Exhibit A

No. 10-11202

In the

ates Court of Appeals

tor the Fifth Circuit

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

Appeal of Order Appointing Receiver in Settled Lawsuit

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

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

BRIEF FOR APPELLANTS NOVO POINT, LLC AND QUANTEC, LLC IN REPLY TO SHERMAN BRIEFING ON APPEALS NOS. 11-10390, 11-10501

Cons. w/ No. 11-10289
NETSPHERE, INC., ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant- Appellant
v.
DANIEL J SHERMAN, Appellee

Cons. w/ No. 11-10290
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, ET AL, Defendants
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Non-Party Appellants
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10390
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants
v.
ONDOVA LIMITED COMPANY, Defendant – Appellee
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10501
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant
v.
PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

Interlocutory Appeals of
Orders in Receivership on Appeal

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

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 NOVO POINT, LLC and QUANTEC, LLC

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ABBREVIATIONS

"SBRE." refers to Sherman's combined Appellee's Brief filed in appeals 11-10289, 11-10390 and 11-10501.

"VBRE." refers to Vogel's combined Appellee's Brief filed in appeals 11-10290, 11-10390 and 11-10501.

ADOPTION BY REFERENCE

This brief adopts and incorporates by reference the reply brief filed in this appeal for Jeff Baron, and the reply brief filed in response to Vogel's Appellee's brief. To the greatest extent possible, duplicative briefing has been avoided in light of the instant appeals' consolidation into appeal no. 10-11202.

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Reply Issue 2: Sherman's argument errs in ignoring the legally separate identities of Novo Point, LLC and Quantec, LLC.

Reply Issue 3: Standing.

Reply Issue 4: Sherman's argument errs on Mootness.

Reply Issue 5: Sherman's argument errs on Appealability.

Reply Issue 6: Sherman's argument errs on Harmless Error.

Reply Issue 7: Sherman's argument errs on Waiver.

REPLY STATEMENT OF FACTS

The Reply Statement of Facts in the Brief for Appellant Jeffrey Baron in Reply to Sherman Briefing On Appeals Nos. 11-10289, 11-10390, 11-10501, is adopted and incorporated herein by reference.

SUMMARY OF THE ARGUMENT

The following reply briefing addresses the fact that the Ondova Bankruptcy Estate was flush with a cash surplus exceeding a million dollars, and held $330,000.00 in an additional cash escrow for Baron and that the bankruptcy was not 'threatened' as Sherman's argument erroneously avers. (SBRE. 3). While the District Judge may have concluded "members of the bar" needed "protecting" (Id.), the receivership was imposed in off-the-record *ex parte* proceedings and based in large part on a fabricated story Sherman presented that Baron had not paid his bankruptcy counsel Martin Thomas.

Sherman's arguments as to standing, mootness, appealablity, harmless error and waiver are also addressed.

ARGUMENT & AUTHORITY

REPLY ISSUE 1: THERE WAS NO EMERGENCY OR EXIGENT NEED FOR SHERMAN AND VOGEL TO SEEK SECRET OFF-THE-RECORD *EX PARTE* PROCEEDINGS TO SEIZE ALL OF BARON'S RIGHTS AND ASSETS.

The Ondova Bankruptcy Estate was Flush with a CASH Surplus Exceeding a Million Dollars, and Held $330,000.00 in Cash Escrow for Baron

Baron is the beneficial owner of Ondova, and in September 2010 Ondova had $330,000.00 of Baron's cash money in 'escrow' and held more than **a million dollar cash surplus** above all claims and liabilities of the bankruptcy estate. In September 2010 the Ondova bankruptcy estate held:

(1) $330,000.00 of Baron's money in 'escrow' to ensure Baron's compliance with the global settlement agreement;

(2) Nearly $300,000.00 of cash belonging to Baron that was refunded from a creditor of Ondova on a debt that Baron personally guaranteed, was forced to pay, and overpaid, and for which the overpayment was seized by Ondova;

(3) Some $2,000,000.00 in cash and only around $900,000.00 in claims.

In other words, in addition to hundreds of thousands of dollars of Baron's money held in 'escrow', Ondova had more than a million dollar cash surplus. [1]

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[1] The July 2010 Monthly Operating Report filed by the Trustee, reflects cash on hand as of July 31, 2010, of $247,476.76 (SR. v10 p4105), $732,811.64 in accounts receivables, $5,000.00 in office equipment, $5,000.00 in machinery, fixtures & equipment, and what appears to be the balance of a retainer fee paid to the firm of Wright-Ginsberg-Brusilow, PC in the amount of $53,281.00 (SR. v10 p4109) giving the Estate a total of $1,043,569.40 in assets (SR. v10 p4109) with no pre-petition or post-petition liabilities (SR. v10 p4110).

The Claims Registry (SR. v10 p4120) lists pending claims of almost $3,000,000.00 even after compromise of the University of Texas Regents claims to an agreed allowed general unsecured claim of $268,000.00 such that the estate is essentially insolvent. Additionally, approximately four dozen creditors were left off the mailing matrix, and did not receive appropriate notice of certain filings. The Trustee filed a Motion to Extend Bar Date as to Certain Creditors (SR. v10 p4131) on or about July 21, 2010 seeking to provide each such creditor with an additional thirty (30) days within which to file a Proof of Claim. The Court granted the Trustees Motion to Extend Bar Date as to Certain Creditors by Order dated July 28, 2010 (SR. v10 p4184) and required that the Trustee provide notices to the affected creditors on or before August 2, 2010. Assuming that the Trustee provided notices to the affected creditors in accordance with the Courts Order, the Bar Date for the affected creditors would be September 1, 2010.

The Monthly Operating Report does not reflect that fact that on July 2, 2010, the Trustee filed The Trustees Motion for Approval of Settlement Agreement Pursuant to Rule 9019, Federal Rules of Bankruptcy Procedure (SR. v10 p4187). Under the terms of the intended settlement, the Estate will receive $1,250,000.00 within ninety (90) days and will receive an additional $450,000.00 in installments over the course of approximately seven months (SR. v10 p4192). Further, under the settlement the Estate received an interest in specific domain names and retained its interest in the internet domain name servers.com and potentially to the continuing payments from a settlement previously approved by the Bankruptcy Court against River Cruise Enterprises of New Zealand. (SR. v10 p4193).

In exchange for the payments to the Estate, the Estate released certain claims including a debt owed to the Estate pursuant to a Note dated December 31, 2005 in the original principal amount of $460,000 from Macadamia Management, LLC, the current balance of which is approximately $600,000. The Estate also released a

claim for approximately $800,000 owed to Ondova under a Domain Name Renewal Agreement between Manassas LLC and Ondova entered into in March 2009. The Estate also waived and released certain avoidance action claims related, inter alia, to: (a) the transfer of a valuable portfolio of domain names from Ondova to Blue Horizon Limited Liability Company, formerly known as Macadamia Management, LLC in December 2005; and (b) a transfer of domain names from Ondova to Manassas, LLC (nominee for Shiloh LLC, a wholly owned subsidiary of Quantec, LLC - Cook Islands) and to Diamond Key, LLC (nominee of Javelina, LLC, a wholly owned subsidiary of Novo Point, LLC - Cook Islands) which occurred in March, 2009. The Estate also waived and released claims that it may have owned an interest in many Blue Horizon domain names which had been jointly monetized between Ondova and Diamond Key, LLC. (SR. v10 p4193). The Court entered an Order Granting Trustees Motion for Approval of Settlement Agreement pursuant to rule 9019, Federal Rules of Bankruptcy Procedure on July 28, 2010 and ordered all parties to execute the settlement agreement within certain time deadlines (SR. v10 p4200). Then, according to the August 2010 Monthly Operating Report filed by the Trustee, the Estates assets remained essentially the same except that it increased its cash on hand from $247,476.76 to $524,691.73 as of August 31, 2010, (SR. v10 p4215) creating total assets of $1,320,764.37. Nowhere are the settlement agreement and the $1,700,000.00 infusion of cash mentioned or accounted for even though the settlement was approved by the Bankruptcy Court on July 28, 2010.

In response to the Notice of Extended Bar Date one new Proof of Claim seeking $1,100.41 on behalf of Bennett, Weston, LaJone & Turner, P.C. was received (SR. v10 p4126). Finally, a final Proof of Claim was filed on September 1, 2010, by Nace & Motley, LLP in the amount of $20,073.00 (SR. v10 p4127). The Bankruptcy Court held a status conference on September 15, 2010. During the status conference the Court was apprised that Mr. Baron had instituted suit against his former counsel Gerrit Pronske of Pronske & Patel, PC to prevent him from divulging attorney client information, and that a dispute concerning payment of an outstanding invoice allegedly owed to Mr. Pronske had arisen. The Court then ordered that the Village Trust make, on Baron's behalf, a security deposit of $330,000.00 (being approximately 50% of the cash on hand in Novo Point, LLC and Ondova, LLC) with the Trustee by September 17, 2010 to incentivize Baron to fulfill his obligations under the settlement agreement. As Ordered, The Village Trust deposited $330,000.00 with the Trustee on September 17, 2010 (SR. v10 p4227).

On September 21, 2010, the law firms of Hohmann, Taube & Summers, LLP; Hitchcock Everett, LLP; West & Associates, LLP; and, Schurig-Jetel-Beckett-Tackett filed a Motion for Allowance of Additional Attorneys Fees Pursuant to Supplemental Settlement Agreement seeking an unspecified amount of attorneys fees but claiming that counsel for AsiaTrust incurred over $150,000.00 in fees and expenses.(SR. v10 p4235). On September 22, 2010 the Estate received a $32,000.00

As detailed in the footnote above, this huge cash surplus over all claims and liabilities was achieved when Baron agreed for Ondova to take all of the settlement proceeds in the global settlement. SR. v10 p4275, *et.seq*. Baron agreed to that because he was promised by the Ondova chapter 11 trustee (Sherman) that:

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payment from the River Cruise settlement. (SR. v10 p4227). Then, on September 27, 2010, the Estate received the $1,250,000.00 from Netsphere in accordance with the settlement approved by the Court on July 28, 2010. (SR. v10 p4227).

The settlement and Village Trust security deposit created a cash position of $2,095,589.36 and total assets of $2,892,559.80, at the end of September 2010. (SR. v10 p4229). Total claims set forth under Schedule D were $71,977.30. Total claims set forth under Schedule E were less than $100,000.00, and the total claims not foreclosed by failure to file a proof of claim before the bar date as set forth on Schedule F were $12,866.39. Of the eighteen proofs of claims filed, the claims filed by Baron, Novo Point, Quantec, Manilla Industries, Netsphere, Inc., Munish Krishan, Simple Solutions, Iguana Consulting, and Four Points Management, were compromised, settled and eliminated as part of the settlement agreement approved by the Bankruptcy Court on July 28, 2010, (SR. v10 p4235), leaving nine remaining claims. The claims of Equivalent Data were previously extinguished in January 2010, by payments made by Baron and others pursuant to an Order of the United States District Court. (SR. v10 p4242). Shortly thereafter, the Estate compromised the claims of Liberty Media and the University of Texas Board of Regents by granting allowed unsecured general claims of $10,000.00 (SR. v10 p4277) and $268,000.00 respectively. (SR. v10 p4408). The settlement agreement also compromised the claims of the Rasansky Firm and Charla Aldous by granting them a $200,000.00 allowed general unsecured claim. (SR. v10 p4235). Accordingly, as of the end of September 2010, the remaining eight claims had a maximum value of $1,344,742.08.

Total claims from Schedule D, Schedule E, allowed Schedule F, and the pending claims set forth in the claims registry were approximately $1,530,000.00. Given total assets of $2,892,559.80, the Estates assets exceeded its liabilities by slightly more than $1,360,000.00. $330,000.00 of those assets were expressly a security deposit for Jeff Baron (SR. v10 p4446), resulting **at the end of September 2010 in a net surplus of $1,060,000.00 in the Ondova estate.**

> "[I]f I were going to be entering into this settlement agreement, that once the creditors were paid, that there would be a significant amount of money that was left over, that would come back, that would stay, you know, in a company that I would have at the end of the day. I was told that obviously if you look at the settlement agreement, I individually am not getting any, a penny from it myself. The settlement agreement was that Ondova was going to be able to walk away out of the bankruptcy, after it paid its creditors, with a large amount of cash, and we were thinking maybe even a million dollars."
>
> SR. v10 p4222 (Baron's testimony before the Bankruptcy Court on 9/15/2010.)

Sherman should have immediately closed the Ondova bankruptcy in September 2010 when there was the million dollars cash surplus. Sherman's counsel has admitted **"The negotiation was to pay the debts and give the keys back to Mr. Baron. But that didn't happen."** R. 4598:11-12. Instead, Sherman kept the bankruptcy open and ran up over $300,000.00 in <u>additional</u> attorney fees. Baron eventually objected. Within three business days of Baron's objection[2], Sherman and Vogel had Baron placed into receivership.

[2] R. 1577.

Notably, by November 2010 when Sherman and Vogel had Vogel appointed *ex parte* as receiver over Baron, Baron had already fully performed all of his settlement agreement obligations. Thus, in his motion Sherman did not allege Baron was in breach of the settlement. Rather, Sherman's motion represented that by recommendation of the Bankruptcy Court, a receivership was to be imposed if Baron fired his bankruptcy counsel and proceeded *pro se*. Such a recommendation does not exist, but if it did, it would clearly not comply with federal law. 28 U.S.C. § 1654.

For the purported recommendation to apply, Sherman and Vogel had to show that Martin Thomas (who was Baron's counsel in the bankruptcy court) was fired. So, **a fraudulent story was concocted** that Baron (1) didn't pay Thomas and (2) filed an ethics complaint against him, thereby forcing Thomas to withdraw as his counsel in the bankruptcy case. The story was false and fabricated. In truth, Thomas was paid in full, did not withdraw, and there was no ethics complaint. SR. v10 p4097-4098.

The concocted story about Thomas was bolstered with reference to a fabricated claim asserted about Stan Broome. With Broome's participation a false claim was fabricated that (1) Broome's fee contract contained no provision capping his monthly fees at $10,000.00 per month, (2) Baron wrongfully refused to pay more than that amount, and thus, (3) Broome was owed *tens of thousands of dollars*. Broome filed his motion to withdraw from the bankruptcy case immediately to prior to Sherman and Vogel's seeking to have Vogel appointed receiver over Baron's assets. Eventually, Vogel was forced by the District Court to produce Broome's contract. At that point the claim was shown to be completely fabricated. See SR. v8 p1212 (the written terms in Broome's contract, imposing a $10,000.00 per month cap on fees incurred and requiring express written authorization to exceed the cap); and see SR. v5 pp426-430 (Broome's fraudulent statements denying the existence of such a term in his contract).

