications was set for April 29, 2013.

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[74] ROA.102–105.

[75] As Judge Furgeson stated to the parties on May 9, 2013, "Of course you know—all of you know why I'm wanting to do this now given I won't be on the bench at the end of this month and given I have lived with this case for so long. I think I have a perspective that would be very difficult for any judicial officer to pick up, and so that's why I think I need to do this." ROA.35303 at ll.20-21; ROA.27978.

[76] This was subsequently extended to May 6, 2013. (ROA.119).

4. The trial on the final fee applications was set on May 8, 2013. ROA.26962.

At the same time, Baron was directed to comply with the above schedule, the DC, in conjunction with the BC, had ordered Baron and all of the parties in the Netsphere DC Case and in the Baron Involuntary Case to a complex multi-party mediation.[77] Ultimately the parties spent approximately three weeks in intensive mediation during April and early May 2013—in-person and by telephone.[78] Additionally, Baron was under orders from the BC to prepare for a trial on the Involuntary Bankruptcy Case, which was, at that time, scheduled to go to trial in the latter part of May 2013.[79]

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[77] ROA.26979

[78] ROA.26979.35293.

[79] SROA.?? (*See involuntary bankruptcy docket, ECF Doc. 77)*

1. The 2013 Fee Applications[80]

The Sherman, Trustee Fee Application. Despite not being employed by the receivership, Sherman filed his final fee application on April 17, 2013, requesting a total amount of $1,219,775.68, consisting of $1,203,329.50 in professional fees and $16,446.18 in reimbursable expenses, of which $379,761.18 had already been paid by the Receiver.[81] This Fee Application totaled 301 pages.

The Gardere Fee Application. On April 17, 2013, the Vogel's former general counsel and current employer, Gardere filed a final fee application requesting a total amount of $2,010,862.22, consisting of $1,956,737.00 in professional fees and $54,125.42 in reimbursable expenses, of which $1,479,571.95 had already been paid by Vogel.[82] This Fee Application incorporated 19 prior Fee Applications, thus totaling 15,775 pages of Fee Ap-

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[80] The fee applications described in this Section ___are collectively referred to herein as the "4/17/2013 *Fee Applications*."

[81] ROA. 26980-26981.

[82] ROA.27286-27317.

plications.[83] Gardere makes no attempt to advise the Court or Baron as to the total amount of fees and expenses incurred and paid for each task Gardere undertook for the Receiver, and no attempt to segregate the expenditures by which of the Appellants' estates they are associated.

Dykema Fee Application. On April 17, 2013, Vogel's current general counsel, Dykema Gossett PLLC ("*Dykema*"), filed a "final" fee application requesting a total amount of $1,550,776.00 through March 2013 (net of voluntary and court-directed 5 percent reduction), consisting of $1,526,694.00 in professional fees and $24,082.00 in expenses, of which $737,276.73 was

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[83] ECF no. 193 (ROA.3470-3486) – 16 pages; ECF no. 258 (ROA.4573-4673) – 100 pages; ECF no. 324 (ROA.5379-5530) – 151 pages; ECF no. 418 (ROA.6307-6480) – 173 pages; ECF no. 491 (ROA.7212-738)] – 170 pages; ECF no. 493 (ROA.7517-7666) – 149 ECF no. 606 (ROA.8946-9128) – 182 pages; ECF no. 648 (ROA.9758-10167) – 409 pages; ECF no. 678 (ROA.11513-12001)– 488 pages; ECF no. 698 (ROA.12703-13152)– 449 pages; ECF no. 713 (ROA.13622-14101) – 479 pages; ECF no. 750 (ROA.15335-15846) – 511 pages; ECF no. 781 (ROA.16678-17218]) – 520 pages; ECF no. 840 (ROA.17861-18442) – 581) pages; ECF no. 853 (ROA.18903-19366)– 463) pages; ECF no. 877 (ROA.20239-??– 10,515 pages; ECF no. 879 (ROA.20762-20911) – 154 pages; ECF no. 993 (ROA.23800-24014) – 214 pages; ECF no. 1035 (ROA.24545-24565) –20 pages. This totals 15,775 pages of Fee Applications filed by Gardere, including the Fee Application filed on April 17, 2013.

on hand in Dykema's trust account, and $398,893.91 had been paid by Vogel.[84] This Fee Application totaled 103 pages.

Vogel's Fee Application. Claiming that he was exempt from the established requirements of disclosure required by attorney billings, Vogel filed "final" applications requesting approval of the fees and expenses of himself, the fees and expenses of former general counsel for Vogel, the fees and expenses of Vogel's current general counsel, Dykema, and the fees and expenses of numerous other professionals.[85] This Fee Application totaled 245 pages.

The total fees and expenses requested are set forth on the Table included in Appellants' Record Excerpt 14.

The DC afforded Baron a miniscule amount of time to review and analyze over 16,000 pages of fee applications covering a time period that spanned 29 months and covered thousands of time entries.

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[84] ROA.27564-27667.

[85] ROA.27318-27563

Importantly, the DC did not reevaluate of additional expenses in the approximate amount of $5,500,000.00 purportedly paid to the LLCs, but never evaluated by the DC.[86]

2. The court consistently denies Baron's Requests/Motions to seek funding for attorney and expert witness fees, for permission to conduct discovery, and to continue the matter to enable him to present a viable defense to the fee applications

At the hearing on April 4, 2013, which resulted in the entry of a Scheduling Order on April 5, 2013, Baron's counsel requested funding for the purpose of paying his attorney fees and expert witness fees needed to contest the attorneys' fees.[87] Deprived of his assets and without any proper funding to mount a defense to respond to the 2013 Fee Applications, Baron filed a motion with the court, on April 17, 2013, attempting to seek funding to pay his professional fees necessary to proceed forward with his defense

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[86] A chart identifying expenditures disclosed in Vogel's "final accounting" is included as Appellants' Record Excerpt 14.

[87] ROA.27679.

of the 2013 Fee Applications. [88]The next day the court summarily denied his request without hearing.[89]

Two days later, on April 19, 2013, Appellant Baron filed a *Motion for Discovery, for Continuance and to Reconsider Funding for Jeffrey Baron's Counsel*. [90]The circumstances described in the motion were grave and merited relief. In the Motion, Baron's counsel explained that he was relatively new to the case and could not possibly prepare for the hearing involving thousands if not tens of thousands of billing entries on such short notice, without funding and without funds for an expert. Baron reasonably requested funding from the receivership estate, which held his assets, including his exempt property assets, to pay his counsel and to hire an expert witness, requested permission to conduct limited discovery, and requested a continuance to prepare for the hearing,

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[88] ROA.27282–27284.

[89] ROA.27670-27671.

[90] ROA.27679–27698.

Judge Furgeson denied the Motion without a hearing.[91] Thus Baron was deprived of a fair and reasonable opportunity to present adequately his objections to over $5 million in fee applications, all of which had been and were expected to be paid out of property that was wrongfully seized by the DC, without jurisdiction.

On May 8, 2013, the first day of the hearing, Steve Cochell, Baron's unpaid counsel, orally moved for a continuance citing compelling reasons for such request, which included the fact that the parties had spent the prior two weeks in a mediation ordered by the DC and BC in which the parties were attempting to settle the entire case.[92] The court denied the motion. [93]

3. The Objections to the Fee Applications

The parties filed the following objections to the 2013 Fee Applications:

1. The Receiver's Objection to Trustee's Fee Application. ROA.27732-27734.

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[91] ROA.27718–27724.

[92] ROA. 26963, 26965 35297-35298.

[93] ROA.35298.

2. The Receiver's Supplemental Response and Objection, objecting to the Ondova Trustee's Fee Application. ROA.27735-27740.

3. The Petitioning Creditors' Omnibus Comment to Receivership Professionals' Fee Applications. ROA.27791-27797.

4. Baron's Preliminary Objections to Trustee, Trustee's Counsel, Receiver and Receiver's Counsel Fee Claims. ROA.27798-27812.

5. Netsphere Parties' Objections to the Attorney Fee Requests in Connection With the Wind-Up of the Receivership. ROA.27821-27825.

4. The hearing & post-hearing briefing on the 2013 Fee Applications

From May 8, 2013 through May 10, 2013,[94] the court held hearings on the 2013 Fee Applications, and following the hearings on the 2013 Fee Applications, the parties filed the following briefs:

1. Vogel and Dykema Consolidated Post-Hearing Brief. ROA.27826-27835.

2. Sherman Letter Brief. ROA.27886-27889.

3. Baron filed the following post-hearing briefs:

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[94] The Transcript for the May 8, 2013 hearing is located at ROA.35290-34546 (This Transcript is erroneously dated May 9, 2013 on the first page, but this is the date of the hearing as reflected on the Docket Sheet-ROA.127).

For May 9, 2013, the Transcript is at ROA.35493-35593.

For May 10, 2013, the Transcript is at ROA.31583–31668.

a. Response to the Receiver's Post-Hearing Briefing. ROA.27890-27902.

b. Reply to Trustee's Letter Brief. ROA.27903-27904.

c. Supplemental Argument on Fees. ROA 27916-27919.

4. The Petitioning Creditors filed a Supplemental Objection to the 2013 Application for Allowance and Subsequent Payment of Compensation for Services and Reimbursement of Expenses to Dykema Gossett PLLC, as Attorneys for Peter S. Vogel. ROA 27922-27.

5. The DC enters the 5/29/2013 Final Fee Order

On May 29, 2013, the DC entered its *Order on Receivership Professional Fees* ("*5/29/2013 Final Fee Order*").[95] The decision of the DC in the 2013 Final Fee Order provided for discounts that were not meaningful and that violated the mandate of the Court. The discounts approved by the DC are set forth on the Table included as Appellants' Record Excerpt 17.

[95] ROA.27931-76

Q. $700,000 of additional fees and expenses paid out of receivership assets were not re-evaluated by the DC as required by *Netsphere I*.

Vogel's 2013 Fee Application included fees and expenses of additional professionals represented at least $957.310.68 paid out of the receivership estate, none of which were reevaluated in the 2013 Fee Order or in any other order, in violation of the *Netsphere 1* mandate.[96]

R. Vogel Continues to Collect Appellants' Property

In violation, or at least in ignorance of the mandates' directive, the DC failed to wind-down the receivership for over two more years and continued to permit Vogel to continue collecting money belonging to Appellants.

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[96] ROA.27320; The only mention to these fees in the 2013 Final Fee Order is a single sentence: "To the extent that the Court has authorized payment to these professionals in the past, the Court finds that these were also appropriate and need not be reduced in any way." ROA.27964. In the 2013 Final Fee Order, the court makes note of its interlocutory Order Granting Motion for Fee Application for the Receiver in Regard to Certain Miscellaneous Receiver Professionals, granting full payment of 118,125.55.without any findings of reasonableness, necessity or whether these fees benefited the estate.ROA.27920.

In fact, Vogel continued to collect approximately $250,000.00 per month, which belonged to one or more of Appellants.[97]

S Vogel is Directed to File Additional Fee Applications and An Accounting

Despite Vogel and his professionals already having been paid in excess of the cap imposed by this Court in *Netsphere I* (the "Fee Cap"), on January 6, 2014, the DC entered an order directing Vogel to file a final accounting and an application for additional payments of fees, and further ordering Vogel to advise the court if he would be unable to return the assets by March 7, 2014 nearly two years after the *Netsphere I* panel issued its mandates in *Netsphere I*.[98]

Despite his employing over 25 lawyers and two accounting firms during a 3 ½ year period at fees of over $5.5 million, Vogel filed a Preliminary Status Report on January 24, 2014 averring, *inter alia*, that: 1) he could not

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[97] ROA.30563-30566; ROA.29606, ROA.29690-29708, ROA.30591-30594. Although Vogel blames the failure on Baron, Vogel was a moving force behind the continuation of the receivership and the imposition of the Involuntary Bankruptcy, as explained infra.

[98] ROA.28974-28975

determine who was the owner of the LLCs, ; 2) he possessed voluminous receivership records and requested a show cause process where Baron would have to prove that he is entitled to the return of the documents; 3) he had accumulated "more than 800" Third Party Actions against the domain name assets, which would overwhelm the recipient of those assets; and 4) the Court should pay additional professional fees to his professionals and establish a date of March 1, 2014 for himself and his professionals to file "final" fee requests.[99]

After the DC entered an order on February 4, 2014 requiring Baron to file any response by February 11, 2014, Baron complied, asserting, *inter alia*, that 1) Vogel has never attempted to protect Baron and the receivership assets from specious claims of the involuntary bankruptcy or any others; 2) the DC should expeditiously wind-up the receivership and return all assets and documents to Baron and the manager of the LLCs; 3) 800 intellectual property claims against the LLCs' created during Vogel's tenure should be stayed for one year; 4) Since this Court's cap on fees mandated in *Netsphere*

[99] ROA.28981-28982; ROA.28983; ROA.28985

I had been reached, Vogel and his professionals should not be awarded any additional fees; 5) The LLCs' assets should be returned to their rightful owner and not to Lisa Katz; and 6) Since Vogel had already been paid approximately $5.2 million after representing to the DC that he completely fulfilled his duties and obligations to marshal assets and fully investigate their source (which Vogel determined was Baron), no further proceedings to determine whether Lisa Katz had any rights to these assets was required.[100]

Baron further pointed out in a sur-reply that there was no real controversy as to the ownership of the LLCs because Vogel had already reported that:

> The Novo Point and Quantec entities are LLCs ultimately owned and controlled by the Village Trust. In the trust deed establishing the Village Trust it is incontrovertible that Baron is identified as both the settlor and the beneficiary of the Village Trust.

