**No. 10-11202**

# In the
# United States Court of Appeals
# for the Fifth Circuit

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

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Appeal of Order Appointing Receiver in Settled Lawsuit

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

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

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

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## REPLY BRIEF FOR APPELLANT JEFFREY BARON

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Respectfully submitted,

/s/ Gary N. Schepps

Gary N. Schepps
Texas State Bar No. 00791608
5400 LBJ Freeway, Suite 1200
Dallas, Texas 75240
(214) 210-5940 - Telephone
(214) 347-4031 - Facsimile
Email: legal@schepps.net
**FOR JEFFREY BARON**

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## REPLY STATEMENT OF FACTS

### Mr. Baron Did Not Fire 19 Law Firms

The record does not support Sherman's factual assertion that Jeff Baron hired and fired 19 law firms. For the dozen or so actions over the past half-decade listed in Sherman's record citation, the record does not disclose who of the over dozen independent entities involved as defendants hired the firms, or how the representation ended.

### The District Court Made No Finding As To The Validity of The Alleged Debt

Significantly, the record does not support Sherman's factual allegation that "Most of the lawyers had not been paid the amounts owed them". (Sherman's Principal Brief, "Sherman's Brief", page 3). The District Court's judicial notice cited to by Sherman expressly states there is no finding as to the validity of the alleged debt. SR. v2 p361. Additionally, the 'claims' giving rise to alleged debt have been shown to be groundless and to have been solicited. SR. v8 pp1197-1201,1212-1235.

**No Threat to Ondova's creditors, no evidence of "Disruption" or Halted Progress**

The record does not support Sherman's factual assertions (Sherman's Brief, pages 2-3): (1) that the grounds of Sherman's motion for receivership were to prevent "continued disruption of the Bankruptcy and District Court proceedings", (2) that claims threatened the ability of Ondova to pay unsecured creditors, and (3) that the appearance of new lawyers sometimes completely halted progress toward winding up the bankruptcy and dismissing the District Court lawsuit.

**Other Sherman Facts Not Supported by the Record**

Mr. Baron's motion for stay was not held pending the outcome of proceedings, but was denied without prejudice. Sherman errs in averring that Baron filed a motion "falsely claiming that the District Court had denied his Emergency Motion". The District Court declined to grant emergency relief and put off the hearing on relief to a date 40 days after the receivership was imposed. Mr. Baron then moved for emergency relief in the Court of Appeals pursuant to the second tier of FRAP 8(a)(2)(A)(ii), averring that the district court had failed to afford the emergency relief requested.

## ARGUMENT SUMMARY

### The Granted Motion Expressly Sought Receivership to Seize All of Jeff Baron's Property so that He could Not Hire an Attorney

In an act unprecedented in the history of American jurisprudence, the District Court below granted a motion to seize all of an individual's assets in order to prevent them from hiring an attorney.[1] As explained by the District Judge: "[T]he receivership is an effort to stop the parade of lawyers trying to wiggle out of lawful injunctions from judicial officers. Yes, sir."[2] Jeff Baron was warned that he was "prohibited from retaining any legal counsel" and that if he did "the Receiver may move the Court to find you in contempt".[3] In case that threat was not sufficient, in order to stop Jeff from having any money to hire a lawyer, all of his assets (exempt and non-exempt) were seized[4], as were all of his future earnings[5]. Jeff was ordered not to cash any checks[6] or enter

[1] R. 1578 (paragraph 13, "the appointment of a receiver is necessary under the circumstances in order to remove Baron from control of his assets and end his ability to further hire and fire a growing army of attorneys." ), 1619-1632.

[2] R. 4593-4594.

[3] SR. v8 p1213.

[4] R. 1620.

[5] R. 1622 paragraph F.

[6] R. 1620, 1621 paragraph C.

into any business transactions[7].

Jeff Baron has been in a civil lockdown since the day the challenged order was issued *ex parte*. Since that day, Mr. Baron has been forced to live off a monthly sustenance stipend from the remaining dollars of his life savings disbursed to him by the receiver. Under the express threat of contempt, **Jeff Baron is allowed to purchase only "local transportation, meals, home utilities, medical care and medicine."**[8] Mr. Baron's business, savings, right to work, and life as a free member of society were taken from him by the challenged order.

Further, unless this Court grants relief, Jeff Baron's savings accounts have been stripped from him forever. While this matter has been on appeal, the District Court has distributed essentially all of Jeff's savings account balances to the receiver and his law firm. The amount is staggering— almost a million dollars. SR. v8 p990-992.[9] Only by order of this Court (1) reversing the receivership order, (2) ordering the receivership assets disbursed while the matter has been on appeal returned, and (3) ordering the receivership costs be born by the

[7] R. 1620, 1622, 1627 paragraph A.

[8] SR. v8 p1213.

[9] Only $23,182.52 was left in Mr. Baron's savings accounts by the start of June. Id.

Appellee, can the property that has been unreasonably and without Due Process of law been taken from Jeff Baron be restored to him.