Sherman's Groundless Legal Theory Sold to the District Judge

Baron was alleged by Sherman to risk the Ondova bankruptcy by firing his attorneys. (SBRE. 3). This claim deserves careful attention.

The Bankruptcy Code sets up the right of every creditor to have his reasonable attorneys fees paid by the bankruptcy estate when the creditor has provided a substantial benefit to the estate. The creditor can seek reimbursement, or his attorneys can seek payment directly. 11 U.S.C. 503(b)(3)(D); *and see e.g., In re DP Partners Ltd. Partnership*, 106 F. 3d 667, 671-673 (5th Cir. 1997). The argument that somehow Baron should be put in receivership to prevent him hiring lawyers who will then make substantial contributions to the Ondova estate and seek payment for it, is legally frivolous and has no support in law. If the creditor has paid the professional who made the contribution, the creditor is entitled to reimbursement from the bankruptcy estate. *Id.* If the professional has not been paid by the creditor, the professional is entitled to be paid directly from the bankruptcy estate. 11 U.S.C. 503(b)(4); *and see e.g., In re Consolidated Bancshares, Inc.*, 785 F.2d 1249,1253 (5th Cir. 1986). In either case, by law the party responsible for paying the cost of any qualifying substantial contribution is the bankruptcy estate and not the creditor who makes the contribution.

It should be noted that to qualify as a substantial contribution, the benefit provided to the estate must be greater than the expense of the claim. *E.g., In re DP Partners*, 106 F. 3d at 673. In summary, the imposition of a receivership in order to force a creditor to pay the costs of substantial contributions to the bankruptcy estate– an obligation imposed by law upon the estate– involves the use of a prohibited means (see 11 U.S.C. 105(b)), to controvert the clear statutory framework of the Bankruptcy Code. There is absolutely zero authority in law for 'indemnification' against a creditor who has made a substantial contribution. Rather it is the creditor who is entitled to be reimbursed (or his professionals paid directly) and not the other way around.

REPLY ISSUE 2: SHERMAN'S ARGUMENT ERRS IN IGNORING THE LEGALLY SEPARATE IDENTITIES OF NOVO POINT, LLC AND QUANTEC, LLC.

Sherman's argument ignores all of the law involving the legal identity of incorporated and chartered entities, and simply ignores the fundamental distinction between Baron, an individual, and Novo Point LLC, and Quantec LLC, independent corporate entities that Baron does not own. (SBRE. 8). Baron and Novo Point LLC are not "collectively ('Baron')". Sherman's argument offers no response to the clear and direct precedent of this Honorable Court's holding in *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006). Rather, Sherman's argument erroneously pretends that Baron is the alter ego of Novo Point LLC and Quantec LLC, even though (1) no pleading making that allegation was filed in the proceedings below, (2) no finding to that effect has been made, (3) no evidence of that has been offered, and significantly, (4) this Honorable Court has directly held that receiverships may not be used to establish alter-ego liability.

REPLY ISSUE 3: STANDING.

Since Vogel took a million dollars and emptied Baron's savings accounts to pay 'fees' for being the receiver of 30 different entities placed into receivership (on Vogel's own motions and without service of process, supporting evidence of cause, pleadings of any claims against the entities, etc.), Baron clearly has an interest in declaring that the receivership over those entities is void.[3]

Standing with Respect to Docs 272 and 287

Sherman takes the contradictory positions that on one hand (1) the two *ex parte* orders placing multiple non-parties into receivership without notice were really turnover orders of property controlled by Baron; but on the other hand (2) Baron has no interest of any kind in the entities and has no standing to complain. Clearly, if (as Sherman argues) the challenged orders divested Baron of control over the companies, then he has a judicially and cognizable injury arising

[3] Notably according to Vogel's work reports, despite the million dollar fee to himself and his law partners (challenged on appeal), in the past year Vogel since he has been receiver, Vogel has filed no tax returns or reports, paid no quarterly federal taxes nor paid any state franchise fees or property taxes for any of the receivership parties, including Novo Point LLC and Quantec LLC. SR. v4 p1438, v5 p1282, v8 p623, v9 p267,v10 pp1219,1964,3243.

out of that divesture. The record, however, does not support Sherman's argument that Baron controlled the mass of entities added by Vogel into the receivership. However, because Baron was charged for costs alleged by the receiver to be incurred with respect to the multiple receivership estates created by the two challenged orders, Baron clearly has an interest in reversal of those orders.

As a matter of established law, if the District Court lacked personal jurisdiction over the entities placed into receivership, or lacked territorial jurisdiction over the assets, or lacked subject matter jurisdiction over the assets, then the District Court is without power to charge fees for the receivership of those assets (other than from the party who provoked the receivership). *Eg., Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923) (Where a case is dismissed for want of jurisdiction there is not even power to award costs). Accordingly, Baron has a judicially cognizable injury (the costs charged to Baron for the receiverships) that is traceable to the challenged orders. *See e.g., Allen v. Wright*, 468 U.S. 737, 754-757 (1984). Similarly, Novo Point LLC, and Quantec LLC, share this standing as their assets are being

threatened to be sold, in part as a result of the massive receivership fees charged with respect to the challenged orders.

REPLY ISSUE 4: SHERMAN'S ARGUMENT ERRS ON MOOTNESS.

The Good Faith Purchaser Exception

Sherman's argument relies upon an unpublished case[4] (which pursuant to the express rules of this Honorable Court is not precedent), that holds where a party does not seek to stay the sale of property sold to good faith purchasers, an appeal of that sale is moot.

Notably, good faith purchasers are afforded special protection under the law. The importance of securing the rights of good faith purchasers is so fundamental that the Supreme Court explained almost 200 years ago: "Strong as a plaintiff's equity may be, it can in no case be stronger than that of a purchaser, who has put himself in peril by purchasing a title, and paying a valuable consideration, without notice of any defect in it, or adverse claim to it." *Boone v. Chiles*, 35 U.S. 177, 210 (1836). Accordingly, with few exceptions, as a special rule, good faith purchaser status trumps a challenge to an order confirming the sale of property. *See generally In re Bleaufontaine, Inc.*, 634 F.2d 1383, 1388 n.7 (5th Cir. 1981). However, **no order challenged on appeal**

[4] S.*E.C. v. Janvey*, 404 Fed.Appx. 912, 916, (5th Cir. 2010).

involves property that has been sold to a good faith purchaser, and the rule has no application in this appeal.

The good faith purchaser exception does not apply to the payment of money. Rather, as a well-established principle of fundamental law, even after money is paid, an appellate court is fully empowered to reverse the order to pay the money, and if reversed, the aggrieved party can recover his money back. *Eg., Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). A case is only moot when the parties lack a legally cognizable interest in the outcome. *E.g., Powell v. McCormack*, 395 U.S. 486, 496 (1969). As a matter of well-established law, a case is justiciable when the court can order specific relief through a decree of a conclusive character. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). This Honorable Court can issue a decree of conclusive character with respect to each of the matters involved in the instant appeal.

Sherman's argument that this Court cannot return "the time they spent or the expenses they incurred", is erroneous for multiple reasons, as follows: First, the time was spent before any fees were awarded.

Accordingly, if the argument had any merit, a district court would have no discretion, but would automatically have to award whatever fees were billed because 'the time was spent'. Contrary to Sherman's argument, a receiver has no 'entitlement' to fees. Secondly, no one seeks the return of the time spent. Rather, the issue on appeal is for return of the million dollars taken by the receiver and his law firm from Baron's savings accounts. This Honorable Court can order that money returned to Baron's savings account, and thereby provide specific relief of a conclusive character. *See e.g., Locke* at 364.

Interim Fee Awards are Not Mooted by their Payment

Sherman's argument that bankruptcy law prohibits appeal of interim fee awards that have been paid has no support in law and ignores the well-established body of law regarding appeal of interim fee awards. As a matter of well-established law, interim fee awards can be reviewed by later appeal (without any motion to stay the interim awards), and have been frequently reversed on appeal by this Honorable Court. *E.g.*, *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 431 (5th Cir. 1968) ("There is thus no

impediment whatever to our reaching the merits of this controversy: Whether the District Court abused its discretion in awarding the interim fees in question to the trustee and his counsel.").

As a matter of established law, an order awarding attorneys fees can be reversed just like any other judgment awarding money. *E.g., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 255-257 (1975). The inherent power of the court to order attorneys (to whom fees were paid pursuant to court order) to repay the fees should the order be reversed, has been expressly recognized as an implicit power of the court. *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986) ("He could appeal from the sanction at the end of the entire suit, and if he won the appeal his opponent would repay the money."). For this reason, as a matter of well-established law, **interim fee awards may be appealed at the end of a case, and do not *require* interlocutory appeals**. *Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 345 (5th Cir. 1989). This Honorable Court has held that only in the *special circumstance* where a party would be at risk that he would be unable to recover the fees back because the attorney would be *unable*

to pay back the fees if the interim award is reversed, does a special rule apply allowing immediate appeal of the interim fee award. *Id.* In such a circumstance the party must prove, as a special factual matter, that the mere payment of the fees would make them unrecoverable because they would uncollectable if the judgment is reversed. *Id.* at 344. Accordingly, absent the existence of a special factual scenario where the attorney would be unable to return the money, the mere payment of fees does not make them unrecoverable on appeal and does not moot the appeal nor deprive the Court of Appeals of jurisdiction to review the challenged interim fee award on appeal. Id.*; Richardson v. Penfold,* 900 F.2d 116, 118 (7th Cir. 1990). Notably, in the instant appeal the interim fee awards are directly appealable because they are orders directing the disposal of receivership property. 28 U.S.C. §1292(a)(2).

Sherman erroneously argues that District Court orders on the disbursement of receivership funds are moot because the interim fee payments ordered have already been made. As discussed above, a matter of well-established and fundamental law, even after money is paid an appellate court is fully empowered to reverse an order for the

payment of money. *E.g. Dakota*, 113 U.S. at 224; *Brock*, 405 F.2d at 431. This Court can clearly give effective relief by reversing the District Court's orders to pay money, and Sherman's argument has offered no authority to the contrary.

Docket No. 285

Sherman argues that District Court Docket No. 285 is moot because part of the relief denied by the Order is moot. First, server fees renew monthly, so that the issue is not currently moot– the server fees are currently past due and unpaid. Moreover, contrary to Sherman's argument the underlying controversy involves more than server fees. Baron moved for an order for his life's work (computer code on a computer hard disk that was threatened with deletion) to be backed up. The District Court failed to allow Baron to reply to Sherman's response to his motion, and denied the motion without allowing Baron the procedural due process required by the Federal Rules of Procedure and Local Rules of the Northern District of Texas. The underlying substance of the denied relief was the preservation of Baron's assets, an express purpose of the *ex parte* receivership imposed upon Baron. The dispute is live, and the matter is not moot.

Other Orders

Sherman's argument appears to argue, without citation to any authority, that where an emergency hearing is requested upon a motion, the relief requested is automatically mooted by the failure to grant the relief on an emergency basis. However, in the context of a receivership, appellate jurisdiction extends to interlocutory review of all orders which take, or refuse to take, "steps to accomplish the purposes" of the receivership. *See Securities & Exch. Com'n. v. Lincoln Thrift Ass'n.*, 577 F.2d 600, 602 (9th Cir. 1978) (an order which takes "steps to accomplish the purposes" of the receivership). Where a motion is made for distribution or disposal of receivership assets for a certain purpose, so long as the distribution or disposal has been declined by the District Court the controversy is live and the matter is not moot. For example, Baron's need for a heated apartment (refused him by the receiver) was acute in the freezing weather of February. The matter is not moot, however, as in the next 30 or 90 days the weather again will be very cold in Dallas. Clearly, a dispute for which review was requested on emergency basis does not become moot because emergency relief was

not granted. Significant harm and irreparable damages may have been incurred, but that does not relate to the fact that damages are still being incurred. Sherman has no made showing of mootness with respect to the motions which sought an 'emergency' setting. Vogel still has Baron is locked in an apartment without heat, and has not allowed Baron to purchase a vehicle, or to travel outside of the northern district of Texas, etc.

Sherman argues that the injunction ordered in District Court Docket No. 318 is moot because it was vacated by the District Court after the order was appealed. However, as a preliminary matter the District Court is without jurisdiction to vacate the order after it was appealed, and thus has no jurisdictional authority to moot the matter on appeal. *Griggs at* 58. Similarly, Docket 291 is an injunction directed personally to Schepps and properly subject to interlocutory review pursuant to 12 U.S.C. §1292(a)(2).

Docket 293 materially expanded the territorial scope of the receivership, and both changed the status of the receivership on appeal and was clearly an order "to take steps to accomplish the purposes" of

the receivership, and is therefore properly subject to interlocutory review by this Honorable Court. *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 77 fn2 (5th Cir. 1995). Similar orders to take steps to accomplish the purposes of the receivership should include Docket 459 relating to Vogel's non-filing of tax returns and reports, Docket 473, purporting to appoint a manager over the Cook Island LLCs; and Docket 551, ordering Baron to disclose his private medical information as a pre-condition to receiving medical care. Notably, Docket 435 involves a threatened violation of attorney-client privilege (as a step to accomplish the purposes of the receivership). There has been no showing the order has been complied with yet, and the controversy is therefore not moot.

Stay Pending Appeal does Not Moot the Appealed from Order

The District Court in Docket No. 288 gave the receiver a blank check to dispose of essentially any and all of the receivership assets of the receivership estates of Novo Point, LLC, and Quantec, LLC (in order to pay alleged debts of Jeff Baron), without the requirement of any further order by the District Court. Sherman argues, with no supporting legal authority, that because after that order was appealed

and the District Court entered subsequent orders, the status of the case has changed and the order is no longer ripe for appeal. However, once the order was appealed the District Court was divested of jurisdiction over the matter and was without power to alter the status of the order then on appeal. *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 argues erroneously that the stay imposed by this Honorable Court on the District Court, makes the orders on appeal non-appealable. However, it is axiomatic that stay pending appeal does not moot the order then on appeal because it has been stayed. Rather, when the decree can be carried into effect without the need for "further order or decree" from the trial court, the order is ripe for interlocutory review. *Burlington, CR & NR Co. v. Simmons*, 123 U.S. 52, 54 (1887).

REPLY ISSUE 5: SHERMAN'S ARGUMENT ERRS ON APPEALABILITY.