ROA.29024; ROA.29025-29050.

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Vogel then filed his Status Report on Feb 28, 2014, again complaining that he could not comply without joining additional parties, engaging in extensive discovery and hearings because, as he claimed: "Despite the Receiver's best efforts to investigate the lawful ownership of certain Receivership Assets, Vogel has been unable to conclusively determine to whom or what entities certain of the Receivership Assets should appropriately and lawfully be returned",[101] and needed to make additional payments to an accounting firm to complete the required accounting.[102] This is incredible since Vogel represented to the DC that he had already employed over 25 lawyers, working over 10,000 hours in this case for four years at a charge to the receivership estate of over $5.5 million, thoroughly examining every minute detail about the receivership assets and their ownership, and yet when it came time to returning the assets, Vogel claimed that he did not know to whom they belong.

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[101] ROA.29122

[102] ROA.29125, 29122: ROA.28976-28986, 29121

According to Vogel, he was further impeded from effectuating a wind-down because his accounting firm allegedly required payment in advance to complete the accounting, despite his already having employed two accounting firms which had been paid at least $121,390.153.[103] As explained infra, Vogel's accountants received the additional payment that Vogel requested, but never performed a bona fide accounting.

T. The DC gives control of the LLCs' assets to non-party Lisa Katz on grounds that Baron lacked standing to object.

The DC entered its order on February 28, 2014[104], rejecting Baron's requests, ruling, *inter alia*, that: 1) Vogel's request to conduct a show cause proceeding to determine the ownership of the LLC's assets was denied; [105] 2) the assets of Novo Point and Quantec would be turned over to non-party Lisa Katz despite her clear lack of authority;[106] 3) Vogel would only return

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[103] ROA.28976-28986, 29121; 27320--see entry for Grant Thornton; ; 29125

[104] ROA. 29135-29146,

[105] ROA.29143,

[106] *Id*

Baron's non-cash assets to Baron, excluding return of any of Appellants' cash; and 4) Vogel could submit additional fee applications to recover additional fees, despite Vogel already having been paid in excess of the Fee Cap determined by the panel in *Netsphere I*.[107] Moreover, the DC (Lindsay, J) stated that he would enter an order releasing Vogel and all persons associated with him from "further liabilities" despite never having even disclosed many of the activities he engaged in while acting in his trustee capacity.[108]

Concerning Katz—despite ruling that "the court will not consider evidence or conduct proceedings regarding the ownership of Novo Point LLC or Quantec LLC or the companies' assets that are at issue" and that "any such determination is outside of the court's jurisdiction.", the DC determined that all of Novo Point and Quantec's assets would be given to the custody of Lisa Katz, over the objection of Baron. This was outrageous in light of this Courts' repeated statements in *Netsphere I* that these LLC assets

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[107] ROA.29145

[108] ROA.29144

were indirectly owned by Baron through being the primary beneficiary of the Village Trust, and that the assets transferred to the LLCs under the GSA were for the benefit of Baron.[109]

Baron filed a motion for reconsideration,[110] requesting that the DC reconsider its order, explaining that: 1) Ms. Katz had never provided any evidence that she had any authority to act as an agent for the LLCs; 2) this Court's Mandate in Netsphere required Vogel to return Baron's assets to Baron; and 3) the DC lacked jurisdiction to provide sweeping releases to Vogel and his privies in the receivership in the wake of a receivership order

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[109] For example, the Court stated that "[t]hese consolidated interlocutory appeals arise from the district court's appointment of a receiver over Jeffrey Baron's personal property **and entities he owned or controlled**." *Netsphere I,* 703 F.3d at 301 (emphasis in bold added). The Court further stated that under the GSA, "[t]he odd-numbered names were assigned to Quantec, LLC, **for Baron's benefit**." *Id.* at 303 (emphasis in bold added). Again the Court stated that **"[t]he receivership also included business entities owned or controlled by Baron, including Novo Point, LLC and Quantec, LLC**." *Id.*, at 310 (emphasis in bold added). In describing the Village Trust, the Court stated that it was "a Cook Islands entity which owned Novo Point, LLC and Quantec, LLC. Its trustee is SouthPac, which is also a Cook Islands entity, **and Baron is the trust's sole beneficiary**." *Id.* at 303 (emphasis in bold added). The DC had no basis for disregarding Baron's objections.

[110] The Motion was made on an emergency basis because the LLC's assets were about to be transferred to the control of Lisa Katz, who lacked any authority and was working against the interests of the LLCs.

that the panel in *Netsphere 1* had ordered vacated, thereby nullifying its existence and effectiveness.[111]

Additionally, Baron reminded the DC that Vogel had already been paid more fees than the $1.6 million cap imposed in *Netsphere I*.[112]

The DC denied Baron's motion to reconsider the disposal of Baron's assets to Katz on grounds that Baron did not have standing, despite the court's seizure of the LLCs assets based on the grounds that the assets belonged to Baron,[113] and notwithstanding that Vogel had admitted Baron was the rightful owner of the assets.[114] On the issue raised by Baron regarding this Court's mandated fee cap, the DC, at that time, confirmed that it would not deviate from the *Netsphere I* mandate, stating "In accordance with the Fifth Circuit's directive, any further amounts paid for receivership

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[111] ROA.29165-29176.

[112] ROA.29174.

[113] ROA.29201.

[114] *See* ROA.28977 - fn 2 (Vogel's counsel stated: "The Novo Point and Quantec entities are LLCs ultimately owned and controlled by the Village Trust. In the trust deed establishing the Village Trust it is incontrovertible that Baron is identified as both the settlor and the beneficiary of the Village Trust.").

expenses will be paid from and limited to the $1.6 million in receivership cash assets on hand as of the Fifth Circuit's December 18, 2012 opinion."[115] However, as explained infra, the DC later reversed course.

Regarding the issue of releasing Vogel and his professionals, the DC stated that it would be "fatuous" not to provide full releases for all acts performed while acting "within the scope of authority" of the court's orders, without even excepting liability for wrongful acts such as breach of fiduciary duty, without recognizing that this Court determined that the DC had no such authority[116]), and notwithstanding that the panel in *Netsphere I* mandated the vacation of the Receivership Order, thus leaving Vogel without the protection of acting pursuant to valid orders of the DC.

U. Vogel files the 2014 Fee Request and Final Accounting.

On April 14, 2014, after being paid $5 million, Vogel filed his Request for Approval of Final Accounting, Application for Payment and Request

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[115] ROA.29201-29202.

[116] ROA.29202.

for Order of Final Discharge (the "2014 Fee Request"), seeking additional payment of fees to himself and his professionals in the amount of $$907,100.62 (ROA.30962) and submitting what he purported to be a "final accounting" for three years of financial activity in all of the receivership's affairs ("the Vogel Final Accounting")[117] The following day, Vogel filed a Supplement thereto (the "2014 Fee Request Supplement").[118] Vogel's request was unverified and unquestionably exceeded the cap on fees imposed by this *Netsphere I* panel.

V. The Vogel Final "Accounting"

The Vogel Final Accounting consisted mostly bank statements and little else. For example, the accounting for Baron's assets consisted entirely of two scant tables of Baron's bank accounts, containing only two figures for each account, namely, the original balance and the balance as of July 12,

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[117] ROA.30700-30959.

[118] ROA.30960 to 30984.

2013.[119] The Vogel Final Accounting did not even identify Baron's assets, except bank account balances, and did not contain a profit/loss, balance sheet or similar accounting report.[120] Further, the Vogel Final Accounting contained no mention whatsoever of the activities of the 26 additional entities that Vogel had possession of during the receivership.

The Vogel Final Accounting for the LLCs consists of a single page, titled "Accounting Snapshot", which summarized the banking activity for a single month along with a single page printout of the online bank account statement.[121]. It too did contain any of the components of a bona fide accounting, not containing profit/loss figures, not categorizing or summarizing expenses or revenues, and not even identifying the assets of the LLCs.

Indeed, Baron filed objections to the 2014 Fee Request and Vogel Final Accounting, and on July 23, 2014 and filed a supplement to the

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[119] ROA.29337-29340.

[120] Vogel also submitted what he labeled "supporting documents" to his "accounting", consisting of bank statements and other miscellaneous data, this is only a document dump of raw data that is neither explained nor verified, and is not categorized in any manner in which useful information can be deduced.

[121] ROA.29346-29347

objections (the "Baron's Objections to 2014 Fee Request and Accounting").[122] In Baron's Objections to 2014 Fee Request and Accounting, Baron objected on grounds that the Vogel Accounting Report, which encompassed fees and expenses in excess of $11 million:

a. was, in reality, merely an indecipherable document dump of 1,500 pages of mostly bank statements, fundamentally flawed by pervasive inconsistencies and unidentified expenses and revenues;

b. did not provide a summary of revenue or expenses;

c. did not provide a summary of revenue or expenses by category;

d. did not provide a summary of revenue or expenses by payee; and

e. did not segregate revenues or expenses by receivership entity.

ROA. 31607-31612; 30995-31178,

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W The Vogel Final Accounting Discloses $$11,404,021.72 in Expenditures

According to the Vogel Final Accounting and a supplement containing proof of additional payments to Vogel, Vogel spent $11,404,021.72[123] of cash belonging to Baron and the LLCs (the "Total Expenditures")[124] of which $5,581,445.46 was been paid to Vogel and his professionals.[125] The remaining $5,822,576.26 (the "Remaining Expenditures") had not previously been disclosed to Appellants and has never been reevaluated by the DC in violation of this Court's mandate in *Netsphere I*.[126]

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[123] *See* Table included as Appellants' Record Excerpt 15.

[124] See *Id.* (Because of the lack of information and organization of the Vogel Final Accounting, Baron can only represent that these figures are based solely upon the information contained therein.)

[125] *See* Table included as Appellants' Record Excerpt 14.

[126] *See* Table included as Appellants' Record Excerpt 15.

X Vogel's 2014 Fee Request Exceeds the Cap Imposed by the *Netsphere I* Mandate.

After being paid over $5 million in fees,[127] Vogel and his professionals requested an additional $901,888.12 in professional fees. [128] In his 2014 Final Fee Request, Vogel justified exceeding the cap imposed by this Court's mandate in *Netsphere I* by alleging that this Court mistakenly excluded items such as the value of claims against third parties and discounts to fee payments in this Court's definition of "cash". Vogel argued that these clearly non-cash items should be counted as cash for the purposes of exceeding the $1.6 million cap, while at the same time admitting that the estate's "cash on hand" in December 2012 excluded these items.[129] Moreover, thes 2014 Fee Request was unverified and no hearing on the matter was ever held.

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[127] Inclusive of professionals, including MHKH.

[128] ROA.30724-30726

[129] ROA.30962—*see* footnote 4; Vogel incorrectly alleged this amount appropriately includes … and withholdings from Domain Holdings Group of monthly monetizer payments of approximately $150,000.00 for the month of December 2012);

In objecting to the 2014 Final Fee Request, Baron explained that the *Netsphere I* panel's mandate required that Vogel's fees were limited to the cash on hand in December 2012, and that since Vogel had taken an additional $1,579,953.88 in cash since the issuance of the *Netsphere I* mandates, he could not possibly be paid any more fees.[130]. Baron further explained that Vogel should not be paid additional money for fees he charged for involvement in the involuntary bankruptcy since Vogel was a primary proponent of the bankruptcy, and then massively billed Baron's estate when it failed.[131]

Y The March 27, 2015 Memorandum Opinion and Order.

Based on Vogel's unverified 2014 Fee Request, and without holding a hearing adducing evidence, the DC entered its Memorandum Opinion and Order of March 27, 2015 (the "3/27/2015 Memorandum Opinion and Or-

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[130] ROA.30999-31001.

[131] Vogel billed a combined rate of over $1,900 per hour for four senior level attorneys to sit in a room for days during mediation when one attorney would have been sufficient. Similarly Vogel overstaffed status conferences and hearings with three or four senior level attorneys when a single attorney would have been sufficient.

der"), granting additional fees to Vogel.[132] The DC defied the mandates issued by the *Netsphere I* panel in numerous respects, disregarding the Fee Cap set by the *Nestphere I* panel (ROA.33580), strangely applying a formula that included adding a $600,000 uncollectable accounts receivables (ROA.33581) to the amount of cash on hand, and substituting this figure for the Fee Cap determined in *Netsphere I*, therewith providing justification for exceeding the cap. After doing so, the DC paradoxically ordered that it would not reduce the $600,000 claim to judgment.[133]

With only vague comments about its adequacy, the court granted Vogel's request for approval of the Vogel Final Accounting[134]. Further, without acknowledging any of the existing or potential claims against Vogel and his professionals for such acts as breach of fiduciary duty or fraud, the

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[132] ROA.33572-33593—entire order: ROA.33589—fee award; In justifying the reasonableness of the fees, the DC nappropriately stated, *inter alia*, "[]the Receiver, and the Receiver's professionals, have received a fair amount of unwarranted negative publicity and treatment at the hands of Baron and his supporters" and "Baron's conduct hiring and firing numerous attorneys [without paying them]". The DC had no verified or unverified pleadings before it where such allegations were asserted, held no hearing, received no evidence regarding such matters..ROA.33577.

