

Case No. 10-11202

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Netsphere, Inc. et. al.,

Plaintiffs

v.

Jeffrey Baron,

Defendant / Appellant

Daniel J. Sherman
(Ondova Limited Company)

Defendant / Appellee

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

**MOTION TO RECONSIDER STAY OF
DISTRICT COURT ORDER APPOINTING RECEIVER OVER THE
PERSON AND PROPERTY OF JEFF BARON**

Respectfully submitted,

/s/ Gary N. Schepps

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FOR 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. Appellant/Defendant:** JEFFREY BARON
- b. Appellee/Defendant:** DANIEL J. SHERMAN, Trustee
for ONDOVA LIMITED COMPANY
- c. Intervenor:** Rasansky, Jeffrey H. and Charla G. Aldous
- d. Intervenor:** VeriSign, Inc.
- e. Plaintiffs:** (1) Netsphere Inc
(2) Manila Industries Inc
(3) Munish Krishan

2. ATTORNEYS

- a. For Appellant: Gary N. Schepps
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(2) Robert W. Mallard, Esq.

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- d. 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 trusts purportedly seized by the ex-parte 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 Islands limited liability company
- (24) Blue Horizon Limited Liability Company
- (25) Simple Solutions, LLC
- (26) Asiatrust Limited
- (27) Southpac Trust Limited
- (28) Stowe Protectors, Ltd.
- (29) Royal Gable 3129 Trust

b. Receiver, Mediator, Special Master: Peter Vogel

c. Counsel for Receiver: Gardere Wynne Sewell LLP

- (1) Peter Vogel
- (2) Barry Golden
- (3) Peter L. Loh

c. Non-parties asking the receiver to give them Jeff Baron's money in the 'alternative court system' set up below:

- 1. Garrey, Robert (Robert J. Garrey, P.C.)**
- 2. Pronske, Gerrit (Pronske & Patel)**
- 3. Rasansky, Jeffrey H. and Charla G. Aldous**
- 4. Taylor, Mark (Powers Taylor)**
- 5. Coale, David (Carrington Coleman)**
- 6. Bickel, John**
- 7. Friedman, Larry (Friedman & Feiger)**
- 8. Nelson, Michael**
- 9. Broome, Stanley (Broome Law Firm)**

- 10. Randy Schaffer**
- 11. Vitullo, Anthony “Louie”**
- 12. Ferguson, Dean**
- 13. Pacione, David L.**
- 14. Motley, Christy (Nace & Motley)**
- 15. Shaver, Steven R. (Shaver & Ash)**
- 16. Hall, Jeffrey**
- 17. Jones, Steven**
- 18. Lyon, Gary**

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

I. TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS 2

I. TABLE OF CONTENTS 6

II. SUMMARY 7

III. FACTS 8

 The Changing Justifications to appoint Peter Vogel as a receiver 8

 Peter Vogel’s prior involvement with Jeff Baron 11

 Without Fear of Retribution 12

 The District Court Proceedings 13

 Proceedings Wholly Outside the Lawsuit, Outside the Law 14

 Fourth Amendment Protections 15

 A Painted Frame 16

 An Annoyance 16

 Irreparable Injury 18

IV. CONCLUSION 19

V. PRAYER..... 19

VI. TABLE OF AUTHORITIES 20

CERTIFICATE OF SERVICE 21

CERTIFICATE OF CONFERENCE..... 21

TO THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW JEFF BARON, Appellant, and respectfully moves for panel reconsideration to stay the district court's order appointing a receiver over the person and property of Mr. Baron.

II. SUMMARY

The legal issues involved in this appeal relate the requirements of due process, and the scope of a district court's inherent power. As a rule, appointments of receivers by the federal courts have been subject to close scrutiny. *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954).

In the typical receivership, the actors will be independent— a disinterested third party, not otherwise employed by the judge, acts as receiver. Here, that is not the case. As outlined below, there is sufficient concern for an inappropriate relationship between receiver and 'receivership party' that issues of an appearance of impropriety may be raised. In such a case, a higher level of scrutiny may be appropriate.

The case presents fundamentally important issues as to the relationship between the Fifth Circuit Court of Appeals and the citizens of the Fifth Circuit. Is a function of the Court to supervise the district courts, and to step in where a federal judge exceeds the judge's authority and seizes control over a litigant and *all* the litigant's assets and immediately begins liquidating and distributing a citizen's assets to colleagues of the judge ?

As discussed below, the district court proceedings below call for a heightened level of scrutiny. No complaint of improper motive or judicial misconduct is directed at the trial court.