Placing a company into receivership is reviewable on interlocutory appeal

Sherman argues that the District Court orders placing over a dozen new receivership parties and estates under receivership are non-appealable turnover orders against Baron's personal property. However, contrary to the assertions of Sherman's argument, the appealed from orders (District Court Docket Numbers 272, 287) make no finding that any company is owned or controlled by Baron. SR. v2 pp365, 405. Rather, more than a dozen independent entities were ordered (without service of process or hearing) placed into receivership, and one entity was ordered removed. Sherman's argument ignores that the entities were placed into receivership and were made subject to a long series of injunctions. Sherman argues instead that there was merely a turnover over. However, the challenged orders are clear: The entities were made receivership parties. Further, as there was also a series of injunctions imposed upon the entities by virtue of the appealed from orders, the orders also fall within the scope of §1292(a).

Sherman's argument also lacks a logical footing. Sherman argues that entities which are not parties to a lawsuit and have not been served with process, can be placed into receivership *ex parte* without being named in the receivership order. Then, after the blank receivership order can no longer be appealed, those companies can then be identified and included in the receivership, but the companies have no right to interlocutory appeal. Thus, to Sherman's argument, the statutory right to interlocutory appeal pursuant to 28 U.S.C. §1292(a) when a receivership is imposed can be abrogated by entering a receivership order without naming receivership parties, and then later, after the time for appeal of that order has lapsed, entering an order reciting the names of the included parties. However, as an established principle of law, an independent right to appeal extends to orders that modify or amend previous orders. *E.g.,*, *Taylor v. Sterrett*, 640 F.2d 663, 666-667 (5th Cir. 1981). Accordingly, an order that clarifies a previous order to place new parties into receivership is clearly an appealable order pursuant to 28 U.S.C. §1292.

Pendent Appellate Jurisdiction

Even if Sherman's argument were logically valid and supported by authority, the appeals challenging the expansion of the receivership should still be considered pursuant to the doctrine of pendent appellate jurisdiction. A refusal to allow the appeal would defeat the principal purpose of allowing an immediate appeal of a receivership order. *See e.g., Morin v. Caire,* 77 F.3d 116, 119-120 (5th Cir. 1996).

The issues raised in appeals nos. 11-10113, 11-10289, 11-10290, 11-10390, and 11-10501 are closely related to the issues raised in appeal no. 10-11202. More information has become available since the time of filing of the original appeal, such as:

(1) facts regarding the original *ex parte* proceedings, such as the direct involvement of Vogel, while Special Master, in secret off-the-record proceedings to have himself appointed receiver over Baron; and the fraudulent nature of the misrepresentations made to the District Judge regarding Baron having caused the mediation (conducted by Vogel) to fail;

(2) the completely groundless nature of the 'claims' asserted against Baron and the fact that Vogel prepared the forms for 'claimants' to submit, and actively sought submission of the 'claims';

(3) the flush financial state of Ondova at the time the receivership was sought by Sherman and Vogel;

(4) the long history of prior involvement between Vogel and Baron, and the decade of litigation involving Gardere against Ondova and Baron, etc.; and

(5) that the functional purpose of the receivership as implemented by Vogel was to literally empty Baron's bank accounts into the pockets of Vogel and his partners.

Yet, a core issue raised in the appeals is the same issue raised in appeal no. 10-11202, whether the District Court is divested of jurisdiction over the matter appealed by an interlocutory appeal. The Appellants argue in this appeal that the District Court was divested of jurisdiction over the matters on appeal and therefore lacked authority other than to maintain the status quo as of the filing of the notice of appeal. *See e.g.,*

Griggs, 459 U.S. at 58*; Coastal Corp.*, 869 F.2d at 820. The same facts and legal issue apply to all of the orders challenged in the subsequent appeals. It materially serves the interest of judicial economy to review orders expanding the jurisdictional authority of a receiver (while the receivership was on appeal) at the same time the Court takes up the issue of the effect of filing an appeal on the District Court's jurisdiction. *See Comstock v. Alabama and Coushatta Indian Tribes*, 261 F.3d 567, 571 (5th Cir. 2001).

Finally, the District Court's authority, if challenged on appeal, is best challenged before the District Court takes action based on that asserted authority, and not after. For that reason, receivership orders are allowed interlocutory review. Orders of the District Court to carry out the purposes of the receivership, which have jurisdictional impact and will necessarily impact the validity of numerous future orders of the District Court, should be allowed interlocutory review at the time the validity of the underlying receivership is reviewed as a matter of fundamental judicial economy.

REPLY ISSUE 6: SHERMAN'S ARGUMENT ERRS ON HARMLESS ERROR.

This Honorable Court has recognized that when a party is denied the opportunity to be heard and present evidence to support their contentions, the resulting error is not harmless. *E.g. Powell v. US*, 849 F.2d 1576,1582 (5th Cir. 1988). Rather, an error in providing notice and an opportunity to be heard is harmless "if the nonmoving party admits that he has no additional evidence anyway or if, as in *Norman v. McCotter*, the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." *Id.* Similarly, this Honorable Court has held 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 fn. 47. Further, the Supreme Court has held that the fundamental safeguards of the Bill of Rights are immune from federal abridgement. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

REPLY ISSUE 7: SHERMAN'S ARGUMENT ERRS ON WAIVER.

The District Court's Failure to Allow Response to Vogel's Motions

Contrary to Sherman's argument[5], complaint about the District Court's failure to allow response to Vogel's motions was raised in the District Court, and was even included in Baron's 28 U.S.C. 144 affidavit, with particulars.[6] The District Court clearly was apprised of the issue and responded by stating that "I am going to give Mr. Schepps a full twenty-one days to respond to every motion that's filed." R. 1625. The District Court, however, proceeded with a pattern of denying an opportunity to respond. In the context where the District Court had threatened appellate counsel for objecting to Baron's lack of paid counsel to represent him in the proceedings[7]– by instructing counsel that "You look to me like you haven't gone to law school. **You are skating so close to having big problems in federal court, having the ability to practice in federal court.** Do you understand that?"–

---

[5] SBRE. 32.

[6] Doc 497, (placed under seal by the District Court.SR. v5 p1470).

[7] Baron's appellate counsel had filed a motion listing issues for which legal representation was needed for Baron, and requesting that Baron be allowed access to his own money to hire an attorney to represent him with respect to those matters. SR. v2 p384.

Baron's appellate counsel was careful that once issues were raised to the District Court's attention, further objection was avoided with respect to the District Court's handling of the matter from that point, as such objections clearly seemed to antagonize the District Judge. SR. v4 p1006.

Baron's Sec. 144 Affidavit

As a matter of established law, the Trial Court is required to accept the allegations contained in a 28 U.S.C. §144 affidavit as true, and on that basis rule on their legal sufficiency. Instead, the District Court ruled that the allegations were insufficient because they were not supported by record citations. SR. v7 p379.

Novo Point LLC and Quantec LLC Objected to being Included as Receivership Parties

Sherman erroneously argues that Novo Point LLC and Quantec LLC never objected to being included as receivership parties, and agreed to that designation.[8] (SBRE. 29).

[8] See the LLCs' reply briefing in appeal no. 11-10113, at pages 18-20.

The Receivership Fee Orders

All of the fee requests suffered the same deficiencies which have been pointed out and argued with specificity. For example, Sherman and Vogel (adopting Sherman) concede that the fees were not allocated to any individual receivership entity or estate. Sherman and Vogel, moreover, offer no responsive authority to the arguments on appeal.

Defects in Subject Matter and Territorial Jurisdiction Cannot be Waived

With respect to Docket 473, defects in subject matter and territorial jurisdiction cannot be waived and are appropriately raised on appeal, even for the first time. *E.g. Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

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 NOVO POINT, LLC and QUANTEC, LLC

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 6,491 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 MS Word 2000 in 14 and 15 point century font.

DATED: November 21, 2011.

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANTS

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 APPELLANTS

Exhibit B

No. 10-11202

In the United States Court of Appeals for the Fifth Circuit

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

Appeal of Order Appointing Receiver in Settled Lawsuit

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

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

DECLARATION OF GARY SCHEPPS

Cons. w/ No. 11-10289
NETSPHERE, INC., ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant- Appellant
v.
DANIEL J SHERMAN, Appellee

Cons. w/ No. 11-10290
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, ET AL, Defendants
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Non-Party Appellants
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10390
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants
v.
ONDOVA LIMITED COMPANY, Defendant – Appellee
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10501
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants

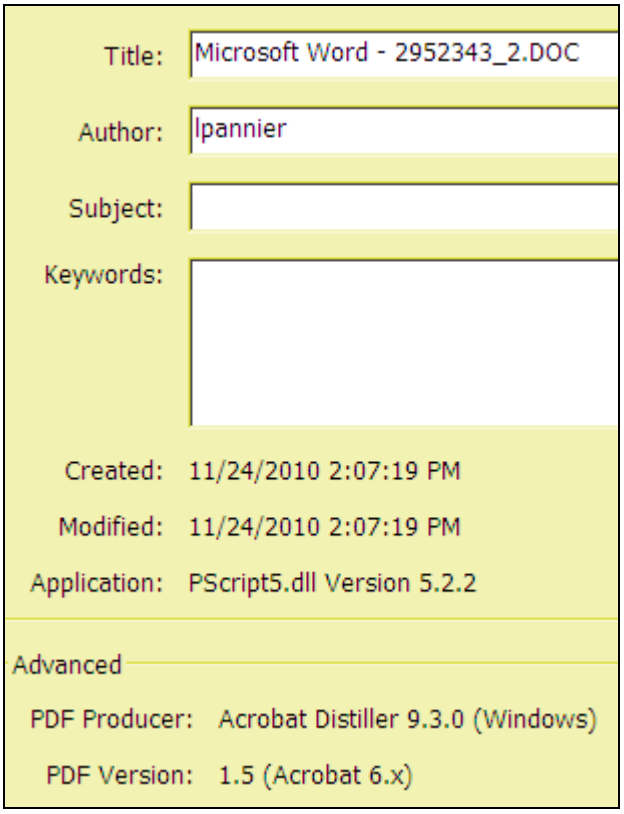
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant
v.
PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

Interlocutory Appeals of
Orders in Receivership on Appeal

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

"1. My name is Gary Schepps. I am the appellate counsel for Jeff Baron, Novo Point, LLC., and Quantec, LLC. I am competent to make this declaration. The facts stated in this declaration are within my personal knowledge and are true and correct. I have knowledge of the stated facts, which I learned in my role as appellate counsel in the above entitled appeals.

"2. The following is a true and accurate screen clip from Adobe Acrobat 9 showing the creation date of Document 123 filed in Case 3:09-cv-00988-F on 11/24/10, the "EMERGENCY MOTION OF TRUSTEE FOR APPOINTMENT OF A RECEIVER OVER JEFFREY BARON". The file shows that it was created at 2:07 PM on 11/24/2010:



"3. The following is an e-mail record of ICANN, the international internet registry, showing that Raymond Urbanik, counsel for Sherman, informed ICANN that the District Court appointed Vogel as receiver at 1:15 pm on 11/24/2010.

From: Urbanik, Raymond
Sent: Wednesday, November 24, 2010 3:54 PM
To: 'Samantha Eisner' <Samantha.Eisner@icann.org>
Cc: Erin Brady; Amy Stathos; 'schnabel.eric@dorsey.com'; mallard.robert@dorsey.com
Subject: RE: Approval of Termination of Accreditation and Bulk Transfer

Sam, Erin, Amy, Eric, Robert

A receiver was appointed over Mr Baron today at 1:15 pm Central time by Senior United States Federal District Court Judge Royal Ferguson.

The order also immediately suspends, enjoins and stays the transfer of the names by ICANN through the de - accredited registrar process.

The newly appointed Receiver, Peter Vogel, will be sending you a copy of the order shortly.

Please call if you would like to discuss this matter. Thank you.

-ray

Raymond J. Urbanik
MUNSCH HARDT KOPF & HARR, P.C.
500 North Akard Street, Suite 3800
Dallas, Texas 75201-6659
Direct: (214) 855-7590
Fax: (214) 978-4374
rurbanik@munsch.com <mailto:rurbanik@munsch.com>
munsch.com <http://www.munsch.com/>

From: Samantha Eisner [mailto:Samantha.Eisner@icann.org]
Sent: Tuesday, November 23, 2010 8:10 PM
To: Urbanik, Raymond
Cc: Erin Brady; Amy Stathos
Subject: FW: Approval of Termination of Accreditation and Bulk Transfer

Hi Ray -

I'm forwarding a message sent from our Registrar Liaison Group to the Primary Contact for Compana.

I believe that the notice to the Registries will be forwarded by tomorrow.

Best regards,

Sam
------ Forwarded Message
From: Brian Peck <brian.peck@icann.org>
Date: Tue, 23 Nov 2010 17:43:06 -0800
To: "ondovalimited@gmail.com" <ondovalimited@gmail.com>
Cc: Samantha Eisner <Samantha.Eisner@icann.org>, Tim Cole <Tim.Cole@icann.org>, Mike Zupke <Mike.Zupke@icann.org>
Subject: Approval of Termination of Accreditation and Bulk Transfer

Dear Mr. Nelson,

We confirm receipt of your written notice of termination of your registrar's RAA. We have completed our internal review and in accordance with ICANN's Inter-Registrar Transfer Policy, we approve your request to designate Fabulous.com Pty Ltd. as the gaining registrar to receive the bulk transfer of all names currently under management of your registrar. We will contact the relevant registries shortly and you can coordinate the timing of the bulk transfers with the registries directly after they contact you.

The termination will be effective on 30 November 2010. As requested, ICANN waives the remainder of the 30-day notice period set forth in the RAA.

Please note that your registrar remains responsible for all outstanding fees due to ICANN which are incurred up until the effective date of termination, which is 30 November, 2010. Please let us know if you have any questions.

Sincerely,

Brian Peck
Registrar Liaison Manager
ICANN

------ End of Forwarded Message

I declare under penalty of perjury that the foregoing declaration is true and correct.

Signed this 19th day of November, 2011, in Dallas, Texas.

/s/ Gary N. Schepps
Gary N. Schepps

Exhibit C

No. 11-10501

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. ET AL,
Plaintiffs

v.

JEFFREY BARON,
Defendant – Appellant

QUANTEC L.L.C.; NOVO POINT L.L.C.,
Appellants

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant

v.