[133] ROA.33586

[134] ROA.33590

DC granted sweeping releases of all liability, except for gross negligence, not only to Vogel, but also to a broad category of third parties including "independent contractors".[135] The DC also created a new continuing jurisdiction scheme over all claims ever to be made by any party regarding the receivership under circumstances where this Court had previously held in *Netsphere I* no such jurisdiction existed.[136]

Additionally, the DC overruled all of Baron's objections, including his request for Vogel to return Baron's personal and business documents.[137]

Z While the Netsphere I Panel was deliberating the case, Appellees were Frantically Selling Receivership Property

In the fall of 2012, as this Court was preparing to issue its Opinion in *Netsphere I*, Appellees and Sherman intensified their efforts to dismantle Baron and the LLCs and moot the appeal, frantically arranging liquidation

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[135] ROA.*Id*

[136] ROA.33592

[137] ROA.33591-33592; 29146

of all of Appellees' remaining assets and billing the receivership estate at an astounding $ $300,000 per month.[138]

This Court enjoined Vogel and Sherman from completing the sale (ROA.25589-25590), but not before the Vogel-Sherman team racked up over $700,000 in billing for their feverish and failed attempt to fire sale all of the remaining assets in the receivership, precisely during the time that the *Nestphere I* Panel was deliberating its decision.[139], [140]

In the end, the DC awarded Appellees approximately $600,000 in additional fees for this astonishing waste of Appellants assets.[141]

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[138] ROA.25928

[139] ROA.25540-25545; ROA.25597-25606; ROA.25500-25515 (3d Dykema Motion for Atty Fees), ROA. 25742-25762 (4th Dykema Motion for Atty Fees), ROA.25928-25948 (5th Dykema Motion for Atty Fees).

[140] For additional examples of Vogel, Sherman and their legal teams' efforts liquidating Appellants' remaining assets *See* ROA.25796-25805, 25502, 25507-25513, 25843-25845, 25857, 25934-25981, 25919-25925.defici

[141] ROA.?

AA. Vogel's Operation of Appellants' Business and Misconduct

On November 24, 2014, Baron and the LLCs filed suit against Vogel and Gardere complaining about their gross misconduct. Baron requests that the court take judicial notice of said complaint as amended in *Baron et al v. Vogel et al*, No. 3:2015cv00232 - Document 32 (N.D. Tex. 2015).

The complaint asserts that,after Vogel moved to have the LLCs added to the receivership and seizing approximately $1 million in cash and over $100 million in assets, he proceeded to engage in intentionally and/or recklessly harmful management actions with respect to the LLCs and their assets including but not limited to:

a) Vogel and Gardere's concealed sales of Appellants' assets to insiders at pennies on the dollar. [142],[143]

b) Vogel and Gardere's failure to use due diligence in destroying over $50,000,000 of the LLCs' assets by avoiding the payment of renewal

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[142] Vogel filed numerous ***sealed ex parte*** Motions to sell Appellants assets. These documents are located in the Sealed Record on Appeal to which Appellants do not have access.

[143] ROA.22031, 17481-17507, 17520, 17514, SROA.?? (Case:11-10501 Document: 00511742749 Page: 12 Date Filed: 01/31/2012); ROA.2145—Sherman admitted "These names have both high revenue potential and can be sold individually – sometimes for in excess of $1 million a piece.".

fees on their assets, in order to pay themselves additional fees using Plaintiff's seized, scarce cash resources.[144]

c) Vogel and Gardere's conspiracy with Sherman to: 1) enable Sherman to be paid over $1 million dollars of Plaintiffs' money in the BC and DC; 2) enable Sherman, Vogel and Gardere to promote and sponsor a liquidating plan, whereby all of Appellants' assets would be liquidated for the primary benefit primarily of Appellees.[145]

d) Engaging is wrongful intentionally tortious activities to support Vogel and Gardere's looting of the LLCs and their assets as well as Baron's assets.

e) Failed and refused to pay a penny in taxes as required by the Internal Revenue Code

BB. Vogel's Fraud in Obtaining Fees

Judge Furgeson awarded fees to Vogel and his professionals based on the belief that Vogel had obtained assets from 17 business around the country and has been managing those 17 nationwide businesses for the past two years.[146]. Vogel's subsequent filings in which he includes a "final accounting" and "complete receivership inventory" are wholly in-

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[144] ROA.3400.(Vogel's Report which lead to this order ROA.??)

[145] ROA.24874-24919

[146] ROA.27957.

consistent with such facts and contain no information concerning the 17 entities that Vogel claimed to have been managing.

Judge Furgeson also believed that Vogel had been incredibly successful in defending the third party domain names disputes (referred to as UDRP complaints) and that Vogel prevailed on every case, believing Vogel's statements that "Gardere and the other attorneys it hired to accomplish this task were incredibly successful and no names were lost during their representation".[147]

Then, in subsequent filings, Vogel admitted to failing to defend 800 "pending and threatened Third Party [domain name disputes]" (which resulted in **losing** some UDRP disputes by failing to offer any defense on the merits of **any** of the claims).[148]

Accordingly, it appears that Vogel's prior representations about acquiring the assets of 17 entities around the country, operating those

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[147] ROA.27957-27958; ROA.35811.

[148] ROA.28983-28984

businesses and vigilantly defending hundreds of domain name disputes are demonstrable frauds on the court.

SUMMARY OF THE ARGUMENT

The DC violated Baron's Fifth and Fourth Amendment rights by (a) refusing to permit Baron to use his funds to retain counsel and experts to defend himself in critical and complex proceedings, (b) granting complex, opposed motions filed by Baron's adversaries without permitting Baron time to respond or by providing negligible time to respond, and (c) failing to return his seized assets under highly questionable circumstances while the court lacked the requisite subject matter jurisdiction and personal jurisdiction.

Baron's constitutional rights were further inadvertently abridged by the panel in *Netsphere I* making findings that were based on false representations made to them by Baron's adversaries, Appellees herein.

The Panel In *Netsphere I* erred in determining that the DC had the equity jurisdiction to award fees and expenses against the assets of Baron or the LLCs, in any amount, where the panel had also determined that the DC lacked subject matter jurisdiction in the first in-

stance. Parts I and II of the *Netsphere I* opinion are in conflict, and cannot be reconciled. The law of the case doctrine does not prevent relief here since the error concerns subject matter jurisdiction, and it would be manifestly unjust to perpetuate this conflict and the error it has caused.

The DC failed to follow the mandates issued by the panel in *Netsphere I* by (a) failing to "meaningfully discount" the professional fees and expenses, (b) failing to order Vogel and his professionals to present billing statements that segregated by task the fees and expenses incurred, and by failing to segregate the fees and expenses on an estate by estate basis, (c) failing to require the professionals to show that their services benefited the various estates and failing to require the professionals to show that such fees and expenses would have been incurred by the owners had the receivership not been instituted, (d) failing to reconsider all of the fees and expenses of the various professionals, (e) awarding fees and expenses to Sherman and his attorneys when same, by admission of the DC, were not allowable under the law, (f) failing to abide by the mandated fee cap, (g) granting broad and sweeping releases without jurisdiction, (h) creating exclusive juris-

diction retention provisions where, as admitted by the DC, no subject matter jurisdiction existed, (i) refusing to return the assets of the LLCs to their rightful owner, (j) refusing to return to Baron his books and records, and (k) failing to expeditiously wind down the receivership proceeding and return Baron's assets to him.

The DC abused its discretion by awarding fees under patently defective fee applications.

Finally, the DC made findings of fact that were clearly erroneous under egregious circumstances. In many cases, no hearings were held and no evidence, sworn or unsworn, was considered by the DC.

Argument

ARGUMENT

I.

THE DC VIOLATED BARON'S FIFTH AMENDMENT DUE PROCESS RIGHTS

FIFTH AMENDMENT

> "NO PERSON … [SHALL BE] DEPRIVED OF LIFE, LIBERTY, OR PROPERTY WITHOUT DUE PROCESS OF LAW;"

The guarantee of due process for all citizens requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes, before the government can deprive a person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally fair, orderly, and just judicial proceeding.

Due process requires that a party must be subject to the personal jurisdiction of a court before a court may adjudicate said party's rights or take such party's assets. *World-Wide Volkswagen Cop. V. Woodson,* 444 U.S. 286, 291 (1980). In effect, the panel in *Netsphere I* held that the DC never obtained personal jurisdiction over the LLCs.[149]

The DC violated Mr. Baron's right to due process of law by, among other things, seizing all of his property on November 24, 2010, under highly unusual circumstances; prohibiting him from engaging counsel; failing to provide cash from his own assets at critical stages in the receivership pro-

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[149] *Netsphere I,* 703 F.3d at 310.

ceeding so that he could engage adequate counsel and experts, and depriving him of adequate notice of motions and a reasonable opportunity to be heard regarding the sale and disposition of his property and of hearings regarding fee applications.

A. The Right to Retain Counsel is Implicit in the Fifth Amendment

This Court has held that "the right to retained counsel in civil litigation is implicit in the concept of the fifth amendment due process." *R.B. Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117 (5th Cir. 1980). Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. *Goldberg v. Kelly*, 397 U.S. 254, 270–71 (1970). The right to counsel in civil matters "'includes the right to choose the lawyer who will provide the representation.'" *Texas Catastrophe Prop. Ins. Assoc. v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (quoting *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1257 (5th Cir. 1983)).

When a party is denied the opportunity to be heard and present evidence to support their contentions, the resulting error is not harmless. *Powell v. United States*, 849 F.2d 1576, 1582 (5th Cir. 1988). This Court has ruled

that basic constitutional rights to a fair trial can never be treated as harmless error. *Vaccaro v. United States*, 461 F.2d 626, 635 (5th Cir. 1972). These rights include, for example, the right to counsel, and an impartial judge. *Id*. at 635 n. 47.

Baron was prohibited from transacting any business, keeping any money that he earned, cashing any checks that he received, using any credit cards, incurring any debt and from removing any of his property from the Northern District of Texas. Such constitutional rights were unlawfully suspended from November 24, 2010, to at least January 2014 when the DC acknowledged that the involuntary bankruptcy against Baron was prohibited and established a timetable for winding down the voided receivership.[150]

During this entire time, Baron was threatened with contempt by Vogel and Gardere, if he attempted to engage trial counsel, while, at the same

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[150] *See* Section F-3 of the Statement of the Case, at p 17.

time, being subjected to a litigation onslaught by armies of lawyers funded by over $8,000,000.00 belonging to Appellants and Ondova.[151]

Baron's unpaid appellate counsel repeatedly explained the due process crisis to the court,[152] and likewise, Baron moved for access to his money in order to pay counsel to represent him.[153] However, the DC rejected virtually every effort.[154]

The DC refused to allow Baron's appellate counsel to be paid during the pendency of the receivership appeal,[155] and, at the request of an oppos-

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[151] *See* Section F-4 of the Statement of the Case, at p 17.

[152] ROA.4862-4869; ROA.4865-4866.; For more examples, *see* ROA.34755-34756, ROA.24994-24998.

[153] ROA.2178, ROA.4865-4866; ROA.4862-4870.;ROA.6600, 6613; ROA.10435-10437, 26928-26930.

[154] E.g., ROA.3013-3016, 5129.

[155] ROA.2178, 34647-34648; ROA.4865-4866; ROA.5129; Gary Schepps made a limited appearance and advised the court that Baron did not have the ability to pay counsel, expert witnesses, or conduct discovery because all of his assets were tied up in the receivership. ROA.7713-7715, 34867-34869.

ing party, sealed Baron's motion in which he requested funds to pay counsel.[156]

B. The DC violated Baron's due process rights by initiating the receivership under dubious circumstances.

The bizarre nature of the circumstances surrounding the appointment of Vogel as receiver on November 24, 2010 are set forth in detail in Sections F-1 and F-2 of the Statement of the Case, supra, at pp 13-17.

C Baron's due process rights were violated when the DC refused to allow him to engage competent counsel in connection with the hearing on the Vacate or Stay Motion.

The events leading up to the entry of the Order Denying Vacate or Stay Motion have been addressed in Section H of the Statement of the Case, supra, at p 20-24.

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[156] ROA.34647-34648; ROA.8210.

D. Baron's due process rights were violated when the DC routinely granted motions filed by the opposition that substantially effected Baron without permitting him to respond.

In over 100 instances, the DC denied Baron an opportunity to respond to opposed motions and requests for relief against Baron's interests, routinely granting such requests within hours or within a few days of being filed by the opposition.[157] *See* chart included as Appellants' Record Excerpt 19, which analyzes opposed motions granted in under 21 days.

E The DC violated Baron's due process rights and abused its discretion by forcing baron to defend the 2013 Fee Applications and the 2014 Fee Request on an unreasonably accelerated basis, refusing to allocate funding to pay counsel or an expert witness, and refusing to grant a continuance

1. The 2013 Fee Application

Baron was not only forced to defend against the 2013 Fee Applications on an incredibly accelerated basis, but also was simultaneously forced to defend himself in a multi-party/multi-day mediation of the receivership

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[157] Local Rule 7.1 (e) of the Northern District of Texas provides for 21 days to respond to an opposed motion

case and the involuntary case, and to defend himself in a complex involuntary bankruptcy trial that was set to be heard in the middle of May 2013, against yet another team of highly skilled lawyers—all this while Baron was deprived of the use of any of his funds to hire counsel.[158] (ROA.27475–77, 27872–99, 27911–17, 27156–58, 31088–89).

The issues were extraordinarily complex, and the documents and evidence were voluminous. As noted at Section P of Statement of the Case, supra, at p _, Vogel and Sherman and their counsel presented over 16,000 pages of Fee Applications, in excess of $5 million in billings, incorporating substantial hours of time and a myriad of time entries. To defend against the Fee Applications on the accelerated time schedule set by the DC required a team of experienced lawyers familiar with the issues along with testifying experts.