III. FACTS

The Changing Justifications to appoint Peter Vogel as a receiver

Attorney **Peter Vogel** is a colleague of the district judge and the two blog together on Karl Bayer's blog site.¹ (Ex. A).

As early as July 1, 2009 the district court discussed putting a receiver over Jeff Baron's company, with the original justification that Jeff stated he did not have personal knowledge of facts regarding some of the 200,000+ assets of the company. (Ex. B).

No motion for receivership was filed at that time, so on July 9, 2009 the district court employed **Peter Vogel** as a special master in the case. (Ex. C).

Then, on September 10, 2009, the district court, once again, sought to appoint a receiver (specifically, **Peter Vogel**) over Jeff Baron's company's assets. This time, the judge offered a new justification. The new justification was that non-parties might have a beneficial interest in the assets which the court, out of caution, wanted to protect. (Ex. D).

Then, the district court offered a yet another new justification to appoint **Peter Vogel** as a receiver over Jeff Baron's assets. The new justification was to allow **Peter Vogel** to investigate. (Ex. E.).

No motion for receivership was filed at that time, but on October 13, 2010, after ex-parte conferences with the district judge (Ex. F), the bankruptcy court filed a report recommending that **Peter Vogel** be appointed mediator to resolve disputed attorney's fees claims with regard to some of Jeff's former attorneys. (Ex. G).

¹ Jeffrey Baron and the lawsuit below is also a topic of that blog site.

The lawsuit before the district court fully and finally settled in July, 2010. No active claims were thereafter pending before the court. Still, on October 19, 2010, the district court ordered that **Peter Vogel** would be paid as a mediator between Jeff Baron and non-party attorneys. (Ex. H).

There is no explanation why **Peter Vogel** would be an appropriate mediator with respect to the disputed attorneys fees claims—they have no connection with the discovery issues **Peter Vogel** presided over as special master. While that mediation was proceeding, **Peter Vogel** was still employed by the district judge as a special master.

Then, on November 24, 2010 (the day that attorney's statements regarding their fee disputes were ordered to be provided to **Peter Vogel**, the mediator) (Ex. H2), the district judge, ex-parte, placed Jeff Baron's assets in the hands of **Peter Vogel**.

However pure the intention of the actors, where an injunction and receivership are issued to seize a citizen's property—without hearing, without notice, without supporting oath, and without setting any hearing date, even the appearance of impropriety must be avoided to protect the integrity of the court system.

It is clear from the record that the district judge had it in his mind since 2009 to put Mr. Baron's property into the hands of **Peter Vogel**. Literally, over and over, different justifications for doing that were floated. The case settled in July 2010.

The Appellee then came and offered some 'grounds': To stop Jeff Baron from hiring lawyers, because the mediation had failed. With haste, the district judge signed an ex-parte order, stripping Jeff Baron of his property.

Since the mediation had not yet even started, and no impasse was declared, the justification that ‘the mediation failed’ makes no sense.² The mediation, moreover, was for state-law attorneys fees claims over which the district court had no subject matter jurisdiction. Notably, post-appeal, new justifications for the receivership (not appearing as grounds in any motion) have now been offered by the district court: that Jeff defrauds lawyers, that Jeff is in contempt of court (no show cause order ever issued, no contempt hearing was ever held), that the global settlement is in danger (what term of the agreement was breached, or how the district court has subject matter jurisdiction, or why a party’s right to trial would be waived if breach were alleged is not explained), that Jeff is vexatious (but has never been sanctioned by any court), etc.

Notably, Peter Vogel, at this minute, is marching forward, billing daily in a billing frenzy, at a rate of almost \$10,000.00 per day. He and his firm have been doing so for more than 90 days. The income to **Peter Vogel** and his law firm is staggering.

The district court appointed **Peter Vogel** as receiver, even though the law prohibited his appointment— 28 U.S.C. 958 mandates that a person employed by any judge of the United States may not at the same time be appointed a receiver.

As explained below, when it comes to Jeff Baron, **Peter Vogel** and his law firm Gardere, are not “an indifferent person” required of a receiver pursuant to established law. *E.g., Atlantic Trust Co. v. Chapman*, 208 US 360, 370 (1908).

² If the sincere desire was to help resolve the fee disputes, why not allow the mediation process to proceed ? The mediation was just about to *start*. Mediation summaries of the issues were only due to the mediator on November 24, 2010. Notably, one attorney, Pronske made an arrangement in the bankruptcy court, and an agreed order to mediate his matter was signed— just a couple days before. Clearly, the receivership cut off the pending mediations. Why ?