PETER S. VOGEL; DANIEL J. SHERMAN,
Appellees

Interlocutory Appeal of Orders
in Receivership on Appeal

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

BRIEF FOR APPELLANTS NOVO POINT, L.L.C., QUANTEC, L.L.C., AND JEFFREY BARON

No. 10-11202

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. Et Al, Plaintiffs

v.

JEFFREY BARON, Defendant-Appellant

v.

ONDOVA LIMITED COMPANY, Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

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

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

---

Cons. w/ No. 11-10289

NETSPHERE, INC., ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant- Appellant

v.

DANIEL J SHERMAN, Appellee

Interlocutory Appeal of Orders in Receivership on Appeal

Cons. w/ No. 11-10290

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, ET AL, Defendants

v.

QUANTEC L.L.C.; NOVO POINT L.L.C., Non-Party Appellants

v.

PETER S. VOGEL, Appellee

Cons. w/ No. 11-10390

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant – Appellant

v.

QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants

v.

ONDOVA LIMITED COMPANY, Defendant – Appellee

v.

PETER S. VOGEL, Appellee

Cons. w/ No. 11-10501

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant – Appellant

QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P., Appellant

v.

PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

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 APPELLANTS NOVO POINT, L.L.C., QUANTEC, L.L.C., and JEFFREY BARON

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. PARTIES

a. Defendant: JEFFREY BARON

b. Defendant: DANIEL J. SHERMAN, Trustee
for ONDOVA LIMITED COMPANY

C. Intervenors: RASANSKY, JEFFREY H.
AND CHARLA G. ALDOUS

d. Intervenor: VeriSign, Inc.

e. Plaintiffs:
(1) Netsphere Inc
(2) Manila Industries Inc
(3) MUNISH KRISHAN

F. APPELLANTS:
(1) NOVO POINT, L.L.C.
(2) QUANTEC, L.L.C.
(3) JEFFREY BARON
(4) CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.

G. APPELLEES:
(1) PETER S. VOGEL
(2) DANIEL J. SHERMAN

2. ATTORNEYS

a. For Appellants Novo Point, LLC., Quantec, LLC., and Jeffrey Baron:

Gary N. Schepps
Suite 1200
5400 LBJ Freeway
Dallas, Texas 75240
Telephone: (214) 210-5940
Facsimile: (214) 347-4031

b. For Appellee Vogel:

Gardere Wynne Sewell LLP
(1) Barry Golden
(2) Peter L. Loh
1601 Elm Street, Suite 3000
Dallas, Texas 75201
Telephone (214) 999-3000
Facsimile (214) 999-4667
bgolden@gardere.com

c. For Appellee Sherman:

Munsch Hardt Kopf & Harr, P.C.
(1) Raymond J. Urbanik, Esq.
(2) Lee J. Pannier, Esq.
3800 Lincoln Plaza / 500 N. Akard Street
Dallas, Texas 75201-6659
Telephone: (214) 855-7500
Facsimile: (214) 855-7584

d. For Intervenor VeriSign: Dorsey & Whitney (Delaware)
(1) Eric Lopez Schnabel, Esq.
(2) Robert W. Mallard, Esq.

d. For Intervenor Rasansky and Aldous:

Aldous Law Firm
Charla G Aldous

f. For Plaintiffs:

(1) John W MacPete, Locke Lord Bissell & Liddell
(2) Douglas D Skierski, Franklin Skierski Lovall Hayward
(3) Franklin Skierski, Franklin Skierski Lovall Hayward
(4) Lovall Hayward , Franklin Skierski Lovall Hayward
(5)Melissa S Hayward, Franklin Skierski Lovall Hayward
(6) George M Tompkins, Tompkins PC

3. OTHER

a. Companies and entities purportedly seized by the receivership:

(1) VillageTrust
(2) Equity Trust Company
(3) IRA 19471
(4) Daystar Trust
(5) Belton Trust
(6) Novo Point, Inc.
(7) Iguana Consulting, Inc.
(8) Quantec, Inc.,
(9) Shiloh LLC
(10) Novquant, LLC
(11) Manassas, LLC
(12) Domain Jamboree, LLC
(13) Genesis, LLC
(14) Nova Point, LLC
(15) Quantec, LLC
(16) Iguana Consulting, LLC
(17) Diamond Key, LLC
(18) Quasar Services, LLC
(19) Javelina, LLC

(20) HCB, LLC, a Delaware limited liability company
(21) HCB, LLC, a U.S. Virgin Islands limited liability company
(22) Realty Investment Management, LLC, a Delaware limited liability company
(23) Realty Investment Management, LLC, a U.S. Virgin
(24) Islands limited liability company
(25) Blue Horizon Limited Liability Company
(26) Simple Solutions, LLC
(27) Asiatrust Limited
(28) Southpac Trust Limited
(29) Stowe Protectors, Ltd.
(30) Royal Gable 3129 Trust

b. Receiver / Mediator / Special Master: Peter Vogel

c. Non-parties seeking money from the receivership res:

1. Garrey, Robert (Robert J. Garrey, P.C.)
2. Pronske and Patel
3. Carrington, Coleman, Sloman & Blumenthal, LLP
4. Aldous Law Firm (Charla G. Aldous)
5. Rasansky Law Firm (Rasansky, Jeffrey H.)
6. Schurig Jetel Beckett Tackett
7. Powers and Taylor (Taylor, Mark)
8. Gary G. Lyon
9. Dean Ferguson
10. Bickel & Brewer
11. Robert J. Garrey
12. Hohmann, Taube & Summers, LLP
13. Michael B. Nelson, Inc.
14. Mateer & Shaffer, LLP (Randy Schaffer)
15. Broome Law Firm, PLLC
16. Fee, Smith, Sharp & Vitullo, LLP (Vitullo, Anthony "Louie")
17. Jones, Otjen & Davis (Jones, Steven)
18. Hitchcock Evert, LLP
19. David L. Pacione
20. Shaver Law Firm
21. James M. Eckels

22. Joshua E. Cox
23. Friedman, Larry (Friedman & Feiger)
24. Pacione, David L.
25. Motley, Christy (Nace & Motley)
26. Shaver, Steven R. (Shaver & Ash)
27. Jeffrey Hall
28. Martin Thomas
29. Sidney B. Chesnin
30. Tom Jackson

CERTIFIED BY: /s/ Gary N. Schepps
Gary N. Schepps
COUNSEL FOR APPELLANTS

STATEMENT REGARDING ORAL ARGUMENT

Appellants do not believe oral argument would be helpful in determining the issues involved in this appeal. Dispositive issues in this appeal raise questions of law involving established legal principles that have been authoritatively decided, *e.g., Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (Filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over all aspects of the case involved in the appeal); *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923) (Even where the court which appoints a receiver had jurisdiction at the time, but loses it ... the first court cannot thereafter make an allowance for the receiver's expenses and compensation); *Scott v. Neely*, 140 U.S. 106, 109-110 (1891) (Seventh Amendment right to jury trial cannot be dispensed with nor can it be impaired by blending with a demand for equitable relief); and *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006) (Receivership cannot be used to adjudicate alter ego claims).

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TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

FEDERAL RULES

STATEMENT OF THE JURISDICTION

The Fifth Circuit Court of Appeals has jurisdiction to hear this interlocutory appeal from the orders of the District Court of the Northern District of Texas: (1) appointing a receiver, (2) taking steps to accomplish the purposes of a receivership, including denying Jeff Baron the ability to hire counsel, (3) directing the sale of receivership assets, and (4) ordering the disposal and disbursement of receivership property; pursuant to 28 U.S.C. §§1292(a)(1) and (2).

The District Court lacked jurisdiction to enter the orders challenged on appeal because: (1) the District Court was divested of jurisdiction over the matter when it was appealed to the Fifth Circuit Court of Appeals; (2) the District Court lacks subject matter jurisdiction both over Baron's assets and over the unpleaded, non-diverse state law claims against Baron, and (3) the District Court lacks personal jurisdiction over the multitude of new parties ordered into receivership without service of process or hearing.

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does interlocutory appeal divest the trial court of jurisdiction over the matter appealed ?

ISSUE 2: Does Due Process require that a party be afforded the opportunity to be heard on motions before substantive relief is granted against that party ?

ISSUE 3: In the absence of a statute, is a court authorized to use receivership to provide a remedy for unsecured creditors' *in personam* claims against an individual before they have been reduced to judgment ?

ISSUE 4: Did the District Court abuse its discretion, act outside of its jurisdiction, or exceed its authority in ordering that Baron, an adult citizen, must involuntarily compromise disputed claims against him ?

ISSUE 5: Did the District Court err in granting relief against Baron and his property held in receivership while prohibiting Baron (1) from being represented by paid counsel, (2) from hiring experienced federal trial counsel, and (3) from hiring expert witnesses to testify as to the necessity and reasonableness of the fees claimed ?

ISSUE 6: Once an affidavit is filed pursuant to 28 U.S.C. §144, is further activity of the Judge circumscribed to making a determination as to the legal sufficiency of the facts stated in the affidavit ?

ISSUE 7: Where the same receiver was appointed over multiple receivership parties and estates, did the District Court abuse its discretion in awarding receivership fees and expenses (1) without a showing or finding that the fees and expenses were reasonable or necessary; (2) without regard to which of multiple receivership estates the fees were allegedly incurred; and (3) where the receiver was prohibited by law from being appointed as a receiver ?

ISSUE 8: Can a receivership be used as a vehicle to make third parties liable as 'reverse alter-egos' of a party ?

ISSUE 9: Did the US District Court in the Northern District of Texas have jurisdictional authority to appoint the manager of a LLC in the Cook Islands ?

STATEMENT OF THE CASE

This is an interlocutory appeal from orders entered by the District Court exercising control of a receivership while the matter is on appeal to the Fifth Circuit.

STATEMENT OF FACTS

One defendant below, Ondova (through Sherman, the chapter 11 trustee who now controls it) filed a motion for the District Court to seize all of the assets of another defendant, Jeffrey Baron, in order to prevent Baron from hiring an attorney.[1] Sherman falsely made it look like the bankruptcy judge desired a receiver over Baron if he hired any lawyers.[2] The District Judge granted Sherman's motion *ex parte* and later explained: "[T]he receivership is an effort to stop the parade of lawyers trying to wiggle out of lawful injunctions from judicial officers. Yes, sir."[3]

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[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. One reason cited by Sherman in his motion was that three business days before, Baron had hired an attorney to assist in objecting to Sherman's Attorney's fee application in the bankruptcy court where Baron is a creditor. 1576-1577.

[2] R. 1576.

[3] R. 4593-4594.

The original purpose of the *ex parte* receivership was clear: 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"**.[4] To enforce compliance and to stop Jeff from having any money to hire a lawyer, all of his assets (including his exempt property) were seized[5], as were all of his future earnings[6]. Jeff was ordered not to cash any checks[7] or enter into any business transactions[8]. Jeff Baron has been this "civil lockdown" since the day the challenged order was issued *ex parte* in November 2010. Baron has been forced to live off a monthly sustenance stipend disbursed to him by the receiver. Under the express threat of contempt, Jeff Baron has been permitted to purchase only "local transportation, meals, home utilities, medical care and medicine."[9]

[4] SR. v8 p1213.
[5] R. 1620.
[6] R. 1622 paragraph F.
[7] R. 1620, 1621 paragraph C.
[8] R. 1620, 1622, 1627 paragraph A.
[9] SR. v8 p1213.

When the receivership was imposed, Baron immediately turned over his personal documents and files requested by the receiver.[10] Baron's estate consists essentially of some savings accounts and some Roth IRAs.[11] Accordingly, the receiver was not left with very much to do. Baron appealed the receivership order on Dec. 2, 2010.[12]

The receiver then moved to add a multitude of companies into his receivership (without lawsuits, service, evidence, or the normally expected process of law).[13] Those companies include:

1. NovoPoint, LLC.
2. Quantec, LLC.
3. Iguana Consulting, LLC.
4. Diamond Key, LLC.
5. Quasar Services, LLC
6. Javelina, LLC.
7. HCB, LLC, a Delaware limited liability company.
8. HCB, LLC, a USVI company.
9. Realty Investment Management, LLC.- Deleware.
10. Realty Investment Management, LLC – USVI.
11. Blue Horizon, LLC.
12. Simple Solutions, LLC.
13. Asiatrust Limited.
14. Southpac Trust Limited.
15. Stowe Protectors, Ltd.
16. Royal Gable 3129 Trust.

[10] R. 3891.

[11] SR. v8 p1007.

[12] R. 1699-1700.

[13] R. 1717, 3952; SR. v1 p40, and sealed record Doc 609; SR. v2 pp365,405.

17. CDM Services, LLC
18. URDMC, LLC.

The District Judge made no findings in entering the original November 2010, *ex parte* receivership order against Baron and an initial set of companies. R. 1619-1632. Months later, in February 2011 the District Court entered findings in denying Baron's Fed.R.App.P. 8(a) motion for relief pending appeal. The post-appeal explanation in the Fed.R.App.P. 8(a) findings is essentially as follows: The District Court believes Baron was a vexatious litigant (although never appearing *pro se* and never sanctioned) who owed money in undetermined amounts to his former attorneys, and therefore should be denied the ability to hire an experienced trial lawyer to defend himself, and should be stripped of his possessions without trial "so that justice is done". SR v2 p358.

While this matter has been on appeal, the District Court has distributed essentially all of Baron's savings account balances to the receiver and his law firm.[14] The amount is staggering— almost a

[14] Around $400,000 in a stock portfolio, and IRAs remain, but the stocks are currently subject to a motion by the receiver to liquidate to pay additional fees, and the receiver did not pay 2010 taxes.

million dollars. SR. v8 p990-992.

The "Claims" Solicited by the Receiver

In addition to the receiver (and his firm's) personal fees, the receiver solicited claims (SR. v8 p1242-43) against Baron by former attorneys of the receivership entities and presented the "claims" to the District court **in a one-sided 'report' that intentionally excluded all of the exculpatory evidence.** SR. v7 p202. Baron moved the District Court for the opportunity to:

(1) retain experienced Federal trial counsel to defend the 'claims';

(2) the opportunity to conduct discovery with respect to the claims; and

(3) the opportunity to retain an expert witness with respect to the reasonableness of the alleged fees.

SR. v5 p139 [Doc 445].