There can be no doubt that the procedural protections mandated by the Due Process Clause of the Fifth Amendment were violated. *See*, *e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 11–12 (1991) (holding that due process protec-

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[158] Except for $25,000 release by the DC to pay for a retainer for bankruptcy counsel after Baron's bankruptcy counsel of choice was denied his requested retainer of $100,000 by the BC.

tion is merited when there is deprivation of property and deprivation need not be "complete, physical, or permanent" to merit protection but that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protections.").

Baron was entitled to a meaningful opportunity to be heard in his defense of the 2013 Fee Applications, and to have had the use of his assets to engage the proper professionals necessary for such defense. *See*, *e.g.*, *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (The right to be heard "before being condemned to grievous loss of any kind . . . is a principle basic to our society" and the "fundamental requirement of due process is the right to heard at a meaningful time and in a meaningful manner").

What constitutes a "meaningful" opportunity to be heard varies with the circumstances and the interest at stake. Due Process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334; *see also Goldberg*, 397 U.S. at 268–69 ("the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard"). In the present litigation, however, the effect of the DC's rigid freeze on funds for Baron's

defense including funds to his counsel, for experts and other costs and expenses precluded Baron from mounting all but a minimal defense and prevented him from having any meaningful opportunity to be heard.

In sharp contrast to Baron's complete deprivation of funds to defend himself, Baron's well-financed adversaries were represented by over 25 highly paid lawyers with large and prestigious law firms, and accounting firms engaged by Vogel.[159]

2. The 2014 Fee Request

With respect to the 2014 Fee Request, Baron was given eight days to prepare an objection to the Vogel Final Accounting and 2014 Fee Request. The "accounting" contained 20 exhibits and 1365 pages, and the 2014 Fee Request contained 34 pages of argument and eight exhibits containing 260 pages. Both were unverified, and no sworn evidence was attached. Further, there was no time to take depositions or for discovery, and the DC did not conduct a hearing to hear oral arguments or receive evidence. In section VII of Baron's 4/22/2014 Objection, Baron objected and requested ad-

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[159] Interested parties are entitled to the opportunity to rebut the proof offered by the receiver. 65 *Am. Jur.* 2d Receivers § 275

ditional time.[160] Again, Baron's due process rights were trampled upon by the DC.

F. The deceit fostered by Vogel and Sherman before the panel and then perpetuated in the opinions of this Court deprives Baron of his life, liberty and property without due process of law.

Allowing Vogel, Sherman and Gardere's litany of fabrications to be perpetuated in the opinions of this Court deprives Baron of his life, liberty and property without due process of law. .

1. Many misrepresentations were adopted by the panel in the *Netsphere I* opinion and by the DC.

Vogel and Sherman misrepresented that Bankruptcy Judge Jernigan had recommended the institution of the receivership, and that they simply carried out her wishes. An example of this appears in Vogel's 2013 Fee Application. ROA.27511.

Sherman made similar fabrications to provoke the receivership. (ROA.22336-7).

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[160] ROA.31016.

Baron was harmed by such false statements because in *Netsphere I,* the panel erroneously found and/or concluded that "no party 'provoked' the receivership" because "the BC recommended a receiver, and the trustee then moved in DC for the appointment as recommended."[161]

In fact there is nothing in the bankruptcy record of Ondova where Bankruptcy Judge Jernigan ever made such a recommendation. More to the point, Bankruptcy Judge Jernigan has now denied that she recommended a receivership. In a hearing on February 11, 2015, Judge Jernigan stated:

> " . . . So you correctly clarified what yes, it's frustrated me a time or two when I've read it in a Fifth Circuit opinion. **I didn't recommend it.**"

SROA.___.

This erroneous finding made in the *Netsphere I* panel opinion not only affected the panel's decision, but it has been used repeatedly to deprive Baron of his constitutional right to pursue causes of action against Vogel, Sherman and their counsel for wrongfully invoking the receivership as

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[161] *Netsphere I,* 703 F.3d at 312.

against him. Incredible as it may seem, this Court, in a recent opinion in Appellate Case No. 13-10696 repeated this falsehood yet again.[162]

Similarly, Sherman misrepresented that he was obligated to move for the appointment of a receiver over Baron because Baron continued to hire and fire lawyers after Judge Jernigan's Report and Recommendation.[163] However, this too was false, as the Ondova docket sheets reflect that there were no substitutions of counsel or appearances of new counsel from and after the BC entered the Report and Recommendation on October 12, 2010. (ROA.24843–47).[164]

Nevertheless, the panel in *Netsphere,* adopted Sherman's falsification when it stated:

> "Baron continued to hire and fire attorneys, causing the bankruptcy trustee to move for the appointment of a receiver over

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[162] *See* Opinion in Appellate Case No. 13-10696, filed August 14, 2015, ECF Doc 00513155610. On page 3 of the Opinion, the Panel, citing Netsphere I, again concluded:

> "Eventually, on the recommendation of the BC, the DC appointed Peter S. Vogel as receiver over Baron."

[163] ROA.1033-1037.

[164] *See* Ondova docket sheets, (ROA24842–47). There is no indication that Baron had fired counsel or hired counsel from October 12, 2010 to November 24, 2010, as had been represented by Sherman, Trustee in the Receivership Motion and to this Court.

> Baron, followed soon by the DC's *ex parte* appointment of a receiver."

Netsphere, 703 F.3d at 308.

Clearly, the *Netsphere I* panel was presented with a formidable task, sorting out Vogel and Sherman's numerous fabrications and innuendos. For example, Sherman and Vogel falsely represented that Baron was shifting assets offshore beyond the jurisdiction of the BC in an effort to support their decision to put Baron in a receivership. However, the panel completely debunked this additional oft-repeated accusation stating:

> "there [was] no record evidence brought to [the court's] attention that any discrete assets subject to the settlement agreement were being moved beyond the reach of the court,"

Netsphere I, 703 F.3d at 307.

Vogel and Sherman also repeatedly accused Baron of failing to transfer the domain names in accordance with the GSA. Again panel debunked this oft-repeated accusation stating:

> "[n]either the trustee nor Vogel . . . pointed to record evidence that Baron failed to transfer the domain names in accordance with the agreement,"

Id., 703 F.3d at 307.

Vogel and Sherman repeatedly misrepresented before all tribunals that Baron was threatening to nullify the GSA. Again the panel stated:

> "We do not, though, find evidence that Baron was threatening to nullify the global settlement agreement by transferring domain names outside the court's jurisdiction."

Id., 703 F.3d at 307–8.

Vogel and Sherman also invented the falsehood that Baron had been repeatedly held in contempt by the courts below. However, this too was debunked by the panel:

> "If the DC entered a sufficiently specific order, it could have held Baron in contempt, imposed a fine or imprisoned him for "disobedience ... to its lawful ... command." 18 U.S.C. § 401. At oral argument in the appeal, it seemed conceded that no clear order existed. Instead, the receiver and trustee cited only to hearings at which the DC admonished Baron not to hire or fire any more attorneys."

Id., 703 F.3d at 311.

Further, at Sherman's provocation, the BC held a hearing on its Order to Show Cause Why Jeffrey Baron Should Not be Held Contempt, spanning several days, where Baron was subjected to examination by the Bankruptcy Judge, numerous lawyers and law firms (ROA.24845-28450). No

contempt was found and no order holding Baron in contempt was ever entered. [165]

Again and again, Vogel and Sherman and their lawyers repeated these falsehoods to the BC, the DC and this Court. These repeated, false representations evoked behavior of the judges below that was calamitous to Baron and violated his constitutional rights. As an example of this behavior, see Judge Furgeson's comments at ROA.30450–51, explaining that the proceeding would inevitably "bring Mr. Baron to a penurious condition".

2. The panel's finding that Jeffrey Baron was a "vexatious" litigant was a result of Sherman and Vogel's fabrications..

Perhaps the most scurrilous accusation made by Vogel and Sherman and adopted by the panel in *Netsphere I* is that Baron was a "vexatious" litigant. For the reasons stated in Section J of the Statement of the Case, supra, at pp 24-28, this was untrue.

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[165] ROA.24845–50

3. The Netsphere panel was clearly erroneous in: (a) finding that Baron's actions increased the fees and expenses of the Receiver.

The panel in *Netsphere* found that "to a large extent, Baron's own actions resulted in more work and more fees for Vogel and his attorneys,"[166] and then concluded that "[f]or these reasons, charging the current receivership fund for reasonable receivership expenses, without allowing any additional assets to be sold, is an equitable solution." *Netsphere*, 703 F.3d at 313. However, the publishing of such statement, in and of itself, violates Baron's due process rights. The only actions Baron ever took were to file objections to the Receivership Order in the form of the Vacate or Stay Motion, file objections to the DC's award of attorney fees to the Receiver, the Trustee and their respective professionals, file objections to the DC's approval of sales of assets owned by the LLCs, and to appeal 70 orders improvidently entered by the DC, 69 of which were reversed by this Court in *Netsphere I*. Baron should not be punished because this caused more work and more fees for Vogel and his attorneys. Baron's actions were appropriate, and he

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[166] *Netsphere*, 703 F.3d at 313.

was doing nothing more than partaking in his constitutional right to defend himself on the trial court level, and his statutory right to appeal the orders of the DC. Moreover, Baron did everything humanly possible to terminate the receivership under circumstances where sufficient funds would be made available to fund the payment of the alleged claims of the attorneys, for whose benefit the receivership was instituted in the first instance. *See* Section K of the Statement of Case, supra, at pp 28-32.

In *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534–35 (3rd Cir. 1970), the receiver and his professionals made similar arguments, which were unequivocally rejected.

4. The cumulative effect of these false representations was to deprive Baron of his Fifth Amendment Rights to Due Process.

Standing alone, perhaps one of these false representations might not have violated Baron's Fifth Amendment constitutional rights. However, the false statements were numerous, and they were repeatedly made before the BC, the DC and this Court. These false representations tarnished the image of Baron in the eyes of the courts he was before. When combined with Baron's inability to engage legal counsel to defend against these at-

tacks, and experts needed at critical junctures in this multi-year litigation, the threats of contempt if he even attempted to engage trial counsel, the confiscation of his legal documents and the total depletion of his cash and non-cash assets, this conduct has undeniably resulted in a deprivation of Baron's Fifth Amendment right to due process.

G. The taking of Baron's assets, including the LLC's assets, amounted to an unconstitutional taking of property without due process.

The Fifth Amendment to the United States Constitution provides that private property shall not be taken without providing due process. *Connecticut v. Doehr*, 501 U.S. 1, 11–12 (1991) (holding that due process protection is merited when there is deprivation of property and deprivation need not be "complete, physical, or permanent" to merit protection but that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protections.").

For all of the reasons stated above, Baron was deprived of his constitutional due process rights every step of the way.

Additionally, the DC's grant of broad and sweeping releases and provisions for retention of jurisdiction over all claims and causes of action Baron might assert against nearly anyone remotely related to this failed receivership to seek redress of the wrongs that have been done to him and for the losses he has suffered is yet another example of how Baron's property rights have been eviscerated without due process. *See* Argument IV-L & M, *infra,* at pp 129-131.

II.

SEIZING AND DISBURSING PROPERTY NOT SUBJECT TO A DISPUTE BEFORE THE COURT AND NOT WITHIN THE COURT'S JURISDICTION VIOLATES THE FOURTH AMENDMENT.

The Fourth Amendment protects persons' property against unreasonable seizure. *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009). The Court defined "seizure" of property as occurring when "there is some meaningful interference with an individual's possessory interests in that property." *Id* quoting from *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Soldal v. Cook County Ill.*, 506 U.S. 56, 61 (1992). Baron's assets and

those of the LLCs were arbitrarily seized without just cause by a DC having no subject matter jurisdiction to do so, in violation of the Fourth Amendment. *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967). The Supreme Court has cautioned that the exercise of court power over property not subject to a dispute pled before the court "would place the whole rights and property of the community under the arbitrary will of the Judge". *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.,* 527 U.S. 308, 332 (1999).

III.

THE PANEL IN *NETSPHERE I ERRED* IN DETERMINING THAT THE DC HAD THE EQUITY JURISDICTION TO AWARD FEES AND EXPENSES AGAINST THE ASSETS OF BARON OR THE LLCS, IN ANY AMOUNT.

The Court should applies a de novo standard for questions of law and an abuse of discretion standard for the discretionary aspects of fee allowances. [167]

A. Analysis of Facts and Law Decided in the Netsphere I Case

In Section I of *Netsphere I* opinion, entitled "Propriety of the Receivership Order,"[168] the panel determined, based on its prior opinion in *Cochrane v. W.F. Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir.1931) (*Potts I*), that "equity does not allow a receivership to be imposed over property that was not the subject of the underlying dispute," and that "a court lacks subject mat-

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[167] See *In re Fredeman Litigation*, 843 F.2d 821, 824; *Gandy Nursery, Inc. v. US*, 318 F.3d 631, 636 (5th Cir. 2003); *Commodity Futures Trading Comm'n v. Morse*, 762 F.2d 60, 63 (8th Cir. 1985).

[168] *Netsphere I,* 703 F.3d at 305-11.

ter jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy."[169] Appellee Gardere has conceded this point.[170]

Relying on *Potts I*, the panel in *Netsphere I* concluded that "the district could not impose a receivership over Baron's personal property and the assets held by Novo Point and Quantec." *Netsphere I,* 703 F.3d at 310.