Peter Vogel's prior involvement with Jeff Baron

Before **Peter Vogel** was the special master, mediator, and receiver in the lawsuit below, he and his law firm had a long history of involvement with Jeff Baron. **Peter Vogel** and his law firm were adverse to Jeff Baron— literally specialists in suing him (and Ondova). They apparently developed this specialty in violation of their ethical duties – after acquiring attorney-client confidential material Jeff Baron disclosed to **Peter Vogel** in 2001.

In 2001, Jeff Baron consulted with **Peter Vogel** with respect to defending Jeff in litigation regarding the company, Ondova. At the time, Jeff disclosed material that was *expressly* confidential and revealed the way domain names were acquired— with a view to Vogel defending a lawsuit pending at the time with respect to a disputed domain name. (Ex. I).

In 2003, Jeff shared more confidential information with Dawn Estes, a colleague of Vogel's at their firm Gardere, again in confidence, and again with a view to Ms. Estes representing Jeff. Once again, material which as expressly confidential was disclosed.

Then, in 2004 Jeff Baron found himself being sued by Gardere on exactly the same type of claim with regard to which he had disclosed to **Peter Vogel** his confidential information— a domain name dispute. Gardere was adverse, representing Jeff's opponent. (*Emke v. Compana*).

In 2005 this happened again, with Gardere suing Jeff over the same type of claim. (*Rolfing Sports*, Ex. I).

In 2006, this happened yet again. (*FabJob, Inc*). Once again, Gardere was suing on the same type of claim. Gardere had become a specialist in suing Jeff or his company for domain registration violations.

Today, **Peter Vogel** and the Appellee have been actively soliciting claims that raise great concerns. For example, the Appellee has worked extensively to “advise” an individual, Joey Dauben, to submit a ‘claim’ against Jeff for the receiver to pay. That attempt is extremely alarming, as follows:

Joey Dauben has not previously raised a claim against Jeff Baron. The solicitation of the Dauben claim at first seems to make no sense. Upon further inquiry, it turns out that a judgment was taken against Mr. Dauben’s company in 2009-2010, and about a million dollars is due on the judgment. If Mr. Dauben received money from the receiver, that could pay off the judgment. That judgment was taken by, and money from the judgment’s recovery is due to be paid to— **Peter Vogel’s** law firm.

Without Fear of Retribution

Appellate Counsel should be able to raise the facts of the case to the attention of the Court of Appeals and should never be forcibly placed in a position of fearing retributory sanctions and charges of contempt in a trial court, as has occurred in this case. The receiver has repeatedly threatened counsel with sanctions and contempt motions. Even if an attorney entirely misunderstood a court’s motives— to allow a district court to place appellate counsel in such a position chills an appellant’s representation. For this reason, a district judge should never be allowed to forcibly order appellate counsel to appear before him.

The District Court Proceedings

It is unclear whether it has to do with Jeff Baron personally, or the district judge's standard judicial temperament, but it is very stressful appearing in the district judge's court. Perhaps the district court has just been misunderstood, but from the perspective of the other side of the bench, the resulting environment is hostile and threatening. This issue pre-dates appellate counsel's involvement in the case. Some examples:

THE COURT: You realize that order is an order of the Court. So any failure to comply with that order is contempt, punishable by lots of dollars, punishable by possible jail, death.

MR. BELL: And death
(6/19/09 p 44)

THE COURT: They do and I have jurisdiction, too. So I'll tell you what.... You want to challenge the court order, I have the marshals behind me. I can come to your house, pick you up, put you in jail. I can seize your property, do anything I need to do to enforce my orders. I'm telling you don't screw with me. You are a fool, a fool, a fool, a fool to screw with a federal judge, and if you don't understand that, I can make you understand it. I have the force of the Navy, Army, Marines and Navy behind me.

(6/19/09 p 49)

[THE COURT:] We do have marshals that walk around here and people that can take control if a judge is unable to convince people of the judge's jurisdiction.

(2/10/11 p 22)

[THE COURT:] You look to me like you haven't gone to law school.

(2/10/11 p 9 – to appellate counsel)

The issue of the atmosphere of threats and hostility is not a complaint about the district judge. Every person has their own personality, and the district judge has clearly been personally offended by Jeff, and apparently by counsel. This may be because, as a result of his own personality style, Jeff's testimony is naturally narrow, and technical. The Court's language is broad. Review of the transcripts shows two men entirely speaking past each other.

A district judge is human, and no person can be blamed when on an internal emotional level they have an angry reaction to someone else, especially if they feel they are being disrespected. The District Judge has stated on many occasions he believes Jeff is contemptuous towards him. It appears the district judge also believes the same of counsel:

“THE COURT: Being a wise ass is not productive.”

(2/10/11 p 20-21 – to appellate counsel).