However, the District Court did not grant Baron any of the requested relief, and instead sealed from the public view Baron's motion, objections, and response to the one-sided receiver's 'report'. SR. v7 p379; and see Doc 458 (itself also sealed). Baron then filed a detailed

briefing rebutting the alleged claims (SR. v5 p1313 [Doc 577]). The District Court sealed that too. SR. v7 p379. Baron had also filed additional evidence. SR. v5 p1369 [Doc 507]; SR. v6 p70 [Doc 523]. The evidence was rejected by the District Court. SR. v6 pp116, 124. The receiver's initial motion for 'approval' of the claims against Baron was denied by the District Court. SR. v6 p94 [Doc 527]. The receiver then filed a new motion seeking approval of the 'former attorney' alleged claims against Baron. SR. v7 p194. Five business days later, the District Court granted the new motion (ignoring the defensive evidence previously filed by Baron), and before Baron was able to file a response to the new motion. SR. v7 p349. Notably, although Baron had previously directed the District Court's attention to evidence refuting the fee allegations made by claimants, the District Court did "not question the evidence presented by the Receiver". SR. v6 p94. The issues involving the unpleaded 'claims' awarded[15] (in the total sum of $870,237.19) by the District Court against Baron include, for example,

[15] The District Court did not evaluate the claims *per se* but decided that the claims would "likely" be successful if tried, ordered Baron to settle with the claimants in the amount set by the District Judge, and authorized the receiver to pay the claims out of any of the receivership estates. SR. v7 p349.

the following:[16]

1. Mr. Broome 'claimed' more than the $10,000.00 per-month capped fee he was paid by Baron. 'Exhibits 4-5b' referenced at SR. v7 p363.[17] Broome's argument is that Mr. Baron paid him based on a $10,000.00 monthly fee cap but his contract did not contain any term limiting the amount of fees that may be *incurred* in any month. SR. v5 pp426, 427. However, Broome's contract (submitted by Broome) clearly contains (in writing) an explicit and unambiguous provision limiting the amount of fees that may be *incurred* to $10,000.00 per month. There is no ambiguity. Broome's contract expressly states a capped monthly fee limit setting the maximum amount of fees that could be "incurred", and expressly

[16] The nine "claims" discussed below constitute approximately 80% of the total dollar amount in "claims" presented. The factual underpinnings of the remaining 16 "claims" are similar to the nine discussed below. However, a full factual discussion of each of the remaining claims would exceed briefing length limitations. See 'Exhibits' referenced at SR. v7 p362-369. Notably, the District Court made no specific factual findings with respect to any individual "claim". SR. v7 p349.

[17] The attorney's allegations were filed as sealed documents, and the Appellants' motion for access to the sealed portions of the record on appeal was denied by the appellate motion panel. Accordingly, Appellants are unable to provide more detailed citation to the record with respect to the 'claim' allegation documentation, (hereinafter referenced as 'Exhibit __').

requires formal written authorization to exceed the capped amount. SR. v8 p1212 (and see SR. v7 p379). No written authorization to exceed the monthly fee cap was alleged in Broome's "claim", and no written authorization to exceed the agreed upon monthly cap has been produced by Broome. Rather, Broome falsely swore that his contract did not contain any provision to limit the amount of fees that could be incurred monthly. SR. v5 pp426-427.

2. Ms. Crandall 'claimed' fees based on her allegation that she had a written contract (which she could not produce) at an hourly fee of $300/hour. 'Exhibit 16' referenced at SR. v7 p364. However, per Crandall's own invoice, Crandall billed (and was paid), at a flat monthly fee. SR. v6 p77; SR. v6 p70-76. There is no ambiguity. Crandall's invoice (which was paid) clearly states that "60.1" hours of work were performed and the "Flat Rate" due was $5,000.00. SR. v6 p77.

3. Mr. Pronske was paid $75,000.00 up front for his work in the bankruptcy court, and later alleged that the $75,000.00 was

just an initial retainer. 'Exhibit 24' referenced at SR. v7 p365. Pronske demanded an additional fee of $241,912.70. Id. However, Pronske admitted that "There are no engagement agreements relating to the representation" and for almost a year after receiving the $75,000.00 fee and working on the case, Pronske sent no contract, no engagement letter, no bill, no invoice, no demand for payment, and no hourly work report alleging that the flat fee payment was actually a 'retainer'. SR. v8 p1218 and 'Exhibit 24'. Also, the only "invoices relating to the Representation" (which Pronske alleges ended in July 2010), were printed up in February 2011, after the claims were solicited by the receiver, and some **seven months** after Pronske's representation ended. Id.

4. Mr. Ferguson's 'claim' sought more than the $22,000.00 capped fee he agreed to in writing and that was paid. SR. v8 p1220. Ferguson offered several conflicting factual scenarios, the latest being that he is allowed to violate his engagement

agreement and charge more than the agreed upon (and paid in full) capped fee because he was 'defrauded'. Id. Ferguson alleged that Baron 'fraudulently' represented that the money would be paid from his million dollar trust and not from his pocket personally because he was personally "destitute" (according to Ferguson). Id. It is, however, undisputed that the trust's money is just as green and in US Dollars, just the same as if it had come from Baron's pocket, and Ferguson was paid the agreed upon fee. Notably, in his original sworn testimony before the District Court at a Fed.R.App.P. 8(a) hearing, Ferguson offered a different story. R. 4443, 4445. At the FRAP 8(a) hearing, to explain the additional fee 'claimed' in light of the agreed fee at which Ferguson was paid, Ferguson claimed the agreed fee was only to August 21 and based on a 33% time demand. Id. In his new 'claim' Ferguson tells a new story to avoid the written agreed upon fee cap. Ferguson's new story contradicts his original version and now admits that the cap *did* apply through

August 31, and with full time work contemplated (as is stated in Ferguson's written agreement), but should not apply since Ferguson claims Baron 'fraudulently' represented the money (which was paid in full) was coming from Baron's million dollar trust. SR. v8 p1220.

5. Mr. Lyon submitted a 'claim' for more than the $40/hour fee he charged and was paid. His argument is that his fee was really $300/hour (and around $260/hour is due him), although he could not produce his written contract. 'Exhibit 19' referenced at SR. v7 p361. However, Lyon's own email (distributed to other attorneys) states his rate was the $40/hour rate he was paid. SR. v5 p1376. In this undisputed evidence, Lyon bragged– in writing– that his rate of $40/hour gave Baron 'more bang for the buck' so that Lyon should be given more work to do. Id.

6. Mr. Taylor submitted a 'claim' for additional fees beyond the money he was paid (in full) pursuant to the $10,000.00 per month fee cap expressly called for in his written contract.

'Exhibit 18' referenced at SR. v7 p365. Unlike Broome, Taylor did not deny his fees were capped at $10,000/month (as stated in his written contract). Instead, Mr. Taylor claims entitlement to a contingency fee even though the contingency provided for in his contract was not met. Id. When the case settled at a substantial loss, Taylor made no claim that the contingency in his contract was met, and made no disclosure of any contingency amount which would be due; rather, Taylor confirmed in writing that only a very small (hourly) fee would be billed. SR. v5 pp1370, 1380. Subsequently, Taylor decided he wanted a contingency fee payment after all, and asked for $42,000.00. SR. v5 p 1378. The District Court, although no suit was filed in the District Court, and with no explanation of how the 'contingency' amount had been calculated, awarded Taylor $78,058.50. SR. v7 p365.

7. Ms. Schurig submitted a 'claim' for more than the million dollar fee she has been paid. Her 'claim' was for work performed– without any contract– for a company neither owned nor managed by Baron—AsiaTrust. SR. v8 p1223. Schurig does not allege that Baron ever agreed or undertook to pay the debts of AsiaTrust, yet the District Court awarded her $93,731.79 "claim" for unpaid fees. Id.; SR. v7 p364.

8. Bickel-Brewer submitted a 'claim' for more than the $200,000.00+ fee it was paid nearly half a decade ago. The current amount claimed due is around $40,000.00– the amount of the work billed by Bickel-Brewer, without explanation, for fees preceding its representation of Baron plus additional fees for seeking payment of the claimed fees. Bickel-Brewer's contract does not call for payment of any pre-engagement work, and there is no explanation of what the work was for, or why Baron is in any way liable to pay it. SR. v8 pp1224-1235; 'Exhibit 20' referenced at SR. v7 p365.

9. Mr. Garrey submitted a 'claim' for two weeks work. Garrey originally demanded a million dollar fee for that alleged work. SR. v4 p104. Recently, Mr. Garrey has lowed his million dollar 'claim' to a $52,275.00 "claim" for the alleged two weeks work. 'Exhibit BLANK' referenced at SR. v7 p361. Garrey, however, has admitted that he agreed in writing to a fixed rate employment at $8,500.00 per month, for the period covering the two weeks he claims to have worked. Id. In his "claim" Garrey notably alleges that he expended a significant amount of time in representing Baron in part because he was "asked to object to the fee requests of the Receiver's counsel, and I was asked to devise a strategy to remove the Receiver and the Receiver's counsel." SR. v8 p1217. Garrey, however, admitted that his alleged two week representation ended on November 16, 2010, well before the application for the appointment of a receiver had been made. Id.

The 28 U.S.C. §144 Affidavit

On or about April 27, 2011, the District Judge issued sealed findings that statements made about an attorney in filings were 'unfounded'. Doc 458 (under seal). No hearing was held and no briefing was submitted on the issue. Accordingly, it appeared that the District Judge had no basis other than bias to make such findings. In light of the foregoing, after a careful review of a series of actions and statements by the District Judge, counsel for Baron came to believe that there was a good faith basis to conclude that due to the District Judge's personal bent of mind (developed well before the filing of the District Court lawsuit), Baron could not receive fair and impartial treatment. Doc 497 filed 4/27/11 (ordered under seal). Baron then submitted an affidavit pursuant to 28 U.S.C. §144, certified to by counsel. Id.

The District Judge Refused to Review the Legal Sufficiency of the Facts Stated in the Affidavit

The District Judge refused to review the legal sufficiency of the facts stated in Baron's §144 affidavit, and ruled that Baron could not submit an affidavit that made factual allegations, but must instead submit an affidavit that cited specific portions of the court record. SR.

v5 p1470. The District Court also sealed Baron's affidavit so that it was hidden from the public. Id. Baron filed a supplemental affidavit that added quotations from the record, including the quoted text and the hearing date, and removed the 'sealed' facts from the affidavit. Doc. 521 (also ordered under seal). The District Judge then struck and placed that affidavit under seal on the grounds that the affidavit "failed to give citation to the record as to every statement by the Court". SR. v6 p122. The District Judge ordered that any supplemental affidavit could not contain any off-the-record statements made by the District Judge, and must be confined to statements the Judge made on the record. Id.

ARGUMENT SUMMARY

This appeal presents core issues that have been authoritatively decided, as follows:

(1) The District Court below lacked jurisdiction to issue the orders challenged in this appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over the aspects of the case involved in the appeal).

(2) The District Court should have ceased all action in the case until the legal sufficiency of the factual allegations made in Baron's §144 affidavit had been ruled on. *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir. 1975).

(3) The District Court erred in holding that it could appoint a receiver over an individual and thereby waive the individual's Constitutional right to trial by jury. *Scott v. Neely*, 140 U.S. 106, 109-110 (1891) (Seventh Amendment right to jury trial cannot be

dispensed with nor can it be impaired by blending with a demand for equitable relief).

(4) The District Court erred in attempting to use receivership to adjudicate alter ego claims. *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006) (receivership cannot be used to adjudicate alter ego claims).

Additionally, there was a breakdown of the basic protections of Due Process in the proceedings below, with the District Court:

(1) issuing orders against non-parties upon whom no service was made and over whom the District Court lacked personal jurisdiction;

(2) issuing orders without allowing the opportunity mandated by the rules to respond to the motions seeking substantive relief; and

(3) refusing to allow Baron to be represented by (1) paid counsel and (2) an experienced Federal trial lawyer.

ARGUMENT & AUTHORITY

ISSUE 1: DOES INTERLOCUTORY APPEAL DIVEST THE TRIAL COURT OF JURISDICTION OVER THE MATTER APPEALED ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo. In Re Fredeman*, 843 F.2d at 824.

Appeal Divests the District Court of Jurisdiction Over the Matter Appealed

Jeffrey Baron filed a notice of appeal from the receivership order on December 2, 2010. R. 1699. The filing of a notice of appeal is an event of jurisdictional significance– it 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). The divesture of jurisdiction of the trial court involves all those aspects of the case appealed. *Id*. As a matter of established law, the district court loses jurisdiction over all matters which are validly on appeal. *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) ("rule which we follow rigorously"). The sole authority of a district court with respect to a

matter on interlocutory appeal is to maintain the status quo of the case as it rests before the court of appeals. *E.g.*, *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *Dayton* at 1063.

The District Court was Divested of Jurisdiction over Receivership Res

As a long-established principle of law, the effect of an appeal of a receivership is that the appellate court is vested with jurisdiction over the receivership res. *E.g.*, *Palmer v. Texas*, 212 U.S. 118, 126 (1909). The Supreme Court held in *Palmer* "**[T]he effect of the appeal was simply ... that the appellate court still had jurisdiction over the res the same as the trial court had**". *Id.* The Supreme Court explained this rule in Palmer, holding:

> "If a court of competent jurisdiction, Federal or state, has ... obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty."
>
> *Id.* at 125.

Similarly, as a long-established rule of law, "Even where the court which appoints a receiver had jurisdiction at the time, but loses it ... the

first court cannot thereafter make an allowance for his expenses and compensation". *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923). Once the matter was placed before the Court of Appeals, the property was in the possession of the Court of Appeals, and "[T]hat possession carried with it the exclusive jurisdiction to determine all judicial questions concerning the property." *Wabash R. Co. v. Adelbert College of Western Reserve Univ.*, 208 U.S. 38, 46 (1908). As an established principle of law and comity, two courts should not attempt to assert jurisdiction over the same matter simultaneously. *Griggs* at 58; *Dayton* at 1063.

While the matter is on appeal, the district court is divested of authority over the matter on appeal, and has no jurisdiction award fees for the matter while it is on appeal. *E.g.*, *Taylor v. Sterrett*, 640 F.2d 663, 668 (5th Cir. 1981) ("[T]he District Court was divested of jurisdiction only as to matters relating to the April 27 and May 12 orders and subsequent orders and, for that reason, fees cannot be recovered for work relating to these orders.").