In Section II of the *Netsphere I* opinion, the panel looked to the second Potts decision, *W.F. Potts Son & Co. v. Cochrane,* 59 F.2d 375, 377–78 (5th Cir. 1932) (*Potts II*) as well as other precedent in the Fifth Circuit, to support its conclusion that "equity is the standard" in assessing costs in the case of an improperly created receivership.[171] In *Potts II*, recognizing that: 1) the DC had jurisdiction over some of the property; 2) The circumstances surrounding the appointment of the receiver amounted to "almost a public calami-

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[169] *Id.,* 703 F.3d at 306, 310.

[170] Appellee Gardere stated in its principal brief filed in Appeals Case 13-10696, on October 27, 2014, Document: 00512816545, page 27:

> "While this court agreed that the DC did not have jurisdiction to impose a receivership over assets held by Novo Point and Quantec—and indeed over any of Baron's personal property"

[171] *Netsphere I, 703 F.3d* at 312.

ty"; 3) the interested parties acquiesced to the receivership for nearly six months; and 4) the receivership had paid certain expenses that "inured directly to its benefit", such as repairs and additions to the property, this Court determined that the estate should be charged some costs, but only those costs that either "inured directly to its benefit" or "those rightfully in charge of it would have had to pay" had a receiver not been appointed. *Id* at 379.

As supported by the authorities below, the panel in *Netsphere I* erred when it determined that: 1) the DC had the equity jurisdiction to award fees and expenses of the receivership against the assets of Baron and the LLCs, in any amount, where the panel had also determined that the DC lacked subject matter jurisdiction in the first instance, and 2) the DC could equitably charge Baron and the LLCs with costs without demonstrating that those costs "inured a benefit to the relevant estate".

B. Without subject matter jurisdiction, a DC is powerless to assess a receiver's professional fees and expenses against assets illegally seized.

The jurisdiction issues in this case are paramount and should not be disregarded by this Court. As this Court has stated, "no pussy-footing around is allowed on jurisdictional issues."[172]

This Court need only review its decisions in *Beach v. Macon Grocery Co.*, 125 F. 513 (5th Cir. 1903) and *Speakman v. Bryan,* 61 F.2d 430, 431 (5th Cir. 1932), and the Supreme Court decisions in *Atlantic Trust Co. v. Chapman*, 208 U.S. 360 (1908) and *Lion Bonding & Surety Co. v. Karatz,* 262 U.S. 640, 641-2 (1923) for controlling authority in this case. Based on the heavy weight of this precedent, this Court must reverse and render, and hold that the DC, having found that it lacked subject matter jurisdiction over the personal assets of Baron and the LLCs, had no authority to award receivership professional fees and expenses to be paid out of the assets of such illegally attached assets.

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[172] *In re Southmark Corp.,* 163 F.3d 925, 929 (5th Cir. 1999).

1. Fifth Circuit Precedent

In 1903, in the *Beach* case, this Court considered the same issue that is presented in the instant appeal. In *Beach*, the property of a nonparty, Miss Dixon, was seized in a receivership imposed because of conduct of Mr. Beach. The receivership was reversed and vacated. However, the receiver incurred expenses which he wanted paid. As an equitable solution, the trial court allowed some receivership expenses to be paid out of Miss Dixon's property. The panel in *Beach* reversed and ruled as follows:

> "[T]he receiver has, by no law, been imposed upon the defendant. Neither is there any equitable principle which should require him to pay, before he can secure a return of his property, the expenses of the unlawful proceeding by which it has been taken and withheld from his possession. **To require that payment from him or his property would be a wrong which the court has neither the power nor the disposition to inflict upon him. It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed**."[173]

Beach, 125 F. at 515 (emphasis in bold added).

In 1932, this Court spoke again. After reviewing the prior precedent in this Court and the Supreme Court concerning invalid receivers, the panel in *Speakman v. Bryan* reaffirmed the same principles and held:

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[173] *Id.* (emphasis added).

> We think it cannot be doubted as established that, **except where the court appointing a receiver is entirely wanting in jurisdiction as a court (*Lion Bonding Co. v. Karatz*, 262 U. S. 640, 43 S. Ct. 641, 67 L. Ed. 1151)** the costs, expenses, and disbursements incurred by a receiver whose appointment was improvidently made, or who has taken wrongful possession of property, will, upon equitable principles, be charged by the court of jurisdiction against the property to the extent that they have inured to its benefit. *State of Missouri v. Angle* (C. C. A.) 236 F. 644; *Palmer v. State of Texas*, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435; *Burnrite Coal Co. v. Riggs*, 274 U. S. 208, 47 S. Ct. 578, 71 L. Ed. 1002; *In Re Zier & Co.* (D. C.) 127 F. 399; *Id.* (C. C. A.) 142 F. 102; *W. F. Potts Son & Co. v. Conchrane* (C. C. A.) 59 F.(2d) 375."

Speakman v. Bryan, 61 F.2d at 431 (emphasis in bold added). In the case at bar, the DC lacked subject matter jurisdiction, and, therefore, there was no basis for applying equitable principles to charge against the property wrongfully seized the fees and expenses of Vogel and his professionals.

2. Supreme Court Precedent

In 1908, in *Atlantic Trust Co. v. Chapman*, the Supreme Court enunciated the fundamental principle of receivership law that a court is prohibited from using property of an entity not a party to the receivership or related lawsuit to pay a receiver's expenses. The Court said:

> "If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession

> is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses."

208 U.S. at 373–74 (quoting *Ephraim v. Pacific Bank*, 62 P. 177, 178 (Cal. 1900)).

In 1923, the Supreme Court again reaffirmed this principle in *Lion Bonding,* where the court held:

> "This court is without power to grant any part of the relief sought. The DC was without jurisdiction as a federal court to appoint receivers in, or otherwise to entertain, the Karatz suit. For this reason, among others, the Hertz suit, a dependent bill, was dismissed. As the lower federal courts lacked jurisdiction, they are necessarily without power to make any charge upon, or disposition of, the assets within their respective districts.[FN1]"

Id., 262 U.S. at 641-2.

C. The *Netsphere I* panel's reliance upon Palmer v. Texas was misplaced.

In *Lion Bonding,* the Supreme Court specifically ruled that the holding in *Palmer v. State of Texas*, 212 U.S. 118, 132 (1909) did not apply where the trial court lacked the jurisdiction to impose the receivership, stating:

> "The case at bar is unlike *Palmer v. Texas*, 212 U.S. 118, 132, upon which the receivers rely. In that case the costs and expenses of a receiver erroneously appointed by the federal court were

> directed to be paid out of funds realized in that court. There, the Circuit Court had jurisdiction as a federal court; but the decree appointing the receiver was reversed, because it was erroneous."

Id., 262 U.S. at 642.

D. The *Netsphere I* panel's reliance on *Potts II* was misplaced.

A careful analysis of *Speakman* and *Potts II* reveals a fundamental flaw in the Court's analysis in *Netsphere I*. The *Potts II* panel did not distinguish between the series E bonds, over which the *Potts I* panel found there was subject matter jurisdiction, and the other bonds, over which the *Potts I* panel found there was no subject matter jurisdiction. However, in *Speakman*, issued shortly after *Potts II*, the Court clarified that the reason equity was employed in *Potts II* was a result of the DC's affirmative jurisdiction over the Series E Bonds.

E. The Law of the Case Doctrine does not bar this Court from reconsidering the ruling in part II of *Netsphere I* decision: a court can never be barred from questioning subject matter jurisdiction.

The law of the case doctrine provides that "an issue of law or fact decided on appeal may not be re-examined either by the DC on remand or by the appellate court on a subsequent appeal." *Gene & Gene, L.L.C. v. BioPay,*

L.L.C., 624 F.3d 698, 702 (5th Cir. 2010). However, there are three exceptions to the law of the case doctrine. A court of appeals can reexamine an issue previously decided on appeal if "(i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice." *Gene & Gene*, 624 F.3d at 702.

1. It is a fundamental concept that a court not having jurisdiction of the res and/or the parties cannot affect the res or the parties by its decree.

Very early on, the Supreme Court enunciated the oft repeated fundamental principles that subject matter jurisdiction is required in order to "exercise any judicial power,"[174] and that a "court, not having jurisdiction of the *res* and/or the parties, cannot affect the *res* or the parties by its decree."[175]

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[174] *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838); *see also Reynolds v. Stockton*, 140 U.S. 254, 268–69 (1891); *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

[175] *Fall v. Eastin*, 215 U.S. 1, 11 (1909).

More recently, in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988), the Supreme Court stated:

> "The challenge in this case goes to the subject matter jurisdiction of the court and hence its power to issue the order.… [this] is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power."

Indeed, there is long-standing, unwavering precedent out of both the Supreme Court and of this Court - that a federal court that lacks subject matter jurisdiction, lacks the power to award costs. *Citizens Bank of Louisianna v. Cannon*, 164 U.S. 319, 324 (1896); *Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326, 330 (1925); *Atlantic; Lion Bonding, Beach, Potts I, Speakman; and United States v. Jardine,* 81 F.2d 747, 747–78 (5th Cir. 1936).

2. Parts I and II of the *Netsphere I* opinion are inconsistent and cannot be reconciled.

In part I of the *Netsphere I* the panel recognized that the receivership remedy is an equitable one, and determined that "equity does not allow a receivership to be imposed over property that was not the subject of the

underlying dispute." *Netsphere*, 703 F.3d at 306. Then, citing *Potts I*,[176] the *Netsphere* panel determined that "[a] court lacks jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy." 703 F.3d at 310. It then concluded:

> We conclude the DC could not impose a receivership over Baron's personal property and the assets held by Novo Point and Quantec."

In part II of the *Netsphere I* opinion, the panel concluded that equity controls when addressing the costs created by an improper receivership. The *Netsphere I* panel found that *Potts II* and *Palmer* were dispositive on this issue. However, the *Netsphere I* panel failed to address the later decision of this Court in *Speakman*, where the Court made it clear that equitable principles cannot be applied where the court finds that there is a want of subject matter jurisdiction—the precise conclusion reached by the panel in part I of the *Netsphere I.*

Id.

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[176] 47 F.2d at 1029.

3. It would be manifestly unjust for this Court to perpetuate this clearly erroneous legal conclusion adopted in Part II of the *Netsphere I* opinion.

In effect, Part I of the the *Netsphere I* opinion was internally inconsistent with Part II of the opinion. Therefore, it would be manifestly unjust for this Court to perpetuate this clearly erroneous legal conclusion adopted in Part II of the *Netsphere I* opinion.

4. Appellees' Demonstrable Fraud on the Court Requires Reconsideration

The holdings in *Netsphere I*, was based largely on Vogel and Sherman's misrepresentations of fact to this Court. Indeed, one of the Court's fundamental premises in Netsphere I was that Bankruptcy Judge Jernigan recommended the appointment of a receiver, and that Sherman was merely following her orders when he dutifully sought such appointment. As explained supra in Argument I-F-1, supra, at pp 82-87, Judge Jernigan denied having made such recommendation.

5. Denial of Due Process Compels Reconsideration of *Netsphere I.*

This court has already held that the receivership was illegal and that all property seized was done so wrongfully. To allow the use of illegally seized property to pay fees once again denies Mr. Baron of his property without due process of law. The DC's continued failure to release this property, as he was required to do by this court's order, further exacerbates the denial of Mr. Baron's constitutional rights and should be remedied by this court.

IV.
THE DC FAILED TO FOLLOW THIS COURT'S MANDATES ISSUED IN *NETSPHERE I.*

The manner in which a lower court enforces an appellate court's mandate is reviewed *de novo*. *United States v. Kellington*, 217 F.3d 1084, 1092 (9th Cir. 2000). Lower courts are obligated to execute the terms of the mandate. Where, on remand, the trial court is ordered to conduct a hearing and enter findings of fact, such findings are reviewed on a like standard of re-

view as required for findings of fact made in the original hearing. *See Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509 (7th Cir. 2003).

A. The Mandate Rule prohibits a DC from straying from an appellate court's directive

This Court holds that a DC is prohibited from taking any action not expressly directed by the Court. *United States v. Castillo*, 179 F.3d 321, 330 (5th Cir. 1999), rev'd on other grounds, 530 U.S. 120 (2000). *See also, Crowe v. Smith*, 261 F.3d 558, 562 (5th Cir.2001). A DC must "'implement both the letter and spirit of the [appellate court's] mandate,' and may not disregard the 'explicit directives' of that court." *United States v. Becerra,* 155 F.3d 740, 752 (5th Cir. 1998) (internal quotations omitted). More to the point, "[t]he mandate rule requires a DC on remand to effect the [circuit court's] mandate and to do nothing else." *General Universal Sys., Inc. v. Hal, Inc.*, 500 F.3d 444, 453 (5th Cir. 2007) (citations omitted).

Where, as here, further proceedings in the DC "'are specified in the mandate [of the Court of Appeals], the DC is limited to holding such as

are directed.'" *Harris v. Sentry Title Co. Inc.,* 806 F.2d 1278, 1279 (5th Cir. 1987).

B. Even if the DC had the equity jurisdiction to award receivership fees and expenses, the DC failed to follow the mandate of the Netsphere I panel in the exercise of such equity jurisdiction.

In Section II of *Netsphere I*,[177] the panel, relying principally on the *Potts II* decision, concluded that "charging the current receivership fund for reasonable receivership expenses, without allowing any additional assets to be sold, [would be] an equitable solution."[178] Without defining "reasonable receivership expenses", the mandates directed the DC to accomplish the eight directives set forth in Section N of the Statement of the Case, supra, at pp 35-37.

Beyond these generalized directives, the panel also provided guidance on how to apply such equitable considerations by citing and relying upon prior precedent of the Court and the Supreme Court, namely *Potts II* and *Palmer*. The DC failed to follow these decisions.