**Receivership is Not Authorized as a Remedy for Vexatious Litigation**

The *only* basis for the receivership put forth by Sherman is that Mr. Baron was guilty of vexatious litigation. Sherman argues that equity receivership seizing all of a citizen's property is an authorized remedy for vexatious litigation. However, equity receivership is not authorized as a means of providing any form of final relief. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923) ("[R]eceivership is not final relief."). The District Court has discretion to impose a receivership only where it is ancillary to some other final equitable remedy sought in the property which is pending before the court. *Kelleam v. Maryland Casualty Co. of Baltimore*, 312 U.S. 377, 381 (1941). The Supreme Court established nearly a hundred years ago that receivership was only authorized as an intermediate remedy to preserve property pending adjudication of disposition of that property. *Gordon v. Washington*, 295 U.S. 30, 37 (1935). As held by the *Gordon* Court,

"There is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition." *Id.*

**Fifth Amendment Due Process**

Sherman argues that the post-deprivation, post-appeal TRAP 8(a) hearing provided 'due process' for the prior *ex parte* seizure of Jeff Baron's assets and the firing of his trial counsel. As discussed in the briefing below, such an argument is contrary to settled law. Further, if a post-deprivation, post-appeal, hearing *could* satisfy the requirements of due process, it does not in this case because there was also a failure of Due Process with respect to the post-deprivation hearing. With respect to the post-deprivation hearing, Mr. Baron was denied the opportunity to retain experienced trial counsel, his documents were stripped from him, and he was denied the opportunity to conduct discovery.

**The Fourth Amendment**

The Fourth Amendment to our Constitution should protect every citizen against the unreasonable seizure of their property. That Constitutional protection is fundamental to freedom in our society. However, the words "Fourth Amendment" are noticeably absent from

Sherman's responsive briefing. There are two core Fourth Amendment protections involved in this appeal:

(1) Objective reasonableness.

Objective reasonableness is required before a citizen's property may be seized. Objective reasonableness is an issue of law reviewed *de novo* on appeal.

(2) Probable Cause upon sworn oath.

As a core procedural protection against unreasonable seizure, no warrant for the seizure of a citizen's property may issue without probable cause shown upon sworn oath or affirmation. However, no oath or affirmation of probable cause preceded the issuance of the challenged order. Sherman has not contested either the factual or legal argument briefed on this issue.

## ARGUMENT & AUTHORITY

### REPLY ISSUE 1: THE POST-DEPRIVATION FRAP 8(A) HEARING DID NOT CURE THE LACK OF A PRE-DEPRIVATION HEARING REQUIRED BY THE FIFTH AMENDMENT

#### A Matter of Established Law

Sherman erroneously argues that because Jeff Baron had notice of post appeal hearings in which he sought relief pursuant to the rules of appellate procedure, a pre-deprivation hearing was not required. (Sherman's Brief, page 24). Sherman ignores the Fifth Circuit's holding in *Dailey v. Vought Aircraft Co.*, 141 F. 3d 224, 230 (5th Cir. 1998) (a post-deprivation hearing does "not repair the district court's violation of her rights to due process under the Constitution and the court rules"). The law regarding this issue is well established in the context of seizure of property and specifically of wages. *Eg. Fuentes v. Shevin*, 407 U.S. 67, 82-85 (1972) ("[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.").

**This Rule also Applies to allegations of Vexatious Litigation**

Prior notice and hearing are established mandatory pre-requisites for declaring litigants vexatious. Sherman's own cases establish this principle. *E.g. Qureshi v. U.S.*, 600 F.3d 523, 526 (5th Cir. 2010) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 (1972)).

***Whatley v. Philo***

Sherman relies upon *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987) as his sole authority for the proposition that no pre-deprivation hearing was required in the proceedings below. Sherman's reliance is misplaced. The constitutional requirements of *ex parte* receivership are not addressed in *Whatley*. The *Whatley* appellant conceded that he enjoyed "no clearly established constitutional right to pre-deprivation notice and hearing ***in the circumstances of [that case]"***. *Id.* at 21. *Whatley* involved a statutory scheme regulating title insurance. *Id.* at 21, fn. 5.

Appellant does not argue a *per se* constitutional prohibition against seizing property *ex parte.* Rather, there are Due Process safeguards required in granting *ex parte* relief seizing a citizen's significant property interest, and there is a constitutional prohibition

against granting such *ex parte* relief where those safeguards are absent.[10] Those safeguards were absent in the proceedings below.

There is also a *per se* prohibition against pre-hearing seizure with respect to an individual's most basic property rights. Those rights have been recognized to include an individual's right to work and right to wages earned. *E.g. Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969), *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 543 (1985). Both of these rights were taken from Mr. Baron by the *ex parte* order challenged in this appeal and, as a matter of established law, a post-deprivation hearing, if one were held, is not sufficient to satisfy constitutional Due Process. *Id*. R. 1620, 1622, 1628.

**Appeal divests the Trial Court of Jurisdiction Over the Matter Appealed**

An appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal". *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982). Accordingly, the district court was without jurisdiction to hear

[10] Jeff Baron's Principal Brief, pages 61-63.

new arguments and evidence in support of the receivership order once it had been appealed. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). As explained by the Fifth Circuit in *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990), a district court does not have the power to "alter the status of the case as it rests before the Court of Appeals".