Accordingly, the District Court was without authority to disburse hundreds of thousands of dollars from the receivership *res* awarded as 'fees', and the following orders should therefore be reversed: Doc 533 (SR. v6 p103), Doc 532 (SR. v6 p101), Doc 535 (SR. v6 p107), Doc 574 (SR. v7 p348), Doc 529 (SR. v6 p98), Doc 462 (SR. v5 p230), Doc 573 (SR. v7 p347), Doc 530 (SR. v6 p99), Doc 461 (SR. v5 p229), Doc 464 (SR. v5 p232), Doc 539 (SR. v6 p113), Doc 543 (SR. v6 p118), Doc 536 (SR. v6 p109), Doc 473 (SR. v5 p412), Doc 463 (SR. v5 p231), Doc 542 (SR. v6 p117), Doc 537 (SR. v6 p110), Doc 538 (SR. v6 p111), Doc 531 (SR. v6 p100), and Doc 540 (SR. v6 p114). Similarly the District Court was without authority to authorize the liquidation of receivership assets or to approve assessments against those assets and Doc 575 (SR. v7 p349) should therefore be reversed. Finally, the District Court was also without authority to approve the propriety of the receiver's actions with respect to the receivership *res*, and accordingly, Doc 459 (SR. v5 p227) should also be reversed.

Policy Issue: The Right to Appellate Review of a Receivership Order

The validity of the receivership order should be resolved on appeal *before* the District Court should be allowed to distribute and disburse the property of a party that was seized by the District Court's receivership order. Otherwise, the District Court can effectively bypass review by the Court of Appeals by distribution of the receivership res before the validity of the receivership has been resolved on appeal. A district court should not be allowed to moot a matter pending before the Court of Appeals. *Dayton*, 906 F.2d at 1063. Accordingly, the challenged orders listed above should be reversed.

ISSUE 2: DOES DUE PROCESS REQUIRE THAT A PARTY BE AFFORDED THE OPPORTUNITY TO BE HEARD ON MOTIONS BEFORE SUBSTANTIVE RELIEF IS GRANTED AGAINST THAT PARTY ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo*. *In Re Fredeman*, 843 F.2d at 824.

Argument

As a matter of established law, failure to afford a party the opportunity to be heard on a motion seeking substantive relief against them is fundamentally inconsistent with the notion of due process and orders issued without such an opportunity are void. *E.g. Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (restored the petitioner to the position he would have occupied had due process of law [the opportunity to be heard] been accorded to him in the first place); *Pennoyer v. Neff*, 95 US 714, 737 (1878) ("void as not being by due process of law")*; Goss v. Lopez*, 419 U.S. 565, 579 (1975) ("The fundamental requisite of due process of law is the opportunity to be heard"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-430 (1982) (due process violated in

denying potential litigants established adjudicatory procedures); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 161 (1951) ("Fairness of procedure is 'due process in the primary sense.' It is ingrained in our national traditions and is designed to maintain them.")(citation omitted); *International Transactions v. Embotelladora Agral*, 347 F.3d 589, 596 (5th Cir. 2003).

Local Rule 7.1(e) of the Northern District of Texas provides that a respondent shall be allowed 21 days to respond to motions. N.D. Tex. L.R. 7.1(e) ("Time for Response and Brief. A response and brief to an opposed motion must be filed within 21 days from the date the motion is filed."). The District Judge did not order or provide any notice that the time would be shortened, but rather notified the parties that the time allowed was "a full twenty-one days to respond to every motion that's filed". SR. v4 p863. Accordingly, with respect to Orders: Doc 575 (SR. v7 p349), Doc 533 (SR. v6 p103), Doc 532 (SR. v6 p101), Doc 535 (SR. v6 p107), Doc 574 (SR. v7 p348), Doc 529 (SR. v6 p98), Doc 462 (SR. v5 p230), Doc 573 (SR. v7 p347), Doc 530 (SR. v6 p99), Doc 461 (SR. v5 p229), Doc 464 (SR. v5 p232), Doc 539 (SR. v6 p113), Doc 543 (SR. v6

p118), Doc 536 (SR. v6 p109), Doc 463 (SR. v5 p231), Doc 542 (SR. v6 p117), Doc 537 (SR. v6 p110), Doc 538 (SR. v6 p111), Doc 531 (SR. v6 p100), Doc 540 (SR. v6 p114), and Doc 459 (SR. v5 p227), the District Court abused its discretion in granting relief without allowing the Appellants the opportunity to respond and be heard on the requested relief as provided for by the applicable rules of procedure. A party is clearly prejudiced when it is not allowed to respond to the reasonableness and propriety of fee claims, and clearly a party is prejudiced by the failure to allow the party to respond and be heard with respect to multiple 'claims' for alleged liability for breach of contract. As discussed above, the District Court's failure to allow the Appellants the established procedures and opportunity to respond and be heard on the relief requested against them constitutes a violation of Due Process and should render the orders so entered void.

ISSUE 3: IN THE ABSENCE OF A STATUTE, IS A COURT AUTHORIZED TO USE RECEIVERSHIP TO PROVIDE A REMEDY FOR UNSECURED CREDITORS' *IN PERSONAM* CLAIMS AGAINST AN INDIVIDUAL BEFORE THEY HAVE BEEN REDUCED TO JUDGMENT ?

Standard of Review

Questions of law are review *de novo. E.g. In re Fredeman*, 843 F.2d at 824; *Gandy Nursery, Inc. v. US*, 318 F.3d 631, 636 (5th Cir. 2003).

Argument Overview

This issue addresses the question:[18]

> "Does the law authorize a court to skip the trouble of lawsuits and trials by simply placing an individual's property into receivership and redistributing the property to pay alleged unsecured debts of the individual as the court finds 'equitable' ?"

An overview of the answer, "No", is as follows:

> 1. Receivership is not authorized as an alternative system of justice. Rather, receivership is a very limited ancillary remedy to conserve property subject to some other claim in equity.

[18] Issue 4, at page 62, addresses the related issues of: (1) The District Court's lack of subject matter jurisdiction over non-diverse state law claims, and (2) The constitutionality of adjudication of disputed claims at law without trial.

2. An individual's unsecured debts are not property of the individual and are not subject to receivership with respect to that individual.

The District Court's Erroneous View of Equity Receivership

In the erroneous view of the District Court:

(1) Receivership is an independent substantive remedy that divests individuals of their property without trial and transmutes the property into "equitable assets" held by the Judge. SR. v7 p353-356.[19]

(2) Those "equitable assets" can then be redistributed to alleged general creditors based on the Judge's sense of "equity". Id.

(3) By appointing a receiver over a citizen the Court can freely waive a citizen's Constitutional rights. SR. v7

[19] The authority erroneously relied upon by the District Court, *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997), notably does not hold that receivership is a remedy available to general creditors to create equitable assets. Rather, *Santibanez* holds that "[R]eceivers may be appointed 'to preserve property pending final determination of its distribution in supplementary proceedings in aid of execution.' In addition, 'receivership may be an appropriate remedy for a **judgment creditor** …' ". *Id.* at 241 (inner citation omitted). The holding in *Santibanez* is fully consistent with the well-established principle of law that a receivership conserves property for specific claims of ownership or equitable interest in that specific property. *E.g.*, *Gordon v. Washington*, 295 U.S. 30, 37 (1935). By stark contrast, "To constitute equitable assets, the trust imposed by the party, or by the court, must be for the benefit of creditors generally". *Freedman's Sav. & Trust Co. v. Earle*, 110 U.S. 710, 718 (1884). Thus, there is a **fundamental** difference between (1) the interlocutory seizure of property by receivership for the benefit of parties holding an existing right to an equitable remedy in the receivership property so that the court can provide that remedy (*Gordon* at 38); and (2) seizure of property for the creation of a trust for the benefit of unsecured general creditors ("equitable assets").

> p356-357. In other words, in the District Court's erroneous view, since a court, through its receiver, can waive a citizen's Constitutional rights for them, a District Court can take away all of a citizens "legal rights" with respect to their property, and redistribute the property without regard to all the Constitutional protections recognized by law. Id.

As discussed below, the District Court has fundamentally erred with respect to the Constitution and the law of equity receivership.

Overview of Equity Receivership Power

As a matter of well-established law, equity receivership is neither an independent nor substantive remedy. Rather, as discussed below, receivership is a special remedy that can be used only as an ancillary remedy to preserve property so that property can be disposed of pursuant to some other recognized equitable remedy that was properly pleaded and that the court has jurisdiction to impose.

Equity Receivership is Only Authorized as an Interlocutory, Ancillary Remedy

The Supreme Court held over a century ago that receivership is "interlocutory only, and intended to preserve the subject-matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by

a final decree". *Forgay v. Conrad*, 47 U.S. 201, 204-205 (1848). The Supreme Court has held this limitation is a fundamental principle of law imposed by the limitations on the equity authority granted to a court. *Gordon v. Washington*, 295 U.S. 30, 37 (1935) (receivership must be "ancillary to some form of final relief which is appropriate for equity to give"). While summary proceedings have been recognized as proper to determine what property should be held in the receivership *res*, such proceedings have not been recognized as proper to determine who should ultimately be entitled to possession of that *res*. *United States v. Arizona Fuels Corp.*, 739 F.2d 455, 459 (9th Cir. 1984) (summary proceedings are appropriate to determine right to possession, although not ultimate rights to title or ownership).

As a matter of established law, receivership is not a substitute for trial nor a substantive remedy. *See Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). The rule of law is clear. As the Supreme Court held in *Pusey*:

> "[T]he appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right; nor is

> it a step in the determination of such a right. It is a means of preserving property"
> *Id.*

Carrington-Coleman's Erroneous Argument

In their Principal Appeal brief, Carrington-Coleman glosses over the well-established principle that receivership is merely an ancillary remedy that determines no substantive rights. On page 8 of its brief, Carrington-Coleman erroneously mis-cites *Sec. & Exch. Comm'n v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 331 (5th Cir. 2001) as holding that the distribution of receivership assets is an equitable remedy. There is no such substantive remedy in equity, and a careful reading of *Forex Asset* reveals this fundamental error in Carrington-Coleman's argument. The holding in *Forex Asset* expressly states that the equitable remedy the holding refers to is the remedy of restitution. *Id.* Specifically, *Forex Asset* holds:

> "[I]n entering a **restitution order**, adherence to specific equitable principles, including rules concerning tracing are 'subject to the equitable discretion of the court.' "
> *Id.*

Notably, *equitable restitution* is an independent equitable remedy and can be imposed regardless of the existence of a receivership.[20] In both *Forex Asset (*and *US v. Durham,* 86 F.3d 70 (5th Cir. 1996), the case relied upon by *Forex Asset*) the receivership was purely ancillary to the ultimate relief afforded (i.e., equitable restitution). In both cases, the receivership provided a mechanism to secure property so that the ultimate relief of equitable restitution could be effectively carried out by the court. Accordingly, when this Honorable Court in *Forex Asset* (and *Durham*) referenced a court's "acting pursuant to its inherent equitable powers" those powers were not some new, independent power in equity

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[20] *Equitable Restitution* is different than restitution generally. *E.g., Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 362 (2006) ('[N]ot all relief falling under the rubric of restitution [was] available in equity.'). *Equitable Restitution* is an equitable remedy that involves *in rem* recovery of specific property. *Id.* As the Supreme Court held in *Sereboff*:

> "To decide whether the restitutionary relief sought by Great-West was equitable or legal, we examined cases and secondary legal materials to determine if the relief would have been equitable '[i]n the days of the divided bench.' Ibid. We explained that one feature of equitable restitution was that it sought to impose a constructive trust or equitable lien on "particular funds or property in the defendant's possession." Id., at 213. That requirement was not met in Knudson, because 'the funds to which petitioners claim[ed] an entitlement" were not in Knudson's possession,'. Thus, for restitution to lie in equity, the action must seek not to impose *in personam* liability on the defendant, but must seek *in rem* recovery to restore to the plaintiff particular funds or property in the defendant's possession. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 , 213-214 (2002)."

arising out of the existence of a receivership, to distribute a party's assets as a court feels is 'just and equitable'. Rather, the powers referenced in *Forex Asset* and *Durham* were specific powers in equity to provide an established form of substantive relief that equity is empowered to give— *Equitable Restitution*.

By contrast, the creation of a new equitable remedy to allow a court to simply seize property in receivership and then distribute the property based on the court's sense of 'equity' would directly violate the holding of *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 310 (1999). The Supreme Court held in *Grupo Mexicano* that "[T]he equitable powers conferred by the Judiciary Act of 1789 [do] not include the power to create remedies previously unknown to equity jurisprudence". *Id.*

***In Personam* vs. *In Rem* Claims**

Moreover, if receivership were authorized as a means of providing final relief, providing a remedy with respect to the alleged unsecured debts of Baron would still fall well outside the District Court's receivership authority. The short explanation for this is that, as a well-

established rule of law, a receiver may only be placed over property. *E.g., Booth v. Clark*, 58 U.S. 322, 331 (1855). Debt, however, "is not property in the hands of the debtor". *Liverpool & C. Ins. Co. v. Orleans Assessors*, 221 U.S. 346, 354 (1911). Accordingly, the *in personam* claims against Baron for his alleged debts are not part of the receivership *res* and adjudication of those claims falls well outside of the receivership itself.

A longer explanation is as follows: Receivership actions are *in rem* actions over specific property. *E.g. Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980). As a matter of established law, *in personam* actions to establish liability on claims against individuals do not involve the receivership *res*. *Hawthorne Savings v. Reliance Ins. Co.*, 421 F.3d 835, 855 (9th Cir. 2005) (noting the fundamental distinction between "the liquidation of a claim and the enforcement of the claim after it has been reduced to judgment"). Accordingly, only an attempt to levy against the *res* made after a judgment has been obtained *in personam* involves an *in rem* action that relates to a court's dominion over the receivership res. *Id.*

The District Court fundamentally erred in, out of a "sense of justice", attempting to create an interest in property that does not exist. *See Meyerson v. Council Bluffs Sav. Bank*, 824 F. Supp. 173, 177 (S.D. Iowa 1991). The 'claimants' do not have, and have not asserted, any legally cognizable *in rem* claims against the *res* property. Rather, the claimants allege that Mr. Baron personally is obligated *in personam* to pay them money for breach of contract. Accordingly, the District Court erred in attempting to bypass the crucial step of adjudication of *in personam* liability. Notably, the fundamental step of adjudicating *in personam* liability is a constitutionally protected step, and with claims at law like those asserted against Baron, a citizen's right to trial by jury is invoked. *E.g., Ross v. Bernhard*, 396 U.S. 531, 531 (1970).