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[177] *Netsphere I*, 703 F.3d at 311 – 314.

[178] *Id.,* 703 F.3d at 313.

C. The standard for applying equity in instances of improvidently appointed receivers has been clearly established.

In *Potts II,* the Court limited the allowance and payment of receivership expenditures to those expenditures that the owners of the property would have had to pay themselves had the receivership not been instituted, or expenditures that resulted in an actual benefit to the receivership estate.[179]

Likewise, in *Palmer*, the Supreme Court employed a similar equitable standard for paying costs of an improperly imposed receivership. There, the Supreme Court held that the receiver could only recover costs from the funds that were created ("realized") by the receiver.

One year later, in, *Speakman*, this Court reviewed the existing precedent of the Supreme Court and this Court, including *Potts II* and *Palmer*, held that "the costs, expenses, and disbursements incurred by a receiver whose appointment was improvidently made, or who has taken wrongful possession of property, will, upon equitable principles, be charged by the court of jurisdiction against the property **to the extent that they have inured to its benefit"**. *Speakman,* 61 F.2d at 431 (emphasis in bold added).

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[179] *Potts II,* 59 F.2d at 378–79.

Two decades later, in *Tucker v. Baker*, 214 F.2d 627 (5th Cir. 1954), the Court reinforced this construct, and disallowed the fees and expenses of the receiver, "**except to the extent that it is made to appear that the receiver's actions and activities have enured to the benefit of the estate**," citing *Potts II*. *Id.*, at 632.

Indeed for the past 70 years, this Court, unequivocally has held that "[a Receiver's] allowances of fees and expenses must rest on facts showing actual benefits" *Godfrey v. Powell,* 159 F.2d 330 (5th Cir.1947).

The corollary to this principle is that a receiver is not entitled to compensation from the estate **for defending his own actions**. *See* cases cited at 45 Am. Jur., Receivers § 278 (1956); *Larchwood Gardens*, 420 F.2d at 535; *In re Marcuse & Co.*, 11 F.2d 513, 516 (7th Cir. 1926).

D. The "discounts" ordered by the DC did not comply with the law or the mandates issued in *Netsphere I*.

Among all of the fee applications considered by the DC after this Court's mandate in *Netsphere I*, the DC approved most of the fee amounts requested by Vogel and his professional and wholly failed to reconsidered any of the Additional Expenditures, expressly approving $5,581,445.46 to

be paid directly to Vogel and his professionals and failing to even mention the Additional Expenditures of $5,822,576.26[180] explained Record Excerpts 14-15. In doing so, the DC failed to employ any of the requirements imposed by precedent, namely, that Vogel's reimbursable fees and expenses must inure a benefit to the estate or that such fees and expenses would have been borne by Appellants if Vogel had not been appointed.

In fact, in presenting thousands of pages of fee applications and numerous motions and arguments, Vogel and his professionals wholly failed to show that their fees and expenses met any of such requirements. *See* Argument V, infra, at pp 133-14111.

E. As a matter of law, the fees incurred by a losing party to a litigation cannot be borne by the prevailing party.

The 2013 Fee Applications and the 2014 Fee Request, which were approved by the DC, consist of time entries that are mainly for self-advocacy services: work advocating Appellees' positions to sustain the appointment

[180] See *See* Charts included as Appellants' Record Excerpts 14 &15.

of Vogel on appeal, prosecuting their own fee applications and other self-serving activities.

Aside from the clear precedent prohibiting reimbursement for such expenditures in a failed receivership, this Court has held that attorney fees may not be justly awarded out of an appellant's funds under any circumstance. *First Nat. Bank v. Southern Cotton Oil Co.*, 86 F.2d 33, 34 (5th Cir. 1936). Moreover, the Supreme Court has repeatedly reaffirmed the efficacy of the "American Rule," which provides that each party in a lawsuit must bear its own attorney fees, win or lose, unless there is express statutory authorization to the contrary. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–53 (2010).[181] No statutory provision exists for the shifting of professional fees here in favor of Vogel or Sherman, who were not the prevailing parties in this receivership litigation. Allowing Sherman and Vogel to recover their professional fees and expenses from the receivership estate, which are Appellants' assets, would, in effect, violate the "American Rule"

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[181] Paradoxically, the DC awarded $5,253,821.70 in fees and expenses to Vogel and his professionals, in part, as a penalty for Baron successfully appealing the DC's orders, stating that Baron "swamped the Fifth Circuit with questionable appeals, the Court finds that it would be entirely inequitable to deny these fees. Accordingly, the Court sees no reason not to charge the Receivership estate for the additional expenses incurred by Baron and Schepps's conduct." ROA.27939.

and force Appellants to pay for Vogel and Sherman's professional fees where they were not the prevailing parties, and in the absence of any statutory basis for fee shifting.

Other circuits have addressed this issue as well. For example, the Third Circuit applies the "American Rule" requiring that each party pay his own expenses including receivers in defense of receivership fees. *Larchwood Gardens,* 420 F.2d at 535. Likewise, the Seventh Circuit has refused to authorize receivership fees when the receiver is engaging in controversy as a litigant advocating a position where he is not acting as a neutral. *In re Marcuse*, 11 F.2d at 516.

The fees and expenses charged by Vogel, Sherman and their respective attorneys or other professionals in prosecuting their own fees and in defending the receivership are not proper charges against, and payable out of, the receivership estate. Such expenditures conferred no discernable benefit upon, or enhancement of, property of the receivership estate, nor would such expenditures have been incurred had the receivership not been instituted.

F. The 2013 Fee Applications and the 2014 Fee Request violated the Court's mandates.

The 2013 Fee Applications[182] and the 2014 Fee Request[183] violated the Court's mandates. These fee applications did not allocate the fees and expenses of such professionals to each separate litigation and non-litigation matter handled by Vogel and each of the receivership professionals.[184] Further, neither Vogel nor his professionals made any effort to divide the fees requested into tasks performed.[185] These fee applications employed block billing practices, which have been frowned upon by the courts.[186]

In the 2014 Fee Request, Vogel requested additional fee payments in the amount of $901,882.12. In the 3/27/2015 Memorandum Opinion and Order, the DC granted Vogel an additional $424,857.76 in fees, which was the entirety of the remaining assets in the receivership estate and exceeded the

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[182] *See* section P-1 of the Statement of the Case, supra, at pp 40-43 . (the "4/17/2013 Fee Applications")

[183] *See* section U of the Statement of the Case, supra, at pp__ . (the "4/14/2014 Fee Request")

[184] *See* Argument V, infra, at p 57.

[185] *Id.*

[186] *See* section H-2 of the Statement of the Case, supra, at p 22.

fee cap set by this Court in *Netsphere I*. *See* sections V and W of the Statement of the Case, supra, at 57-58.

Additionally, the court never addressed the Additional Expenditures as identified in Appellants' Record Excerpt 15. In total, the receivership professionals have liquidated $11,404,021.72 s of Baron and the LLCs' cash to pay themselves $5,581,445.46 in fees and expenses, even while the *Netsphere I* panel found that it was an abuse of discretion to have created the receivership in the first instance.[187]

G. The DC violated the mandates by failing to reconsider all of the professional fees and expenses and failing to reconsider payments made to other professionals.

Vogel's 2013 Fee Application[188] included fees and expenses of 13 law firms outside of Texas, and the fees and expenses of the following additional professionals: Thomas Jackson, Joshua Cox, James Eckels, Jeffrey Harbin, Gary Lyon, Grant Thornton, LLP, Martin Thomas, Damon Nelson and Matt Morris. These additional fees and expenses represented at least

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[187] *Netsphere I,* 703 F.3d at 302.

[188] *See* section P-1 of the Statement of the Case, supra, at pp40-43.

$700,000 paid out of the receivership estate (ROA.27320), but none were reevaluated by the DC, as required by *Netshpere 1*. Instead, the court only reconsidered the fees and expenses of four professionals, Vogel, MHKH, Dykema, and Gardere. (ROA.27320–27321, 27173–27474), not including numerous fees and expenses that had been paid, but not included in the Receiver's fee application. (ROA.13246–58, 13943–57, 14177–91, 15661–76, 15917–32, 17146–63, 18504–23, 18239–58, 19222–40, 19456–76, 24106–43).

H. The DC violated the mandates by awarding fees and expenses in favor of Sherman's attorneys, MHKH, in the amount of $379,761.18.

Where, as here, the interests of a receivership estate are adequately represented by receivership counsel, unnecessary action by others allegedly on the receivership's behalf should not be compensated. *Veeder v. Public Service Holding Corp.*, 51 A.2d 321, 325–26 (Del. 1947). Even where such non-receivership professionals make suggestions and recommendations and render services of value to the receivership estate, unless they are receivership professionals, they cannot be paid out of the receivership estate. *In re Middle West Utilities Co.,* 17 F.Supp. 359, 371 (D.C. Ill. 1936). In the present

case, Sherman sought the imposition of the unlawful receivership. One can only assume that in a case where there is a wrongful receivership, the rule prohibiting the payment of non-receivership professionals would be a much greater hurdle to overcome, and one can only assume that when the non-receivership professional seeking compensation is the party that instituted the wrongful receivership such hurdle would be impossible to overcome.

1. In *Netsphere I*, this Court reversed the order awarding the Ondova bankruptcy trustee's fees and expenses.

By this Court's Mandates, most if not all of the orders awarding fees and expenses to Vogel, Vogel's professionals and Sherman were reversed, including, specifically, the order granting Sherman's first fee application (ROA 21409-10), by which the Ondova Trustee was paid $379,761.18. *See* Court's Mandate (ROA.27979–10).

2. The DC correctly ruled, on January 2, 2013, that no more fees and expenses would be awarded to the Ondova bankruptcy trustee and that disgorgement was in order

On January 2, 2013, the DC issued an *Advisory on Past and Pending Receivership Disbursements* (the "*Advisory*"). In the Advisory, the DC announced:

> "*. . . **the Trustee will be instructed to return all previously paid amounts back to the Receiver.***"

(ROA.26478) (emphasis added).

3. The DC did a 180 degree turn, disavowing the January 2, 2013 Advisory.

Inexplicably, the DC made a 180 degree turn in the 5/29/2013 Fee Order and did not order the Ondova Trustee to disgorge the $379,761.18 previously awarded by the DC. The reasoning of the DC in the 5/29/2013 Fee Order was convoluted and unconvincing. (ROA.28147 - 48).

Having found that an analysis of the *Johnson* factors was moot because the fee award was prohibited by law, the court then gratuitously awarded fees without applying the *Johnson* factors or considering the benefit to the receivership estate. This is clearly erroneous. *Id.*

If the law does not permit a non-receivership professional to recover professional fees and expenses, as the DC concluded twice, what would the legal basis be for awarding any fees and expenses to the Ondova Trustee's attorneys? The DC found that there was no contract, oral or written, between the Ondova Trustee and Receiver. The DC also determined that the Ondova Trustee was not entitled to recover fees and expenses under a *quantum meruit* cause. *Id.*

In directing the DC to reconsider all receivership professional fees and expenses and meaningfully discount them, the *Netsphere I* panel did not direct the DC to gift away assets to non-receivership professionals in a "willy nilly" fashion, using unexplained equitable considerations as a basis for awarding such fees and expenses. At a minimum, as to the $379,761.18 awarded to MHKH, the 5/29/2013 Fee Order must be reversed and rendered in favor of Baron. *Id.*

I The DC violated the mandates by awarding fees in excess of the $1,600,000 fee cap.

In the *Netsphere I* opinion, the panel clearly and unequivocally instructed the DC, on remand, to limit the payment of any future fees and expens-

es to Vogel and his attorneys to "cash on hand" as of November 26, 2012, which the panel in *Netsphere I* found was $1,600,000,[189] which Vogel admits was only $1,196,744.31—an amount considerably less.[190] However, Vogel has now taken the position that this was not a "fixed cap".

Performing some metaphysical "hocus pocus", Vogel's analysis suggests that the cash on hand on December 18, 2012, was actually $4,106,015.08,[191] alleging that the panel in *Netsphere I* mistakenly excluded items such as unliquidated claims against third parties and discounts to fee payments in the panel's definition of "cash". Vogel argues that the panel actually intended to include within the definition of "cash on hand" these clearly non-cash items for the purposes of increasing the cap. [192]

Baron filed his objection to the 2014 Fee Request, explaining that the *Netsphere I* panel's mandate required that Vogel's fees were limited to the cap set by the Court, and that since Vogel had already been paid $1,579,953.88 since the issuance of the *Netsphere I* mandates, it could not be

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[189] *Netsphere I,* 703 F.3d at 313-314.

[190] ROA.30736, fn 4.

[191] *Id.*

[192] *See* section U of the Statement of the Case, supra, at p 57.

paid any more than $20,046.12 ($1,600,000 - $1,579,953.88). [193] If, as Vogel posits, the panel did not intend to fix the fee cap at $1,600,000, then the Court should use the actual cash on hand on December 18, 2012, as per Vogel, $1,196,744.31, to determine the amount by which the fee cap was exceeded, which would result in Vogel's obligation to return to the receivership estate $808,067.33 ($1,196,744.31-$1,579,953.88-$424,857.76).