Sherman offers a partial quote from *Farmhand, Inc. v. Anel Engineering Industries, Inc.*, 693 F.2d 1140, 1146 (5th Cir. 1982), that a district court may "support" its judgment post-appeal. The Farmhand holding uses the word "support" but clearly refers to a district court's authority to maintain the status quo created by an appealed from order. *Id.* Farmhand's "support" is the power to "to enforce its order by civil contempt proceedings." *Id.* This is not the authority to alter the status of an order on appeal by holding new hearings on the motion and entering findings to "support" (in the sense of 'prop up') the order on appeal. As the Fifth Circuit has held in *Coastal Corp.*, 869 F.2d at 820, "the district court lacks jurisdiction 'to tamper in any way with the order then on interlocutory appeal other than to issue orders designed

to preserve the status quo of the case as it sat before the court of appeals.' "

## REPLY ISSUE 2: FAILURE OF DUE PROCESS WITH RESPECT TO THE FRAP 8(A) HEARING

### Factual Background of the FRAP 8(a) Hearing

1. Timing of the Hearing

Although multiple requests for an emergency hearing were made, the District Court postponed the FRAP 8(a) hearing until December 17, 2010, started and then continued the hearing to January 4, 2011, some 40 days after Jeff Baron's property was seized. R. 27-34.

2. Motion Strictly Limited as an Appellate Motion Pursuant to FRAP 8(a)

Baron filed his notice of appeal on December 2, 2010 and the next day filed for relief expressly "pursuant to Federal Rule of Appellate Procedure 8(a)(1)". R.1699, 1702. The motion specified the specific designation of the provision of the Federal Rules under which the motion was filed. That Rule was FRAP 8(a)(1). Id. The district judge expressly understood and accepted the motion as a post appeal motion and ruled that **"this matter would fall within the scope of representation of Mr. Baron's appellate counsel, Mr. Schepps, who states in the instant motion that his representation is limited to the appeal of the Order Appointing Receiver."**

R. 3557. The FRAP 8(a) motion did not request a re-hearing, but requested pursuant to FRAP 8(a)(1) either stay or vacation of the order. R. 1702, 1708-1709. Baron argued that the order could be vacated pursuant to FRAP 8(a)(1) because the order was void *ab initio*. R. 4404.

Notably, the burden at the FRAP 8(a) hearing was upon Jeff Baron as movant. The district court ruled against Jeff because it found "that Baron has not met his burden to show that the Court should stay the Receivership". SR v2 p 359.

**Failure of Due Process**

On December 13, Mr. Baron moved the District Court to be allow access to his money to hire an experienced Federal trial counsel to represent him before the District Court. R. 2720. In his motion Mr. Baron noted that:

(1) His personal papers and money had been seized, and

(2) He had no way to fairly defend himself without: (A) access to his money to hire experienced Federal trial counsel to represent him before the trial court,

(B) his papers and evidence, and (C) an opportunity to conduct discovery.

Id.

The district court denied Mr. Baron's requests. R. 3557. The district court refused to allow Mr. Baron any discovery. R. 3565-3566. The district court denied Mr. Baron's request to have access to his own money in order to hire experienced trial counsel to represent him at the hearing. R. 2720, 3557.

The District Court erred because Mr. Baron was entitled to be "afforded the fair opportunity to secure counsel **of his own choice**." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (emphasis added). Moreover, the District Court's refusal to afford Mr. Baron the opportunity to secure counsel of his own choice is a denial of due process in the constitutional sense. *Id*. at 69. Prior to the *ex parte* receivership order Mr. Baron was represented by an AV rated trial attorney, and was in possession of his papers and documents, and could have defended himself at a hearing to appoint a receiver if that hearing was heard before the receivership was imposed upon him. R. 3890-3892. Upon his

appointment, the receiver fired Mr. Baron's trial counsel and seized his documents. Id. A fundamental violation of due process should be clear when party is put to defend the seizure of their property and the forced firing of their trial attorney[11], *after* their documents have been seized and their trial counsel has been fired by the court's receiver. Id.

Additionally, the particularity requirement in Rule 7 requires that a non-movant be afforded notice of the grounds upon which relief is based, in order to provide that party with a meaningful opportunity to respond. Fed.R.Civ.P. 7; *e.g.*, *Registration Control Systems v. Compusystems, Inc.*, 922 F.2d 805, 807 (Federal Cir. 1990). The Fifth Circuit has held "The right of defendants to present controverting factual data is illusory unless there is adequate notice of plaintiffs' claims." *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 356 (5th Cir. 1971). The Constitution requires that the opportunity to be heard be granted in a meaningful manner. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). As a basic matter of due process, a district court cannot issue relief based on grounds not advanced by the

[11] Mr. Baron's appellate counsel handles Federal appeals, not Federal trials. He has never on his own handled a Federal trial, bench or jury, and has always relied upon experienced co-counsel for trials in the Federal court. SR. v5 p1256.

moving party in their motion. *See John Deere Co. v. American Nat. Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987) (summary judgment context); *and cf. Vought Aircraft Co.*, 141 F.3d at 230 (sanctions context). Notably, the motion for receivership did not allege the matters found by the trial court in its post-appeal order denying Mr. Baron's FRAP 8(a) motion. For example, the motion for receivership did not allege that Jeff was a vexatious litigant, or had "engaged in a consistent pattern and practice during this federal litigation of defrauding his own counsel", or that there was a threat Jeff would move his assets. R. 1575-1579. Yet, these are precisely the asserted justifications Sherman argues in his briefing.