Baron's Unsecured Alleged Creditors Have No Right in the Receivership Property

Unsecured Creditors Have No Rights in the Property of their Debtor

Baron's unsecured creditors have no rights in a receivership because, in the absence of statute, they have no substantive right, legal or equitable, in or to his property. *See Pusey,* 261 U.S. 491 at 497. This is true, whatever the nature of the property. *Id.* The only substantive

right of a simple contract creditor is to have his debt paid in due course and his recourse for non-payment is a suit at law. *Id.* Moreover, such a creditor has no right whatsoever in equity until he has exhausted his legal remedy. *Id.* Accordingly, as matter of well-established law, a court does not have equitable jurisdiction to use receivership to enforce the unsecured creditors' *in personam* claims (against the owner of the receivership property) before those claims have been reduced to judgment. *Id.; e.g., Williams Holding Co. v. Pennell*, 86 F.2d 230 (5th Cir. 1936). The District Court's Order [Doc 575] to pay alleged unsecured creditors of Baron should therefore be reversed. SR. v7 p349.

Distinction between Receivership of a Corporation and Receivership of an Individual's Property

It is notable that unlike an individual, control of a corporation is a property interest. *E.g., US v. Wallach,* 935 F.2d 445, 462 (2nd Cir. 1991). Similarly, ownership rights in a corporation constitute property. *See* 11 Fletcher Cyclopedia of the Law of Private Corporations § 5097, at 92 (Perm. ed. 1990). Thus, claims against a corporation which has been taken into the hands of a receiver are claims against the receivership *res*. By contrast, claims against the corporation's

shareholders (the owners of property) are *in personam*. *E.g.*, *Morris v. Jones*, 329 U.S. 545, 549 (1947) (the liquidation of a claim against a person "[I]s strictly a proceeding *in personam*"*); and see e.g., United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983) (taking property interest held by a person is *in personam* and not *in rem).* Accordingly, the *in personam* claims against Baron, are not *in rem* claims against the receivership *res* and fall well outside the District Court's subject matter jurisdiction and authority with respect to the receivership *res*.

Exercise of Receivership Power Must be Closely Scrutinized

This Honorable Court has held that "[R]eceiverships for conservation have a legitimate function but they are to be watched with jealous eyes lest their function be perverted." *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954). This Court held in *Tucker* that:

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of the court of equity; it is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court, in its discretion, may appoint a receiver to preserve and protect the property pending its final disposition. For that purpose the court may appoint a

> receiver of mortgaged property to protect and conserve it pending foreclosure, or of property which a judgment creditor seeks to have applied to the satisfaction of his judgment."

This Honorable Court's holding in *Santibanez*, 105 F.3d at 241 is consistent with the holding in *Tucker* and the Supreme Court's holdings in *Gordon, Pusey, Forgay,* etc. Receivership is authorized when a *judgment creditor* seeks to have a defendant's property applied to the satisfaction of his judgment. The District Court erred in confusing the rights of a judgment creditor with those of unsecured general creditors. Attempting to use receivership to seize a citizen's property in order to redistribute the property to unsecured general creditors is not authorized by law. *E.g.*, *Pusey* 261 U.S. at 497. It is also prohibited by the Constitution. U.S. Const. amend. VII. Accordingly, the District Court's "FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ON ASSESSMENT AND DISBURSEMENT OF FORMER ATTORNEY CLAIMS" entered 5/18/2011 (Doc 575) should be reversed. SR. v7 p349.

ISSUE 4: DID THE DISTRICT COURT ABUSE ITS DISCRETION, ACT OUTSIDE OF ITS JURISDICTION, OR EXCEED ITS AUTHORITY IN ORDERING THAT BARON, AN ADULT CITIZEN, MUST INVOLUNTARILY COMPROMISE DISPUTED CLAIMS AGAINST HIM ?

Standard of Review

The discretionary aspects of a District Court's rulings are reviewed for abuse of discretion. *E.g.*, *Commodity Credit*, 107 F.2d at 1001. Issues of authority, jurisdiction, and constitutionality are based on questions law and are subject to independent review, *de novo*. See e.g., *Castillo v. Cameron County, Texas*, 238 F.3d 339, 347 (5th Cir. 2001).

Subject Matter Jurisdiction

Lack of subject matter jurisdiction cannot be waived. *E.g.*, *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Subject matter jurisdiction arises out of the matter in controversy between the parties before the court. *Williamson v. Berry*, 49 U.S. 495, 536 (1850). Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *See, e. g., Marbury v. Madison*, 1

Cranch 137, 173-180 (1803). The claims of Baron's former attorneys are state law claims between non-diverse parties and invoke no federal question. *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010). Accordingly, the District Court was without subject matter jurisdiction over the claims, and was without power to order Baron to settle the claims.

Notably, a receivership cannot endow the District Court with any subject matter jurisdiction it did not already posses. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1028 (5th Cir. 1931) (seizure in receivership does not endow a court with subject matter jurisdiction over the property seized "[U]nless the subject-matter was by proper pleadings already before the court"). While Rule 66 permits the appointment of receivers under the Federal Rules, the rules do not extend the jurisdiction of the district court. Fed.R.Civ.P. 82.

Abuse of Discretion

As discussed in the Statement of Facts, above, the groundless nature of the 'claims' is clear from the evidence and documents in the record. A district court abuses its discretion if it relies on clearly erroneous factual findings. *E.g., In re Volkswagen of America, Inc.,* 545

F.3d 304, 310 (5th Cir. 2008). The District Court relied on no evidence nor basis in law to find Baron "could quite possibly be found liable to some of the claimants .. for punitive damages". SR. v7 p358. Accordingly, the District Court abused its discretion in making such a finding. Similarly, the District Court found that "if the Former Attorney Claims were to be litigated, Baron would likely lose at trial". However, no evidence was offered as to the likely outcome of any trial. Notably, the receiver's "report" as to the claims was one-sided and intentionally omitted all of the exculpatory evidence in Baron's favor. SR. v7 p202. Accordingly, the District Court abused its discretion in making its findings.

If District Court's adjudication of the "claims" were otherwise authorized by law and the Constitution, a Court's adjudication must be based on the legal rights of the parties, not upon what the outcome would "likely" be *if* the claims were tried. The District Court made no findings with respect to the underlying facts of any specific "claim". A court abuses its discretion where it misapplies the law. *E.g. McClure v. Ashcroft, 335 F.3d* 404, 408 (5th Cir. 2003). Accordingly, the District

Court abused its discretion in awarding claims based on what would 'likely' happen if the claims were tried.

The District Court similarly abused its discretion in failing to allow the period of time required by the local rules (21 days) for a response to the receiver's motion for relief granted by the District Court, and abused its discretion granting the receiver's motion only 7 days after it was filed, without notice of any shortened response period. SR. v7 p194 (filed 5/11/11); SR. v7 p349 (entered 5/18/11).

The District Court also abused its discretion in denying Baron the right to be represented by paid counsel, and refusing to consider Baron's affidavit evidence because Baron was unwilling to submit to cross-examination (at a prior hearing) without the representation of paid counsel. SR. v7 p366.

The Seventh Amendment

As a matter of fundamental law in the United States, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved". U.S. Const. amend. VII. The matter is one of well-established law. As the Supreme Court

held Court in *Scott v. Neely*, 140 U.S. 106, 109-110 (1891):

> "The Constitution, in its Seventh Amendment, declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." In the Federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the Federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact. In the case before us the debt due the complainants was in no respect different from any other debt upon contract; it was the subject of a legal action only, in which the defendants were entitled to a jury trial … a proceeding to set aside alleged fraudulent conveyances of the defendants, did not take that right from them, or in any respect impair it."

The "former attorney" alleged claims are clearly claims in contract. Accordingly, the District Court's order mandating Baron to compromise the disputed attorneys' claims is a direct violation of the Seventh Amendment. *See e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999)(court mandated settlement of claims violates the Seventh Amendment). As a fundamental restriction on a court's exercise of

power, "[T]he constitutional right to trial by jury cannot be evaded." *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945). The District Court's order entered 5/18/2011 (Doc 575) should accordingly be reversed. SR. v7 p349.

ISSUE 5: DID THE DISTRICT COURT ERR IN GRANTING RELIEF AGAINST BARON AND HIS PROPERTY HELD IN RECEIVERSHIP WHILE PROHIBITING BARON (1) FROM BEING REPRESENTED BY PAID COUNSEL, (2) FROM HIRING EXPERIENCED FEDERAL TRIAL COUNSEL, AND (3) FROM HIRING EXPERT WITNESSES TO TESTIFY AS TO THE NECESSITY AND REASONABLENESS OF THE FEES CLAIMED ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo. In Re Fredeman*, 843 F.2d at 824. The discretionary aspects of receivership fee allowances are reviewed for abuse of discretion. *Commodity Credit*, 107 F.2d at 1001.

Argument

Baron repeatedly moved to be allowed access to his own money in order to hire attorneys to represent him. E.g., R. 2720; SR. v2 p384-390 (Doc 264); SR. v5 p139 (Doc 445). However, the District Court did not allow Baron to hire counsel. E.g., Doc 316 (SR. v4 p119). The District Court went so far as to order that Baron's appellate counsel could not be paid during the pendency of the receivership and sealed Baron's motion to hire counsel so that it would not be viewed by the public. R. 4580-4581; SR. v7 p379.

This Honorable Court has held that a civil litigant has a constitutional right to retain hired counsel. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). Moreover, this Honorable Court has held that "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." Id. at 1118; *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981). An individual's relationship with his or her attorney "acts as a critical buffer between the individual and the power of the State." *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002). Further, the Supreme Court has held that a party must be afforded a fair opportunity to secure counsel "of his own choice" and that applies "in any case, civil or criminal" as a due process right "in the constitutional sense". *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932). That basic right was denied Baron by the District Court below.

As a fundamental cornerstone of Due Process, the Constitution guarantees every citizen the right to a meaningful opportunity to be heard in a meaningful manner. *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). As a matter of established law, this means **the**

right to be represented by paid legal counsel. *E.g.*, *Mosley*, 634 F. 2d at 946; *Powell*, 287 U.S. at 53; *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). In the proceedings below, Jeffrey Baron was denied this fundamental right. Accordingly the substantive orders[21] issued against Baron and his property while he was deprived of that basic constitutional right should be reversed.

[21] Doc 527 (SR. v6 p94), Doc 575 (SR. v7 p349), Doc 533 (SR. v6 p103), Doc 532 (SR. v6 p101), Doc 534 (SR. v6 p105), Doc 535 (SR. v6 p107), Doc 574 (SR. v7 p348), Doc 529 (SR. v6 p98), Doc 462 (SR. v5 p230), Doc 573 (SR. v7 p347), Doc 530 (SR. v6 p99), Doc 461 (SR. v5 p229), Doc 464 (SR. v5 p232), Doc 539 (SR. v6 p113), Doc 543 (SR. v6 p118), Doc 536 (SR. v6 p109), Doc 463 (SR. v5 p231), Doc 542 (SR. v6 p117), Doc 537 (SR. v6 p110), Doc 538 (SR. v6 p111), Doc 531 (SR. v6 p100), and Doc 540 (SR. v6 p114),

ISSUE 6: ONCE AN AFFIDAVIT IS FILED PURSUANT TO 28 U.S.C. §144, IS FURTHER ACTIVITY OF THE JUDGE CIRCUMSCRIBED TO MAKING A DETERMINATION AS TO THE LEGAL SUFFICIENCY OF THE FACTS STATED IN THE AFFIDAVIT ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo. In Re Fredeman*, 843 F.2d at 824.

Argument

This Honorable Court has held that "Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matters alleged". *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975). Baron filed his motion and affidavit under §144,[22] and pursuant to 28 U.S.C. §144 and the clear precedent of this Honorable Court, the District Court must pass on the legal sufficiency of the affidavit. *Id.* This Honorable Court has expressly held in *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir.

[22] Doc 497. The affidavit was sealed by the District Judge and Appellant's motion for access to the sealed portion of the record was denied by the motion panel on appeal. Accordingly, more specific citation to the record cannot be provided.

1975)(emphasis) that:

> "The threshold requirement under the §144 disqualification procedure is that a party file an affidavit demonstrating personal bias or prejudice on the part of the district judge against that party or in favor of an adverse party. **Once the affidavit is filed, further activity of the judge against whom it is filed is circumscribed except as allowed by the statute.** In terms of the statute, there are three issues to be determined: (1) was the affidavit timely filed; (2) was it accompanied by the necessary certificate of counsel of record; and (3) is the affidavit sufficient in statutory terms?"

However, the District Judge below: (1) refused to accept the factual allegations in Baron's §144 affidavit as true; (2) refused to pass on the legal sufficiency of facts stated in the Baron's §144 affidavit, and (3) continued his normal activity in the case. Because the District Judge's authority to act was circumscribed by law as discussed above, the District Judge lacked authority to issue subsequent orders, and those orders[23] should therefore be reversed.

[23] Doc 527 (SR. v6 p94), Doc 575 (SR. v7 p349), Doc 533 (SR. v6 p103), Doc 532 (SR. v6 p101), Doc 534 (SR. v6 p105), Doc 535 (SR. v6 p107), Doc 574 (SR. v7 p348), Doc 529 (SR. v6 p98), Doc 573 (SR. v7 p347), Doc 530 (SR. v6 p99), Doc 539 (SR. v6 p113), Doc 543 (SR. v6 p118), Doc 536 (SR. v6 p109), Doc 542 (SR. v6 p117), Doc 537 (SR. v6 p110), Doc 538 (SR. v6 p111), Doc 531 (SR. v6 p100), Doc 540 (SR. v6 p114),

ISSUE 7: WHERE THE SAME RECEIVER WAS APPOINTED OVER MULTIPLE RECEIVERSHIP PARTIES AND ESTATES, DID THE DISTRICT COURT ABUSE ITS DISCRETION IN AWARDING RECEIVERSHIP FEES AND EXPENSES (1) WITHOUT A SHOWING OR FINDING THAT THE FEES AND EXPENSES WERE REASONABLE OR NECESSARY; (2) WITHOUT REGARD TO WHICH OF MULTIPLE RECEIVERSHIP ESTATES THE FEES WERE ALLEGEDLY INCURRED; AND (3) WHERE THE RECEIVER WAS PROHIBITED BY LAW FROM BEING APPOINTED AS A RECEIVER ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo*. *In Re Fredeman*, 843 F.2d at 824. The discretionary aspects of receivership fee allowances are reviewed for abuse of discretion. *Commodity Credit Corporation v. Bell*, 107 F.2d 1001 (5th Cir. 1939).