Based on the unverified 2014 Fee Request and Supplement, and without holding a hearing or adducing evidence, the DC entered its 3/27/2015 Memorandum Opinion and Order, in which the DC granted Vogel an additional $424,857.76--the entirety of the remaining cash assets in the receivership estate.[194] The DC defied the mandates issued by the *Netsphere I* panel, disregarding the Fee Cap set by the *Nestphere I* panel.[195] The DC strangely applied a formula that included adding the amount of an uncollectable accounts receivables of $600,000 due from the Netsphere parties (ROA.33581) to the amount of cash on hand, and substituting this figure for the Fee Cap

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[193] ROA.30999-31001

[194] ROA.33587. *See* footnote __, supra.

[195] ROA.33580.

determined in *Netsphere I*, thereby providing justification for exceeding the cap. After doing so, the court, paradoxically, vacated its order requiring Netsphere to pay the $600,000.[196]

Against this backdrop, Baron's assets have now finally been depleted to zero. He has received nothing from the wind-down of the receivership with the exception of his assets exempt under Texas law. For the receiver-ship professionals to receive $5,581,445.46 for fees primarily used to defend the receivership and their fees, as compared to Baron receiving none of his non-exempt assets returned to him, none of the assets of the LLCs returned to him and no records seized by Vogel returned to him does not achieve the equitable solution the panel in *Netsphere I* was seeking, nor does this satisfy the mandate to "meaningfully discount" the fees, nor does this comport with the traditional notions of due process.

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[196] ROA.33585-38586.

J. The DC violated the mandates by refusing to return the assets of the LLCs to their rightful owner, and by refusing to make a determination of the rightful owner of the LLCs.

The panel instructed the DC, on remand, that non-cash assets in the receivership were to be "expeditiously released to Baron under a schedule to be determined by the DC for winding up the receivership."[197]

On December 31, 2012, the *Netsphere I* panel issued an order of clarification ("Order of Clarification"). ECF Doc 00512097486, in Appellate Case No. 10-11202. In the Order of Clarification, the panel stated:

> "Our utilization of a shorthand reference to Baron did not in any way affect the ownership of assets that were brought into the receivership. Assets are to be returned as appropriate to Baron or other entities that were subject to the receivership."

Id., at p7.[198]

Notwithstanding the *Netsphere I* panel's directives to return the non-cash assets to "Baron or the other entities that were subject to the receiver-

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[197] *Netsphere I,* 703 F.3d at 313-14.

[198] Baron would ask that the Court take judicial notice of this order. Fed. R. Evid. 201(b)(2). *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (holding that a DC may take judicial notice of information on an official government website. Pacer is such a website).

ship," the DC entered an order on March 3, 2014,[199] in which the court refused to "consider evidence or conduct proceedings regarding the ownership of Novo Point LLC or Quantec LLC or the companies' assets that are at issue", (ROA.29135) because "any such determination [was] outside of the court's jurisdiction." (ROA.29143). Without a hearing or considering any evidence, and over the objection of Baron, the DC determined that all of LLC's assets, including all of their domain names, would be given to the custody of Lisa Katz.

Baron filed an emergency motion for reconsideration requesting that the DC reconsider its order,[200] which the DC denied on grounds that Baron did not have standing. This contradicted the basis upon which the DC seized of the LLCs' assets in December 2010, when it seized the LLCs on the basis that the assets belonged to Baron. (ROA.29201). Additionally, the DC did not consider this Court's acknowledgment in *Netsphere I* that the

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[199] ROA.29135-29146

[200] ROA.29165-29176. The Motion was made on an emergency basis because the LLC's assets were about to be transferred to the control of Lisa Katz, who lacked any authority and was working against the interests of the LLCs.

domain names "were assigned to Quantec, LLC, for Baron's benefit," in the GSA.[201] The panel also stated in the *Netsphere I* opinion the following:

> "The trust to which Pronske was referring was the Village Trust, a Cook Islands entity which owned Novo Point, LLC and Quantec, LLC. Its trustee is SouthPac, which is also a Cook Islands entity, **and Baron is the trust's sole beneficiary**."

Netsphere I, 703 F.3d at 303 (emphasis added). The panel also stated:

> "The receivership also included business entities **owned or controlled by Baron, including Novo Point, LLC and Quantec, LLC.**"

Netsphere I, 703 F.3d at 310 (emphasis in bold added). To this day Baron has not received back any of the assets of the LLCs. In effect, Baron has lost a business that originally had been valued at over $100,000,000. How can this Court possibly conclude that this process was expeditious or fair and equitable? How can the DCs actions in refusing to make this determination and failing to hold an evidentiary hearing comport with the traditional notions of due process?

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[201] *Netsphere I,* 703 F.3d at 303.

K. The DC violated the mandates of the panel in *Netsphere I* by granting broad and sweeping releases to Vogel and others.

In the DC's 3/27/2015 Memorandum Opinion and Order, the DC granted broad and sweeping releases to Vogel and other related parties.[202] However, the panel in *Netsphere I* did not mandate that the DC consider or grant broad and sweeping releases of all liability, not only to Vogel, but also to a broad category of third parties, including "independent contractors". The penultimate ruling and mandate of the panel in *Netsphere I* was as follows:

> "The judgment appointing the receiver is REVERSED with directions to vacate the receivership and discharge the receiver, his attorneys and employees, and to charge against the cash in the receivership fund the remaining receivership fees in accordance with this opinion."

Netsphere I, 703 F.3d at 315.

There was no mandate that the DC consider and grant such broad and sweeping releases. The panel in *Netsphere I* determined that the DC had no subject matter jurisdiction over the personal assets of Baron or the assets of the LLCs, and found that there was no subject matter jurisdiction over the

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[202] ROA.33590-33591.

LLCs because they were not parties in the Netsphere DC Case. If the DC was lacking in subject matter jurisdiction to establish the receivership in the first instance, it is inconceivable that this Court could find now that the DC had the jurisdiction to grant such broad and sweeping releases.

1. Vogel and his professionals acted as trustees for Appellants' assets

Further, it is undisputed that Vogel and professionals under his auspices were occupying a fiduciary relationship with Baron and the LLCs, or, at minimum, occupied the position of constructive trustee in possession and control of the assets of Baron and the LLCs. In fact, early on in the receivership Vogel admitted he was Baron's attorney.[203] Accordingly, Vogel is required to deal with Appellants and their assets fairly, in a fiduciary capacity and as a constructive trustee of the assets.

Consequently, releasing such a fiduciaries to be exculpated for their breaches of the duties, without full and complete disclosure and an

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[203] Vogel and his counsel repeatedly acknowledged their fiduciary obligations to Appellants and at least once acknowledged that their relationship with Baron was that of an attorney-client ("I am the counsel for Mr. Baron. And that's what the judge said. So now we're going to move on from that. We're not hiring any new lawyers" ROA.29048).

agreement to such exculpation by the person to whom the duty is owed, is against public policy and a nullity.[204]. [205]

Indeed, a trustee has a duty of undivided loyalty "to administer the trust solely in the interest of the beneficiaries… and "the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests." Restatement (Third) of Trusts (Third) § 78 (2007).[206] In addition, "a trustee has a duty in dealing with a beneficiary to deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter."*Id.; see also Pegram v. Herdrich,* 530 U.S. 211, 224

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[204] An attorney cannot exculpate himself from acts unknown at the time of the acts nor can a court do so. The Texas Disciplinary Rules of Professional Conduct is established by the judicial branch and expressly prohibits prospective limitations of liability for malpractice (Rule 108(G)).

[205] Even if Vogel and his professional were acting with jurisdiction and subject to quasi-judicial immunity, this Court has held that a trustee acting in such capacity is responsible for acts such as breaches of fiduciary duty. *Dodson v. Huff* (*In re Smyth*), 207 F.3d 758 (5th Cir. 2000); See also *Mosser v. Darrow,* 341 U.S. 267, 272-73 (1951) and for failure to pay taxes. *n re Texas Pig Stands, Inc.*, 610 F.3d 937 (5th Cir, 2010).

[206] "The rule against self-dealing extends to transactions with a firm of which the trustee is a member". *George G. Bogert et al.*, The Law of Trusts and Trustees § 543, at 219 (2008).

(2000). Even if he could be exculpated for some duties of a traditional attorney, Vogel cannot be exculpated himself of his fiduciary duties.

2. Vogel and his privies concealed their dealings with Appellants' assets

Here, there was no agreement among the parties to release liability and nor could there be because Vogel and his professionals have failed to disclose their dealings with respect to Appellants' assets and affairs, including concealing the substance of tens of millions of dollars of sales and abandonment of Appellants' property, repeatedly and consistently making motions to sell such property ***ex parte and under seal.***[207] Indeed, the Sealed Record in this case, consisting of Vogel's sealed filings, contains at least 22 Bankers Boxes full of sealed documents, which Appellees continue to object to Appellants attempts to view.[208]

Vogel's asset sales were made without hearings, discovery and without proper disclosure to Baron or the LLCs. Vogel and his professionals cannot

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[207] *See* Chart included as Appellants' Record Excerpt 18.

[208] *See* ECF Doc 00513199813, filed by Vogel in this appeal on September 18, 2015.

do this behind the curtain and then get a release without the curtain having been lifted.

L. The DC violated the Mandate Rule in *Netsphere I* by creating exclusive jurisdiction over claims relating to parties and assets over which the panel held that the DC had no subject matter jurisdiction to begin with.

In the DC's 3/27/2015 Memorandum Opinion and Order, the DC granted broad general jurisdiction provisions over claims and causes of action relating to parties and assets over which the DC never had jurisdiction in the first instance. [209] The panel in *Netsphere I*, however, did not mandate that the DC establish such exclusive jurisdiction provisions. Since the DC was lacking in subject matter jurisdiction to establish the receivership in the first instance, it is inconceivable that this Court could approve the DC's creation of jurisdiction by judicial fiat where none existed by constitution or statute in the first instance.[210].

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[209] ROA.33592.

[210] *B.,Inc. v. Miller Brewing Co.,* 663 F.2d 545, 548 (5th Cir.1981).

M. The DC's grant of broad, sweeping releases and creation of an exclusive continuing jurisdiction provisions not only violate the mandate but are in conflict with the DC's prior pronouncements.

These provisions are not only in violation of this Court's mandates, they are also are in conflict with the DC's own prior pronouncements. For example, the DC observed that "A judgment is void if the court that rendered it lacked jurisdiction over the subject matter or the parties." *See* Memorandum and Opinion, Lindsay, J, Case 3:13-cv-03461-L, Document 52, pp 24-5., citing *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 143 (5th Cir. 1996).[211]

Again, the DC recognized the limited scope of its jurisdiction when it stated:

> "Thus, any such determination [of ownership of the LLCs] is outside of the court's jurisdiction. For the same reason, the court does not and will not have jurisdiction in this case over any claims and disputes regarding the ownership of the receivership.

ROA.29143

Once more, DC stated in the same Order on Show Cause:

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[211] Appellants would ask this this Court to take judicial notice of this court filing. *See* footnote __, supra.

> "If the court lacks jurisdiction over the disputes regarding the ownership of the Novo Point and Quantec receivership assets, it would seem that it also lacks jurisdiction to enjoin third-party claims dealing with this matter, particularly those claims that have already been filed, litigated, or arbitrated or are in the process of being litigated or arbitrated."

ROA.29145.

Since the DC recognized it lack of subject matter jurisdiction as being so pervasive, then where would the DC now obtain the requisite jurisdiction to grant releases to a receiver, his professionals and others? How could the DC justify the creation out of "whole cloth" of an all-encompassing, continuing jurisdiction clause. Aside from its clear violation of the Mandate Rule, the court otherwise lacked jurisdiction to make these determinations.

N. The DC violated the mandates by refusing to order the return of Appellants' books and records seized by Vogel

To date the DC has refused to order Vogel to return Appellants' books and records, allowing Vogel to keep them.[212] As this court ruled that the receivership was illegal, these documents should have been returned immediately following this Court's rulings in *Netsphere I*.

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[212] ROA.33591

O. The DC approved a wholly deficient accounting

Among the duties of a trustee is a full accounting. *Garrett v. First National Bank & Trust Co. of Vicksburg, Miss*, *153 F.2d 289, 292* (5th Cir.1946) ("Whenever a trust relation between the parties is shown to exist, the right to an accounting at reasonable periods follows as a matter of course"). "The burden is upon the trustee to show that it has performed its trust and the manner of its performance" *Id George G. Bogert et al.*, The Law of Trusts and Trustees § 543, at 219 (2008).

The documents provided by Vogel are devoid of any of the characteristics of an accounting, defined for example, in Black's Law Dictionary as "the report of all items of property, income, and expenses" prepared by the trustee for a beneficiary". Here, Vogel did not even identify the status of any of the other domain names that he seized when he was appointed, not even the domain names that he apparently sold for approximately $2 million.

A clear and comprehensive accounting is specifically mandated in cases where the court employs equity to apportion costs in an unlawfully appointed receivership. *Speakman,* 61 F.2d at 432.

> "We affirmed [in Potts II] that court's jurisdiction to hold plaintiff to account for losses which the improvident appointment of the receiver had caused." (citations omitted).

P. The DC violated the mandates by failing to expeditiously wind-down the receivership and return assets to Appellants

The DC improperly continued the receivership for approximately 2 years past the date this Court issued its mandates requiring an expeditious termination. This permitted Vogel and his professionals to continue billing the estate, to the detriment of Appellants.

V.

THE DC ABUSED ITS DISCRETION BY AWARDING FEES UNDER PATENTLY DEFECTIVE FEE APPLICATIONS

A. Block billing practices rendered the Fee Applications defective as a matter of law

The term "block billing" refers to the method by which each lawyer enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.