## REPLY ISSUE 3: RECEIVERSHIP IS NOT AUTHORIZED AS A REMEDY FOR VEXATIOUS LITIGATION

### Controlling Access to the Court

The Fifth Circuit has based a court's power to control vexatious litigants on the inherent power of the court to protect its jurisdiction and judgments and to control its docket. *Farguson v. MBank Houston, NA*, 808 F.2d 358, 360 (5th Cir. 1986). The inherent power of a district court to deter vexatious litigation that has been recognized by the Fifth Circuit extends to the imposing of pre-filing injunctions to control access to the court. *E.g.*, *Baum v. Blue Moon Ventures, LLC*, 513 F. 3d 181, 187 (5th Cir. 2008).

There is a wide chasm between (A) inherent jurisdiction over access to the court, and (B) jurisdiction over a citizen's property not subject to any claim or controversy before the court. The district courts of the United States are "courts of limited jurisdiction". *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 552 (2005). While courts have been recognized to have the jurisdiction to lock a vexatious litigant out of the courthouse,[12] they have not been recognized to have the

[12] *E.g.*, *Baum,* 513 F. 3d at 187.

*inherent* jurisdiction to lock a litigant out of the litigant's own house. *Cf. Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375,380 (1994)( "the power asked for here is quite remote from what courts require in order to perform their functions" ).

**Pre-Filing Injunction is the Authorized Remedy for Vexatious Litigation**

The cases that Sherman has briefed set out the well-established precedent that the authorized remedy for controlling vexatious litigation is pre-filing injunction. Every vexatious litigation case cited by Sherman has the same holding: the authorized remedy is injunction. The cases cited by Sherman do not support his argument to the contrary on this issue. For example:

1. Sherman argues *Qureshi* to hold there is a general "power to create a remedy" for vexatious litigants (Sherman's Brief, page 6). However, the *Qureshi* Court ruled that "we hold that **a pre-filing injunction** like the one imposed here falls within ... the court's jurisdiction." *Qureshi*, 600 F.3d at 526.

2. Sherman argues *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181 (5th Cir. 2008) to hold that a court can enter whatever orders it feels are necessary to control a vexatious litigant (Sherman's Brief, page 10). However, *Baum* holds that "A district court has jurisdiction to impose **a pre-filing injunction** to deter vexatious, abusive, and harassing litigation". *Id*. at 187. Moreover, the pre-filing injunction must preserve "the legitimate rights" of the litigant. *Id.*
3. Sherman argues *In re Hartford Textile Corp.*, 681 F.2d 895, 897 (2d Cir. 1982) to hold that courts have been traditionally allowed enter whatever orders they feel are necessary to control a vexatious litigant. (Sherman's Brief, pages 13-14). However, *Hartford* holds "The equity power of a court to give **injunctive relief** against vexatious litigation is an ancient one which has been codified in the All Writs Statute,". *Id*. at 897.

The Court can control access to its door by locking its door and placing the key in the hands of a judge to supervise access— That is pre-filing injunction. The Court does not need to, and is not authorized to, go to a litigant's house and smash his legs so that he can't come around any more.

**The limits of Inherent Power: *De Beers***

Sherman argues that 'Federal Courts also have the power to appoint receivers where equity requires it to insure compliance with the orders of the Court'. (Sherman's Brief, page 14). However, that is exactly what the law *expressly* prohibits. The Supreme Court held in *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220 (1945), that the court's inherent authority to 'protect is jurisdiction and authority' does **not** extend to the power to provide security that its orders will be complied with. *Id. De Beers* expressly holds that "[P]roviding security for compliance with other process which conceivably may be issued" is not authorized.

Sherman also errs in concluding that the injunction sought in *De Beer*s was not intended to protect the exercise of the court's power.

(Sherman's Brief, page 13). That was clearly the intention— the injunction in *De Beers* was intended as "a method of providing security for compliance with other process which conceivably may be issued". *De Beers*, 325 U.S. at 220. *De Beers* held that a district court lacks authority to order the "requisition of such security on the footing of a complaint in equity". *Id.* As the Supreme Court explained in *De Beers*, the power to disable a party's use of property as security for compliance with possible decrees of the court has never been thought justified in the "long history of equity jurisprudence". *Id.* at 222.

Sherman acknowledges that *De Beers* holds that the All Wits Act and inherent powers authority are justified only in order to preserve the court's subject matter jurisdiction or necessary to processing a litigation. *Id.* at 826. (Sherman's Brief, page 10). However, Sherman's argument ignores the meaning of that holding. The Fifth Circuit made clear in *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1360 (5th Cir. 1978) that there are limitations to the scope of inherent powers. One limit is that inherent powers "be used only as *required* for the performance of duties" (emphasis in original). *Id.* Pivotally, there

is no duty or power of the district court that it could not exercise without seizing Jeff Baron's property.