Established Limitations on Receivership Fees

While a District Court enjoys great discretion in determining the compensation of a receiver, that discretion has clear bounds. As a preliminary matter, the receiver's compensation should correspond with the degree of responsibility and business ability required in the management of the affairs entrusted to him and the perplexity and

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Doc 551 (SR. v6 p125), Doc 541 (SR. v6 p116), Doc 544 (SR. v6 p119), and Doc 550 (SR. v6 p124)

difficulty involved in that management. *Stuart v. Boulware*, 133 U.S. 78, 82 (1890). A receiver looks for compensation to the receivership estate, which may belong, in equity, largely to others than those who have requested the receiver's services, and the receiver should have in mind the fact that the total aggregate of fees must bear some reasonable relation to the estate's value. *Cf. In re Imperial "400" National, Inc.*, 432 F.2d 232, 237 (3rd Cir. 1970); *Finn v. Childs Co.*, 181 F.2d 431, 436 (2nd Cir. 1950). Critically, compensation paid to a receiver from a receivership estate must be for actual services provided by the receiver to that estate. *E.g.*, *Commodity Credit Corporation v. Bell*, 107 F.2d 1001, 1001 (5th Cir. 1939). Where the same receiver is appointed over multiple receivership estates, the charge to each estate should be based on the work performed by the receiver for that particular estate. *Bank of Commerce & Trust Co. v. Hood*, 65 F.2d 281, 283-284 (5th Cir. 1933) (fees and expenses must be charged against each fund held by receiver as if separate receivers had been appointed for each and an "[A]ccurate inquiry ought to be made as to what time and services counsel and receiver gave to each fund, and what part of

their expenses were in fact necessary for each."); *and e.g., Butterwick v. Fitzpatrick*, 2008 Cal. App. LEXIS 1293 (4th Appellate Dist., 1st Div., February 15, 2008). The District Court considered none of these mandated factors, and therefore abused its discretion in granting the receivership fees.

No Evidence of Necessity or Reasonableness, and No Segregation of Fees across Multiple Receivership Estates

A series of orders challenged in this appeal[24] award fees to the receiver, his law partners, and 'professionals' employed by the receiver. With respect to the motions seeking such fees, there was no argument or evidence offered that the fees were reasonable or necessary. The fees moreover were billed for work on multiple receivership estates, for work involving multiple receivership parties and multiple receivership *res*; however, the fees were not segregated in any way and were charged apparently arbitrarily against any particular receivership party or

[24] Doc 533 (SR. v6 p103), Doc 532 (SR. v6 p101), Doc 534 (SR. v6 p105), Doc 535 (SR. v6 p107), Doc 574 (SR. v7 p348), Doc 529 (SR. v6 p98), Doc 462 (SR. v5 p230), Doc 573 (SR. v7 p347), Doc 530 (SR. v6 p99), Doc 461 (SR. v5 p229), Doc 464 (SR. v5 p232), Doc 539 (SR. v6 p113), Doc 543 (SR. v6 p118), Doc 536 (SR. v6 p109), Doc 463 (SR. v5 p231), Doc 542 (SR. v6 p117), Doc 537 (SR. v6 p110), Doc 538 (SR. v6 p111), Doc 531 (SR. v6 p100), and Doc 540 (SR. v6 p114).

estate. The District Court entered no findings of fact or law in support of its granting the motions for payment of the fees. Accordingly, the District Court abused its discretion in granting the fee awards.

Vogel Was Prohibited by Law from Being Appointed Receiver

Background

On July 9, 2009, the District Court employed Peter Vogel as a special master in this case. R. 394. While still in his role as special master in this case, Vogel consulted *ex parte* with Sherman (who then controlled the defendant Ondova) with respect to the motion to appoint himself (Vogel) as a private receiver over Mr. Baron's assets. SR. v5 p238. Vogel was also a special master in this case when he moved to add Novo Point, LLC., and Quantec, LLC., under his own receivership. R. 1717. A special master employed by the Court is an officer of the court. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Further, courts which have considered the issue have held that a special master is a judge sitting in the case in which he is employed. *E.g.*, *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998); *Vereen v. Everett, Dist. Court*, (ND Georgia 2009, No. 1:08-CV-1969-RWS).

28 U.S.C. §958 Prohibited Vogel's Appointment as Receiver

Congress mandated in 28 U.S.C. §958 that any person (1) holding any civil office or (2) employed by any judge of the United States, shall not be appointed a receiver in any case. Accordingly, pursuant to Federal law, Peter Vogel could not be appointed a receiver because he was employed by the District Judge as a special master at the time he was appointed receiver. A clear public policy purpose of the statute is to prevent conflict of interest. The possibility that a special master in a case would privately consult behind closed doors to have himself appointed as a private receiver over a party in the lawsuit where he presently sat as a judge, violates the most fundamental notations of an impartial judiciary. If the motive of personal profit is allowed to enter the side of the bench behind which judges and special masters sit, the very foundation of an independent, impartial judiciary is threatened. For these reasons, regardless of the character and intentions of those involved, the fees awarded to Peter Vogel and his law firm should be reversed. [25]

[25] Vogel's multiple conflicts of interest are not merely theoretical. For example, after his appointment as receiver, Vogel as receiver moved, without any explanation

ISSUE 8: CAN A RECEIVERSHIP BE USED AS A VEHICLE TO MAKE THIRD PARTIES LIABLE AS 'REVERSE ALTER-EGOS' OF A PARTY ?

Standard of Review

This Honorable Court has held that a district court's decision to grant appoint a receiver is subject to "close scrutiny" on appeal. *Tucker*, 214 F.2d at 631. Equity receivership has been recognized as an "extraordinary" remedy to be "employed with the utmost caution". *See e.g.*, *Solis v. Matheson*, 563 F.3d 425, 437 (9th Cir. 2009); *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993); *Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 326-27 (1st Cir. 1988). Issues based on questions law underlying a court's decision are subject to

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as to why payment should come from receivership funds, to be paid out of the receivership funds for his work as special master. SR. v4 p 541. Notably, Vogel was employed as special master in the case below, even though his law firm represented another plaintiff against the defendants below, Ondova and Baron, in another dispute that was still in litigation against the same defendants and involved one of the very same assets ("servers.com") involved in the case below. SR. v8 p424. The District Court took the unusual step, expressly prohibited by the Federal Rules, of appointing Vogel as special master without requiring Vogel to file a conflicts affidavit. Vogel's employment as special master in the case below was thus undertaken in clear violation of Federal Rule of Civil Procedure 53(b)(3), which strictly requires that a court may issue an order appointing a special master only after the master files an affidavit disclosing any ground for disqualification under 28 U.S.C. §455. (Vogel and Gardere's decade long history of conflicts involving Baron <u>predating</u> the lawsuit below is detailed in Document 00511400011 filed 3/2/2011 in Fifth Circuit case 10-11202).

independent review, *de novo*. *In re Fredeman*, 843 F.2d at 824.

Receivership May Not be Used to Determine an Alter Ego Claim

As discussed below, as matter of established law receivership may not be used to determine (or bypass the determination of) an alter ego claim. Moreover, as a matter of long settled law receivership "determines no substantive right; nor is it a step in the determination of such a right." *E.g., Pusey,* 261 U.S. at 497 (1923).

Bollore SA v. Import Warehouse, Inc.

The issue was presented to this Honorable Court in *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006). In *Bollore*, the district court entered an order appointing a receiver over an alleged 'alter ego' entity, and ordering turnover of property. *Id*. at 321. This Honorable Court vacated the receivership and ruled that turnover orders do "not allow for a determination of the substantive rights of involved parties" and may not be used "as a vehicle to adjudicate the substantive rights of non-judgment third parties". *Id*. at 323. This Honorable Court held that this rule ultimately springs from due process

concerns. *Id.* (such a remedy "completely bypasses our system of affording due process.").

As explained by this Honorable Court in *Bollore*, alter ego proceedings are substantive proceedings arising out of state law. *Id.* at 324. Pursuant to Texas law, a party must pursue their alter ego proceedings in a separate trial on the merits. *Id.* No such proceedings were plead against Novo Point or Quantec, and no such trial was ever held.

As in *Bollore*, because no independent trial was held against Novo Point or Quantec to establish an alter ego claim, the District Court's order that cash and assets from the receivership estates of Novo Point, LLC, and Quantec, LLC, can be used to pay alleged creditors of Jeffrey Baron should be vacated. *Id.* at 326.

If there had been a trial on Alter Ego, Novo Point and Quantec would have prevailed as a matter of law

If Novo Point and Quantec *had been* served with citation and appeared as parties in a lawsuit seeking to impute liability upon them under an alter ego or reverse piercing theory (neither of which has occurred), they would have prevailed at trial as a matter of law. The

first step to a claim for piercing the corporate veil (although notably, no such claim was plead or heard) is to determine which jurisdiction's law controls the issue. *E.g.*, *Sommers Drug Stores Co. Emp. P. Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989). Novo Point, LLC and Quantec, LLC are incorporated under the laws of the Cook Islands. The law of the Cook Islands therefore applies. *See e.g.*, *Alberto v. Diversified Group, Inc.*, 55 F.3d 201, 203 (5th Cir. 1995); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Pursuant to Cook Islands law, there is no basis to impose reverse alter-ego liability. Art. 45, Cook Islands Limited Liability Companies Act (2008).[26]

Accordingly, because receivership cannot be used to determine (or bypass the determination) of an alter ego claim, and the companies have not been determined in any trial to be alter-egos of Jeffrey Baron, the District Court's order allowing application of the companies assets to the alleged debts of Baron should be reversed.

[26] The same result would be reached in applying Texas corporate law. As explained by the Fifth Circuit in *Bollore*, "Texas courts will not apply the alter ego doctrine to directly or reversely pierce the corporate veil unless one of the 'alter egos' owns stock in the other." *Id.* at 325. Since Jeff Baron owns no stock in either Novo Point, LLC, nor Quantec, LLC, alter-ego liability would not apply.

Novo Point and Quantec Are Not Parties to the Lawsuit

Novo Point and Quantec are not parties to the lawsuit below. As Justice Hand explained nearly a century ago, "[N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law …. its jurisdiction is limited to those who therefore can have their day in court". *Alemite Mfg. Corporation v. Staff*, 42 F.2d 832 (2nd Cir.1930).

Materially Missing Steps with Respect to the LLCs

The District Court has erroneously attempted to convert the unliquidated *in personam* claims against Baron into *in rem* claims against the LLC entities. The District Court erred in skipping two fundamental steps: First, the claims need to be liquidated and converted to judgments against Baron. Pursuant to the Constitution of the United States and the Fifth and Seventh Amendments, converting the claims to judgment requires jury trials since the claims are claims at law exceeding twenty dollars. Secondly, if claims are adjudicated and converted into judgments against Baron, liability against Baron still has to be converted into liability of the LLC entities. That requires

a separate determination as to whether the LLC entities are liable under the law for Baron's debts. *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317, 323 (5th Cir. 2006). As discussed above, as a matter of established law, the LLC entities are not liable for Baron's personal debt. However, **instead of taking the path of due process, the District Court skipped both of two critical steps** discussed above, and used instead an ad hoc 'shortcut'. The District Court's order authorizing application of the LLC entities' assets for the payment of the claims against Baron should therefore be reversed. SR. v7 p349 (Doc 575).

ISSUE 9: DID THE US DISTRICT COURT IN THE NORTHERN DISTRICT OF TEXAS HAVE JURISDICTIONAL AUTHORITY TO APPOINT THE MANAGER OF A LLC IN THE COOK ISLANDS ?

Standard of Review

Issues based on questions law are subject to independent review, *de novo*. *In Re Fredeman*, 843 F.2d at 824.

Argument

Novo Point, LLC and Quantec, LLC, exist as legal entities pursuant to laws of the sovereign government of the Cook Islands, a member of the British Commonwealth. R. 850, 2110. The two companies are owned by a Cook Islands trustee, SouthPac Trust International, Inc. ("SouthPac"). R 4681. SouthPac is an internationally recognized and well respected trustee, recognized as a proper and lawful litigant by the Federal Circuit Court of Appeal and multiple US Federal Courts. *E.g., Prima Tek II LLC v. Polypap, SaRL*, 318 F. 3d 1143 (Fed. Cir. 2003). SouthPac, however, is not a party to the lawsuit below and has not been served with any process in the proceedings below. Accordingly, the District Court did not acquire personal

jurisdiction over SouthPac. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied"); *St. Clair v. Cox*, 106 U.S. 350, 353 (1882) ("The courts … must have acquired jurisdiction over the party … whether the party be a corporation or a natural person.").

While a US district court has jurisdiction to place into receivership the assets of a foreign company that are located within the district in which the Court sits, the Supreme Court has held that a district court does not have power to directly affect property located in foreign jurisdictions. *E.g., Booth v. Clark*, 58 U.S. 322, 333 (1855); *Guaranty Trust Co. of New York v. Fentress*, 61 F. 2d 329, 332 (7th Cir.1932). Similarly, the Supreme Court has held that the sovereign where the company is chartered has "jurisdiction of all questions relating to the internal management of the corporation." *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 671 (1915).

Pursuant to the law of the Cook Islands, the sovereign pursuant to whose laws Novo Point, L.L.C., and Quantec, L.L.C. are chartered, the

membership rights of the owners of the companies may not be executed upon by judicial process or otherwise controlled by any court other than the courts of the Cook Islands. Art. 45, Cook Islands Limited Liability Companies Act (2008). A treaty between the United States and the Cook Islands obligates the United States to recognize Cook Islands' sovereignty.[27] Accordingly, while the District Court below may have jurisdiction to seize the property of Novo Point, LLC and Quantec, LLC that is located within the Northern District of Texas, the District Court has no authority to change or appoint the Cook Islands' manager of the companies, an act by virtue of Cook Islands' law that can be performed only by the courts of the Cook Islands and the owners of the LLCs. Art. 26, Cook Islands Limited Liability Companies Act (2008). The District Court thus lacked authority and jurisdiction to change the companies' international management, and the order of the District Court attempting to do so should be reversed. SR. v4 p777 (Doc 362).

[27] Paragraph Five of the "Treaty on Friendship and Delimitation of the Maritime Boundary Between the United States of America and the Cook Islands", signed at Rarotonga on 11 June 1980, and ratified by the US Senate June 21, 1983.

PRAYER

Appellants, jointly and in the alternative requests the following relief:

(1) That the challenged orders be reversed.

(2) That the challenged orders be found to be void *ab initio*.

(3) That costs be taxed against the Appellees.

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 APPELLANTS

NOVO POINT, LLC.,
QUANTEC, LLC., and
JEFFREY BARON

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 12,836 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 MS Word 2000 in 14 and 15 point century font.

DATED: October 6, 2011.

CERTIFIED BY: /s/ Gary N. Schepps
GARY N. SCHEPPS
COUNSEL FOR APPELLANT

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 APPELLANTS