It is well established that a party does not have the right to bill for time that is not properly documented. *Texas State Teachers Ass'n v. Garland Indep.*

Sch. Dist., 489 U.S. 782, 784 (1989). Block billing is inadequate to support a fee award. *E.g.*, *Kearney v. Auto-Owners Ins. Co.*, 713 F.Supp.2d 1369, 1378 (M.D. Fla. 2010); *Seastrunk v. Darwell Integrated Technology, Inc.,* No. 3:05-CV-0531, 2009 WL 2705511, at *8 (N.D.Tex. Aug. 27, 2009) (reducing award in block billing case).

In the instant case, Vogel, Gardere and Dykema have submitted Fee Applications supported entirely by block billing, where they fail to allocate fees and expenses to the various tasks they were performing and fail to segregate their fees and expenses by receivership party.

1. A receiver and his lawyers must meet a high standard before receiving compensation

Compensation of receivers and their professionals are held to a higher standard than lawyers billing private clients. 75 C.J.S., Receivers, § 389(a), p. 1064. Courts emphasize the necessity that a trustee (or a receiver) must establish the time expended and the nature of the services performed as a precondition to receipt of compensation. *In re Imperial "400" National, Inc.*, 432 F.2d 232, 237 (3rd Cir.1970); *Larchwood Gardens,* 420 F.2d 531, 534–35.

Courts also consider the results they achieved in benefiting the estate a "critical factor" in determining the appropriate fees. *W.L. Moody*, 374 F.Supp. at 480; U*nited States v. Code Products Corp.*, 362 F.2d 669, 673 (3d Cir.1966) ("Results obtained are a critical factor").

Thus, the court must look at the activities performed by a receiver on a task by task basis, and determine whether these benefited the estate or whether they personally benefited the receiver. *Nowell v. International Trust Co.*, 169 F. 497, 505 (9th Cir.1909); *Larchwood Gardens*, 420 F.2d 531, 534–35. ("neither the receivers nor their attorney are entitled to compensation for time spent in surmounting difficulties caused by their own improper, though well intended, course of conduct.").

Further, courts require full disclosure from receivers, as the Supreme Court of Florida observed in *Gramil Corp.*, 94 So. 2d at 177.

Had the DC fully considered these factors, it would have determined that the receiver and his professionals' work purely benefited themselves and provided no benefit to the estate.

2. Gardere's fee application is wholly deficient

Gardere's Final Fee Application[213] makes no discernable attempt to break down the amount of fees and expenses incurred and paid for each task Gardere undertook for Vogel and makes no attempt to segregate the expenditures and charge them to the estates with which they are associated. Instead, Gardere insincerely attempts to comply with such requirements in a single section of one of its fee application entitled "E. Gardere expenses would largely have been incurred by Baron any-way."[214]. In this section, Gardere lists six main tasks performed by Gardere for the Vogel,[215] This constitutes the only attempt to delineate the tasks Gardere allegedly performed. However, even in this instance, Gardere's list is fundamentally flawed because it fails to allocate their fees and expenses to each task.

Gardere's fee application suffers from yet another fatal flaw, in that the tasks performed could have been performed at far less cost, yet Gardere

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[213] *See* section P-1 of the Statement of the Case, supra, at pp 40-43. ("Gardere Fee Application")

[214] ROA.27501–05

[215] Albeit, these tasks are associated with Novo Point and Quantec and not Baron.

billed at much higher attorney-rates for these tasks. Recognizing the inequity in this kind of behavior, this Court criticized this conduct. *Neville v. Eufaula Bank & Trust Co. (In re U.S. Golf Corp.)*, 639 F.2d 1197, 1201–02 (5th Cir. 1981).

Clearly administrative tasks such as assisting with accounting, managing sales and the like, are not "legal work," and thus cannot be billed at attorney rates, as Gardere has done

Gardere has stated that the firm recognizes that it and its lawyers acted as fiduciaries of Baron.[216] As fiduciaries of Baron, it is Gardere who must account to Baron for the fees and expenses requested or paid, task by task, so that Baron and the DC can make a meaningful decision as whether such fees and expenses are compensable under *Potts II*. Baron should not be required to analyze Gardere's fee applications to allocate the fees and expenses of Gardere, task by task. The burden of proving up its fees and

[216] ROA.34954.

expenses and meeting the criteria set out in *Potts II* clearly falls on Gardere.[217]

3. Dykema's fee application is just as deficient as Gardere's

Dykema's fee application[218], [219]suffers from the same infirmities as the Gardere final fee application. In a section entitled "Dykema Gossett PLLC's Role in the Receivership Case," Dykema seemingly attempts to summarize the different tasks performed by the firm, but, like the Gardere fee application, no attempt is made to delineate the time spent or expenses incurred, task by task or entity by entity.[220]

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[217] *See* also *Godfrey v. Powell,* 159 F.2d at 33; *Gramil Corp.*, 94 So. 2d at 176-177; *In re Blackwood Assoc., L.P.*, 165 B.R. 108, 111 (Bankr. E.D.N.Y.1994).

[218] *See* section P-1 of the Statement of the Case, supra, at pp 40-43. (the "Dykema Fee Application") ROA. 27761-65.

[219] In the Receivership Professionals' Fee Application (ROA.27511–27756), in Section II entitled "Receivership Fees and Expenses," Vogel recites that he submitted applications for fees and expenses from September 1, 2012–October 31, 2012, and from December 1–28, 2012, as detailed in the invoices attached to a prior application. (ROA.27320–27321).

4. Vogel's time entries are the most deficient.

The time entries in Vogel's Fee Application are far worse.[221] For example, three invoices are attached for September, October and December 2012.[222] Approximately 45 time entries are covered in such invoices. Nearly every single entry is identical and reads as follows:

> "Review pleading, files, emails, send emails, and related conversations with Receiver's counsel."

Vogel also attaches invoices for work performed by him from the commencement of the receivership on November 24, 2010, through August 2012. (ROA.27614–734). The non-specific time entries in all of these invoices failed to delineate who Vogel talked to, for how long and why, the nature of the tasks performed and their relationship to this case.

Vogel claims that he is exempt from the established requirements imposed on attorney fee applications since he did not act as counsel. However, the DC found that Vogel was acting as "lead litigator" in criticism of Vogel's activities and billing practices:

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[221] *See* section P-1 of the Statement of the Case, supra, at pp 40-43. ("Vogel's Fee Application")

[222] ROA.27571–92.

> The result was that the estate was essentially billed for two lead litigators. This problem is confounded by the fact that Vogel's billings were often generic and repetitive, making it difficult to determine exactly what work was done when (sic).

(ROA.28160, 5/29/2013 Fee Order at p. 37).

5. Vogel's 2014 Fee Request is deficient.

Vogel's 2014 Fee Request is also deficient.[223] The deficiencies in the 2014 Fee Request, as supplemented, were identified in section VI of the 4/22/2014 Objection, and are incorporated herein by reference for all purposes.

C. A Receiver Has a Duty to segregate his expenditures

Vogel is responsible to segregate receivership billings, delineating the source of each expenditure. In *Bank of Commerce & Trust Co. v. Hood,* 65 F.2d 281 (5th Cir. 1933), the Court held that when a receiver is administering a receivership for multiple estates, the responsibility to segregate expenses is that of the receiver.

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[223] *See* section U & V of the Statement of the Case, supra, at pp 57-58. ("Vogel files the 4/14/2014 Fee Request and Final Accounting" and "The Vogel Final "Accounting")

D. Fees for work performed after receivership deemed illegal are not compensable

In addition to the deficiencies and prohibitions concerning Vogel and his professionals' fee applications, it is abundantly clear that no fees could be awarded for work provided to the receivership after this Court determined that the receivership was illegal. Approximately $800,000 has been paid to the receiver and his professionals for work performed after the *Netsphere I* decision., which clearly is not compensable.

E. Disgorgement Required for Breaches of Fiduciary Duty.

Trustees, like Vogel and the receivership professionals who have breached their fiduciary duties is subject to disgorgement of fees. *PSL Realty Co. v. Granite Investment Co.,* 395 N.E.2d 641 (Ill. 1979) , *overruled by* 86 Ill.2d 291, 56 Ill.Dec. 368, 427 N.E.2d 563 (1981); *Woods v. City National Bank & Trust Co. of Chicago,* 312 U.S. 262 (1941).

While the issues surrounding Vogel and his professionals' breach of fiduciary duty, negligence and fraud were not litigated in the district court, the district court nevertheless should have recognized

such breaches as described in set forth in Section N of the Statement of the Case, supra, at p 35. in observing these professionals' conduct during throughout the proceedings.

VI.

THE DC ERRED IN MAKING FINDINGS OF FACT UNSUPPORTED BY THE RECORD

Findings of fact are reviewed under a clearly erroneous standard. *Beaubouef v. Beaubouef* (In re Beaubouef), 966 F.2d 174, 178 (5th Cir. 1992). "[T]he clearly erroneous standard requires that an appellate court be able to discern the evidentiary basis for a trial court's factual finding. Only if the district court specifies which evidence it adopted and which evidence it rejected in making its finding can we properly and effectively apply the clearly erroneous standard." *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott II,* 748 F.3d at 583, 604 (5th Cir. 2014)*; Lopez v. Current Dir. of Tex. Econ. Dev. Comm'n*, 807 F.2d 430, 434 (5th Cir. 1987) (citation omitted));) ("Rule 52(a) exacts neither punctilious detail nor slavish tracing of the claims issue by issue and witness by witness, but it does require findings that

are explicit and detailed enough to enable us to review them under the applicable standard." (quotation marks omitted). *Collins v. Baptist Mem'l Geriatric Ctr.*, 937 F.2d 190, 194 (5th Cir. 1991).

The DC made numerous erroneous findings based on unsupported statements of opposing counsel and innuendo, all of which require reversal. Record Excerpt 22 is a table of the factual findings which Baron asserts were clearly erroneous.

CONCLUSION

The DC violated the Fifth Amendment when it prevented Jeffrey Baron from accessing to his funds to pay counsel during contentious, complex proceedings. Charging fees against property that was wrongfully seized without jurisdiction and without probable cause violates the Fourth or Fifth Amendments. Because of these violations, the Court must set aside the Memorandum Opinion and Order entered on March 27, 2015 and the Final Fee Order entered on May 29, 2013, Record Excerpts 12 and 5 and order the Receiver and his professionals to disgorge the fees they have received in this case and all other expenditures made

from the proceeds from the receivership estate, in total, over $11,000.00. *See* Record Excerpts 14 and 15.

The precedent of this Court and the Supreme Court precludes charging expenses of an unlawful receivership against property over which the court lacks subject matter jurisdiction. The decision in *Netsphere I* was clearly erroneous in determining that the DC had the equity jurisdiction to award fees and expenses against the assets of Baron, Novo Point and Quantec, where the Court had determined that the DC lacked subject matter jurisdiction in the first instance. Accordingly, the Court must set aside the Memorandum Opinion and Order entered on March 27, 2015 and the Final Fee Order entered on May 29, 2013, Record Excerpts 12 and 5 and order the Receiver and his professionals to disgorge the fees they have received in this case and all other expenditures made from the proceeds from the receivership estate, in total, over $11,000.00. *See* Record Excerpts 14 and 15.

Even if the DC had equity jurisdiction, it could not ignore this Court's mandates and controlling precedent from the Supreme Court and this Court in awarding fees to a vacated receiver and his professionals without a showing that the fees conferred a benefit to the estate.

Accordingly, the Court must set aside the Memorandum Opinion and Order entered on March 27, 2015 and the Final Fee Order entered on May 29, 2013, Record Excerpts 12 and 5 and remand the case to the DC with specific instructions that all fee awards must be based on a showing of benefit to the receivership estate, and such fee awards cannot include fees and expenses incurred in defending against the appeals which Baron successfully prosecuted before this Court.

The DC cannot disregard this Court's mandates in *Netsphere, Inc. v. Baron*, in awarding excessive fees and expenses to Vogel and the professionals hired by him and to Sherman, the party who moved for the receivership. This Court cannot permit a vacated receiver to charge the estate for work that he and his professionals performed vindicating their personal interests, including services involved in prosecuting fee applications to the DC and defending them. Accordingly, the Court must set aside the Memorandum Opinion and Order entered on March 27, 2015 and the Final Fee Order entered on May 29, 2013, Record Excerpts 12 and 5 and remand the case to the DC with specific instructions that all fee awards must be based on a showing of benefit to the receivership estate, and such fee awards cannot include fees and ex-

penses incurred in defending against the appeals which Baron successfully prosecuted before this Court.

As a matter of law, fiduciaries canot receive broad releases of liability without an agreement for such releases and without disclosure of their activities and when the lower court lacks jurisdiction to grant such releases. This Court must reverse the March 27, 2015, Memorandum Opinion and Order, Record Except 10, because the Court did not have the power or authority to grant such releases or to employ exclusive jurisdiction provisions the likes of which were adopted by the DC.

The findings set forth in Record Excerpt 22 must be set aside because they were clearly erroneous.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the Appellant Jeffrey Baron's Brief was electronically filed with the Clerk of the United States Court of Appeals for the Fifth Circuit using the Appellate CM/ECF system. Accordingly, counsel who have entered an appearance in this case and are registered Appellate CM/ECF users will be served electronically by the Appellate CM/ECF system through their registered e-mail addresses.

The undersigned further certifies that a true and correct copy of this Appellants' Brief was served on counsel who do not participate in the Appellate CM/ECF system by courier in accordance with Fed. R. App. P. 25 and 5TH CIR. R. 25.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 25,575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011 (Mac OS X) in 14 point Palatino for text, and Helvetica Neue for headings.

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Dated: October 5 2015