**Seizing Jeff Baron's Assets was not Necessary to Enable the Court to Exercise any of its Powers**

The receivership ordered against Jeff Baron was not necessary to protect the District Court's exercise of any its powers. For example:

(1) The District Court has power to authorize or reject the appearance of any attorney before it and does not need to seize Jeff Baron's assets in order to exercise that power.

(2) The District Court has power to delay proceedings or to refuse to delay them. The District Court did not need to seize Jeff Baron's house keys in order to exercise its power to control its docket.

(3) The District Court has power to sign the stipulated dismissal with prejudice entered into by the parties in the lawsuit below. Stripping Jeff Baron of his property was not necessary for the District Court to exercise that power.

(4) The bankruptcy court has power to allow, disallow, set a deadline for filing, and sanction any groundless filings with

respect to claims for substantial contribution. The District Court did not have to seize all of Jeff Baron's assets for the bankruptcy court to exercise its authority over substantial contribution claims.

Notably, Sherman offers no explanation as to why or how seizing all of Jeff's assets met the standard in *Fredeman* that the seizure be "essential to preserving the court's subject matter jurisdiction or processing the litigation". *In re Fredeman Litigation,* 843 F.2d 821, 826 (5th Cir. 1988). A stipulated dismissal of all claims in the lawsuit was entered into by all parties in the suit below. R. 2346-2355. All the District Court needed to do to complete the pending case was to sign the dismissal order.

**Sherman's Argument:**

1. *United States v. First Nat. City Bank*

Sherman appears to attempt to make up for the lack of necessity discussed above by citation to *United States v. First Nat. City Bank*, 379 U.S. 378, 85 S.Ct. 528 (1965), although it is unclear how the case supports Sherman's position. In *First Nat. City*, the Supreme Court

noted that review of a *statutory grant of authority* must be in light of the public interest involved. *Id.* at 383.[13] The Supreme Court in *First Nat. City Bank* held:

> Unlike *De Beers Mines v. United States*, 325 U.S. 212, there is here property which would be "the subject of the provisions of any final decree in the cause."
>
> *Id.* at 385.

The case at bar is like *De Beers* and unlike *First Nat. City Bank*— the property subject to the challenged order in this appeal was not subject to any claim in the underlying suit. That is one of the key issues raised in this appeal —the pivotal distinction between authority over property subject to claims before the court and lack of authority over property "not subject to any final decree in the cause".

2. Receivership is Authorized as a form of Final Relief if it has a Purpose

Sherman also argues that receivership is authorized as a form of final relief where it is a means to achieve a desired end. (Sherman's Brief, page 12). However, Sherman has offered no authority for allowing

[13] The court's review of a statutory grant of authority is in contrast to the review of the exercise of inherent power, which is reviewed in light of Chancery Court practices.

the appointment of a receiver to seize an individual's property that was not subject to a claim pled before the Court.

Sherman argues that *Gordon* merely forbids receivership where it can accomplish no purpose. (Sherman's Brief, page 12). However, in *Gordon* there was a clear purpose requested of the Receivership. In *Gordon*, the movant was not happy with the way a trustee was handling certain property. *Id* at 33-34. The movant complained that interest on many of the mortgages in a certain mortgage pool had not been paid, and little effort was being made by the trustee to compel payment of the taxes on the mortgaged properties. *Id.* The court placed the properties into receivership to provide a remedy. The 'end sought' was to have the interest collected on the mortgages and effort made to have the debtors pay taxes on the mortgaged property. However, in reversing the lower court's decision the Supreme Court explained that receivership is not a form of equitable relief which a court is authorized to give. Rather, receivership must be "ancillary to some form of final relief which is appropriate for equity to give" *Id.* at 39. Moreover, that form of final equitable relief must involve disposition of the property

placed into receivership. *Id.* at 37 ("there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition."). [14]

The Supreme Court and the Fifth Circuit have delineated, with clarity, the strict limitations on the authorized exercise of a court's inherent or equitable powers. That delineation is the strict limit fixed by the powers of the Chancery Court in 1789. *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). Moreover, it has been firmly established by the holdings of the Fifth Circuit in *ITT Community Development*, 569 F.2d at 1359, and *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1409 (5th Cir. 1993) that a court's inherent and 'all writs' powers are limited to the powers exercised by the Court of Chancery at the time of the enactment of the Judiciary Act. As the Supreme Court explained in *Gordon*, because the Court of Chancery limited the issuance of receivership orders exclusively to conserve property over which the court had been asked to make a further disposition, the equitable authority of the

[14] The reason for this limitation is jurisdictional. As explained in *Gordon*, "The English chancery court from the beginning declined to exercise its jurisdiction for that purpose." *Id.* at 37.

district court to impose a receivership is limited by the same restraint and thus receivership is only authorized when it is ancillary to a claim seeking a final decree disposing of the property. *Gordon* at 37-38.

Sherman, however, disagrees and relies upon an unpublished opinion, which pursuant to the Fifth Circuit's local rule 46.5.4 is not precedent, to argue that *Grupo Mexicano* does not hold that a court's equitable powers are limited. (Sherman's Brief, page 12). However, even the unpublished case relied upon by Sherman recognizes that *Grupo Mexicano* holds "that a federal court's equitable power is limited to the jurisdiction exercised by the High Court of Chancery in England at the time of the enactment of the Judiciary Act of 1789."[15]

3. Governmental Receivership

Sherman has offered governmental receivership cases from other circuits. The receivership power recognized in those circuits springs from the constitutional structure of the branches of government (as viewed in those circuits), and not from the power of the Court of

[15] A*nimale Group Inc. v. Sunny's Perfume Inc.*, 256 Fed.Appx. 707 (5th Cir. 2007) (unpublished).

Chancery.[16] Receivership over a governmental agency for "constitutional purposes" is not at issue in the case at bar.

*Gordon*, *De Beers*, *Grupo Mexicano*, *ITT Community Development*, *Natural Gas Pipeline*, and *Tucker* are the applicable and controlling precedent to the issues at bar in this case. To adopt an 'all things reasonable' expansion of a court's equity and inherent powers would reverse the well established controlling precedent setting forth the source and limits of a court's equitable and inherent power as the Chancery Court. As explained by the Supreme Court in *Gordon* and the Fifth Circuit in *Tucker*, receivership is not the 'catch all' tool of last resort argued by Sherman. (Sherman's Brief, page 15). It can be tempting for a court to try to use receivership beyond the narrow purpose for which it is authorized, and for that reason the Fifth Circuit has held that receiverships "are to be watched with jealous eyes lest their function be perverted". *Tucker,* 214 F.2d at 631.

[16] See Jeff Baron's Principal Brief, page 33, fn2.

**The Specific Remedy of Equity Receivership is Not Authorized to be Used as a Stand-Alone Remedy**

It is well settled law that receivership is not authorized as a stand-alone-remedy. *Gordon v. Washington*, 295 U.S. 30, 37-38 (1935). The district court lacks authority to administer receivership as a remedy for ultimate relief. *Id.* at 38. Equity Receivership is authorized only to conserve property where distribution of that property is sought pursuant to some equitable form of relief. *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954).

## REPLY ISSUE 4: THERE IS A CONSTITUTIONAL RIGHT TO ASSOCIATE WITH AND RETAIN LEGAL COUNSEL

Sherman acknowledges the purpose of the receivership is to restrict Jeff Baron's right to retain counsel. (Sherman's Brief, page 23). However, Sherman's argument confuses a court's authority to control its docket[17] with a citizen's constitutional right to associate with and retain counsel of their choice. *E.g.*¸ *Powell*, 287 U.S. at 53; *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 942, 945-946 (5th Cir. 1981); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). Contrary to Sherman's unsupported assertion that Jeff Baron never moved for access to his funds to hire an attorney to represent him, the record establishes a multiplicity of such motions filed and denied in the court below. R. 2720, 3556-3668, SR. v2 p385-390, SR. v4 p119.

[17] Eg., *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983).

**REPLY ISSUE 5: THE SEIZURE OF ALL OF JEFF BARON'S PROPERTY IS OBJECTIVELY UNREASONABLE AND THUS VIOLATES THE FOURTH AMENDMENT**

Sherman responds to the constitutional issues by arguing that the standard of review for a district court's factual findings is the clearly erroneous standard. (Sherman's Brief, pages 17, 22). However:

(1) The objective reasonableness required by the Fourth Amendment is not a question of fact, but is an issue of law reviewed *de novo*. *E.g.*, *White v. Balderama*, 153 F.3d 237, 241 (5th Cir. 1998); *US v. Stewart*, 93 F.3d 189, 192 (5th Cir. 1996);

(2) The District Court's post-appeal findings do not cure the absence of a sworn showing of probable cause prior to the issuance of the warrant for the receiver to seize all of Jeff Baron's property;

(3) Looking to post-appeal justifications for an order presents a moving target on appeal; and

(4) Baron was denied Due Process at the post-deprivation hearing as his trial counsel was fired by the receiver, he

was stripped of all his papers and documents, and he was not allowed to conduct discovery.

Assuming for the moment that it is proper to consider post-appeal findings of the trial court made in deciding a TRAP 8(a) motion in testing an order challenged on appeal, a fundamental question presented is whether seizure of Jeff Baron's property was excessive in relation to the need for action.[18] That standard is not met by the retrospective justifications offered by Sherman.[19] Specifically:

4. Sherman's argued justification: to prevent vexatious delay caused by substitution of counsel.

The District Court's post-appeal finding of Mr. Baron's "vexatious litigation" was based on the allegation that he was firing attorneys and causing delay. SR. v2 p345. However, control of delay in court proceedings does not require stripping a litigant of all of their property and property rights. A court can simply not delay when an attorney is

[18] *Cf. Hale v. Townley*, 45 F.3d 914 (5th Cir. 1995) (objectively unreasonable if excessive in relation to the need for action); *Spallone v. United States*, 493 U.S. 265, 280 (1990) (a court must exercise "[T]he least possible power adequate to the end proposed"); *Scaife v. Associated Air Center Inc.*, 100 F. 3d 406, 411 (5th Cir. 1996) (same).

[19] Sherman's Brief, page 16.

substituted. Further, there are other much less excessive remedies than seizure of a litigant's property that would prevent delay caused by substitution of counsel. For example, a court could simply refuse to allow substitution.

5. Sherman's argued justification: Allowing a creditor of a bankrupt company to hire attorneys exposes the bankruptcy case to claims.

Sherman's justification is a legal fallacy, since the only claims 'exposed' are substantial contribution claims, which require that the creditor make a substantial beneficial contribution to the case. (Jeff Baron's Brief, pages 53-54). Moreover, if it were constitutional to prevent hiring attorneys, the court could simply enter an injunction to prevent a creditor from hiring an attorney— seizure of all of a litigant's assets to achieve that purpose is patently unreasonable and excessive. Similarly, if the purpose was to pay attorneys so that Mr. Baron would have to make any substantial contribution claim directly (which provides zero net benefit to the bankruptcy estate, as the same claim is being made)[20], Mr. Baron could have simply been ordered to pay the

[20] By statute, a professional's direct claim for substantial contribution is allowable only where the expense would be allowable to the creditor. 11 U.S.C. §503(b)(4).

attorneys.[21] Notably, receivership is expressly prohibited as an extension of the bankruptcy proceedings or as an alternative procedure to the established bankruptcy claims processes. 11 U.S.C. § 105(b) ("[A] court may not appoint a receiver in a case under this title.").

6. Sherman's argued justification: To ensure compliance with court orders.

It is objectively unreasonable to take action to ensure compliance with an order that does not exist. The District Court erred in believing an order was entered prohibiting Jeff Baron from retaining counsel. Moreover, if such an order had been entered, unless the District Court has tried lesser sanctions first, (such as a fine), it is unreasonable to seize all of a party's assets and property rights. It is also unreasonable to seize a quantity of property with no proportionality to the alleged threatened harm.

[21] As a factual matter the record establishes the groundlessness of the solicited former attorneys "claims". SR. v8 pp1197-1244. As a legal matter, receivership is not authorized as a vehicle to bypass an individual's Fifth Amendment right to Due Process and Seventh Amendment right to trial by jury, in order to collect allegedly past due attorney's fees. *E.g,. Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923)

7. Sherman's argued justification: because Jeff is accused of defrauding lawyers.

If the district court had jurisdiction over claims of attorneys being defrauded, the court could issue an injunction, require the posting a of bond, order that the fees be paid, etc. Seizure of all of a citizen's property is patently unreasonable, as is seizure of property without any proportion to the amount of the *alleged* debt.

8. Sherman's argued justification: to 'maintain jurisdiction' over assets so that justice may be done.

It is patently unreasonable to protect 'jurisdiction' when there are no claims pending in the district court over the property seized. Moreover, when a lawsuit has settled and a stipulated dismissal entered into by all parties[22], there is no 'jurisdiction' to protect. It is also unreasonable to seize an individual's assets for ambiguous purposes such as "doing justice".

[22] R. 2346-2355.

**REPLY ISSUE 6: A RECEIVER'S FIDELITY BOND IS NOT A MOVANT'S BOND TO COMPENSATE FOR DAMAGES CAUSED IN CASE OF WRONGFUL ENJOINMENT**

Sherman offers no authority in support of his novel argument that the requirement for security to pay the damages sustained by any party found to have been wrongfully enjoined is satisfied by a receiver's fidelity bond. (Sherman's Brief, page 9). A receiver's fidelity bond securing his faithful execution of the court's order has nothing to do with a bond to secure the damages caused if a party was wrongfully enjoined. The receiver's bond in this case was conditioned on "the faithful discharge by Vogel of duties as receiver in the above entitled and numbered cause, and obedience to the orders of the court". R. 1692. That clearly does not satisfy the requirement for security "to pay the costs and damages sustained by any party found ... wrongfully enjoined" as required by Rule 65. Fed.R.Civ.P. 65(c).

Sherman argues in the alternative that no bond is required because the injunction is merely 'in rem'. However, the challenged order imposes clear <u>personal</u> injunctions against Jeff Baron. For example, Jeff is prohibited from entering any business transactions,

from filing any law suits, etc. R. 1619-1632.

Further, Sherman errs in reading *United States v. Hall*, 472 F.2d 261, 267 (5th Cir.1972) as recognizing in rem injunctions as being exempt from, and falling outside of the requirements of Rule 65. (Sherman's Brief, page 8). The holding in *Hall* expressly did not reverse *Harrington v. Colquitt County Board of Education*, 449 F.2d 161, at 267-268 (5th Cir. 1971). Instead, the Fifth Circuit ruled in *Hall* that:

> "[T]he portion of the court's order here complained of may be characterized as a temporary restraining order, which under Rule 65(b) may be issued ex parte."
> *Hall,* at 267.

Additionally, the scope of the issue in *Hall* is limited to Rule 65(d)(2). Even if *Hall* had created an exception allowing injunctions to be valid against the world,[23] that exception would bypass only the requirements of 65(d)(2) and not the entirety of Rule 65 as argued by Sherman. Nothing in *Hall* does away with the requirements of notice, hearing, mandatory findings, and bond.

[23] This is an exception that Hall expressly holds it does not create. As the Fifth Circuit expressly noted, "We do not hold that courts are free to issue permanent injunctions against all the world" *Hall*, 472 F.2d at 267.

As a matter of settled law, a bond must be required to protect against wrongful injunction where damages will flow from that injunction. *E.g.*, *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990). In the case at bar, the challenged order enjoins Jeff Baron from "Cashing any checks or depositing any payments from customers or clients" or "Transacting" any business.[24] The injunction also removes Jeff from controlling the content of his "web sites"[25], directly impinging his First Amendment rights. As a matter of law that necessarily involves injury. *E.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In addition to the requirements of the Rules of Federal Procedure, as a mater of constitutional law, a pre-hearing deprivation of property violates Due Process unless a bond to compensate for wrongful deprivation is required. *Connecticut v. Doehr*, 501 U.S. 1, 4 (1991).

[24] R. 1627.

[25] R. 1629.

## REPLY ISSUE 7: INVOLUNTARY SERVITUDE

The right to possess property, the right to enter into business transactions, the right to receive wages for one's work, and the right to spend one's money freely are all rights necessarily inherent in freedom. *See e.g,. Local Loan Co. v. Hunt*, 292 U.S. 234, 245 (1934).

A free citizen has the right to earn money and use that money as he sees fit, for example: to travel out of state, to purchase gifts for others, to buy flowers, and if he desires, to take out a newspaper or radio advertisement and tell the world what is happening to him. Jeff Baron has been expressly prohibited from doing all of these things. He has been prohibited from entering into any business transactions, and is permitted to purchase only "local transportation, meals, home utilities, medical care and medicine." SR. v8 p1213. Similarly, Jeff has been expressly prohibited from retaining legal counsel. Id The issue of the district court's imposition of involuntary servitude upon Jeff Baron and ordering him under the control of a receiver is neither frivolous nor rhetorical. Sherman offers no responsive legal authority on the issue.

## CONCLUSION

The Fourth Amendment prohibits the issuance of any warrant to seize a citizen's property unless there is first presented a showing of probable cause made under oath. The challenged order fails this fundamental Constitutional requirement and no further showing should be necessary to declare the order void.

As discussed in Jeff Baron's Principal Brief pages 61-63, there are established mandatory Constitutional safeguards required whenever property is seized without a pre-deprivation hearing. None of those mandatory Due Process safeguards were provided in the proceedings below. Sherman argues that after the receivership order was appealed, Jeff Baron was found to be a vexatious litigant. However:

(1) As a preliminary matter, the law requires that Jeff Baron be afforded due process before he can be declared vexatious. Jeff was not afforded that—He was provided no notice that a hearing was being held to determine that he was a vexatious litigant, and prior to the hearing Jeff was stripped by the District Court of his evidence, his money, and his trial counsel;

(2) As a matter of well established constitutional law, a post-deprivation hearing is insufficient to satisfy the requirements of Due Process absent the required pre-deprivation safeguards; and

(3) The law provides that appeal divests the trial court of jurisdiction over all aspects of the matter appealed. Once an order is appealed, the district court was without jurisdiction to hear new evidence and issue new findings to justify the previously appealed from order.

Aside from the constitutional issues, as a matter of well-established law, a receivership order is not authorized as a remedy to control vexatious litigation. Two distinct principles apply:

(1) The remedy of equity receivership is authorized only to conserve property pending its final disposition pursuant to a primary claim for equitable relief in the property; and

(2) Exercise of power over property that is not the subject of a controversy before the court falls outside a court's inherent authority and subject matter jurisdiction.

Our system is that of a free society, where a court will exercise–by law must exercise– the least power necessary to achieve any authorized use of its power. *Spallone v. United States*, 493 U.S. 265, 280 (1990). A court can control access to its door by telling a litigant not to enter without permission. It is not necessary, reasonable, nor within the authority of a court to control access to the courts by seizing all of a litigant's property. In America, it should not be possible for a citizen to wake up one morning, and have his cell phone, house keys, bank accounts, life savings, credit cards, personal papers, wages, and all his earthly possessions seized *ex parte* by a judge based on a finding months later that the person was a vexatious litigant and 'delayed' court proceedings.

As the Supreme Court explained in *Kokkonen,* 511 U.S. at 380, "the power asked for here is quite remote from what courts require in order to perform their functions".

Respectfully submitted,

/s/ Gary N. Schepps

Gary N. Schepps
Texas State Bar No. 00791608
5400 LBJ Freeway, Suite 1200
Dallas, Texas 75240
(214) 210-5940 - Telephone
(214) 347-4031 - Facsimile
Email: legal@schepps.net
**FOR JEFFREY BARON**

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DATED: July 15, 2011.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANT JEFFREY BARON

## CERTIFICATE OF SERVICE

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

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANT JEFFREY BARON

# *United States Court of Appeals*

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CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 18, 2011

Mr. Gary N. Schepps
Schepps Law Offices
5400 Lyndon B. Johnson Freeway
Dallas, TX 75240-0000

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