Proceedings Wholly Outside the Lawsuit, Outside the Law

There are no claims still pending in the district court. The case fully and finally settled. What is the purpose of the ongoing search for the assets of Jeffrey Baron ?

The district court's post-appeal justifications for the receivership make clear that the seizure of Jeff Baron's assets was not issued on behalf of any private party's interest in Jeff's property– the seizure was an act of the sovereign, seizing the property of a citizen for redistribution by the district court.

The district court is using a receivership remedy as a quasi-bankruptcy proceeding outside of the bankruptcy laws. Congress has legislated a clear set of laws for determining the rights and the procedures for assessing and paying claims against an individual in bankruptcy. There is a formal claims process, and established rules of priority, etc.

This is not a bankruptcy. **The district court is using the receivership to take— by the force of the writ of the district court— money from Jeff Baron to pay Peter Vogel, and if money is left, to pay contested unadjudicated ‘claims’ not pled before the district court.**

In the proceedings actively underway in the district court, the most basic and fundamental procedural protection of freedoms are being disregarded.

Fourth Amendment Protections

The Fourth Amendment insures that we will be secure in our persons and property and that no warrant shall issue for seizing property that is not supported by oath or affirmation setting out the cause for the seizure. We should not lose that right by walking into a federal courtroom.

Here, a receiver with a long entangled personal history with Jeff Baron was appointed to seize Jeff's property and privacy, without any due process of law, and without any supporting oath setting out the cause for such seizure. *See generally Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009).

A Painted Frame

Appellee has painted a frame around Jeff to look like a serial lawyer contract breaker—but that should not impact this panel’s decision.

Jeff has been under an incredible amount of stress from the litigations, and has certainly used more attorneys than a client would in different circumstances. In light of the size of the assets involved, and multiple litigations the number of attorneys was less than other’s similar litigations. Notably, Jeff has almost always been defending, not instigating suits. Jeff has also always prevailed at trial. Jeff has followed the rules, and has not lost a trial. The rejection of the plaintiff’s legal filings was affirmed on appeal by the Ninth Circuit.

An Annoyance

Clearly, the bankruptcy court was frustrated with Jeff Baron. Justifiably, or not, the court was frustrated. The bankruptcy judge wrote a report threatening Jeff that if he decided not to fulfill his settlement obligations the court would recommend a receiver be appointed over him. (Of course, if someone alleges a breach of contract, the defendant is entitled to a trial, not summary receivership). However, the issue is moot– Jeff complied with the settlement agreement).

Appellee knew that contemplation of receivership was 'in the air'. The district judge had at least three times said he wanted to appoint **Peter Vogel** as a receiver in the case, each time with a new justification. Clearly the district judge had it in his mind to place Jeff Baron’s assets in **Peter Vogel**’s hands.

The bankruptcy court had threatened *receivership* to carry out Jeff's settlement obligations if: (1) Jeff fired his attorneys **and** (2) failed to comply with the global settlement agreement.

Appellee used that threat. Appellee, however, represented in their motion for a receiver that there was a recommendation to appoint a receiver solely if Jeff fired any lawyer.

The bankruptcy court's actual recommendation is Exhibit J. The text is plain. The page from Appellee's motion for receivership is Exhibit K. The text is plain— and materially different from the actual recommendation.

Cloaked under the garments of respect of a “Chapter 11 Trustee”, Mr. Urbanik represented to the district court that the bankruptcy judge recommended a receiver be placed over Jeff Baron if he fired any lawyers. And here, Mr. Urbanik averred, Jeff thumbs his nose at everyone— he fired lawyers— put him into emergency receivership, the bankruptcy judge recommended it! Exhibit K.

However, the bankruptcy judge did not recommend it, and most likely would never recommend such a thing. Congress has expressly legislated the right of every individual in the federal court system the legal right to conduct their own cases personally. *28 U.S.C. § 1654.*

But the district judge did it. The district judge— already having it in his mind to place Jeff Baron's assets in **Peter Vogel's** hands— trusted the Appellee's representations.

No questions asked, no notice, no hearing held— Jeff Baron and all his assets (exempt and non-exempt) into a receivership. The receiver's first act— to withdraw Jeff Baron's objection to the Appellee's massive attorney's fee application in the bankruptcy court.

Irreparable Injury

Who will pay the damages if the actions against Jeff Baron are found to be taken wrongfully and the actors claim judicial immunity ?

In such a case, the damages are irreparable.

The injury of being deprived of one's assets, being unable to enter any business transactions, of suffering the indignity of being a ward of the district judge who literally decides, at his discretion, how much Jeff Baron's monthly budget must be, how much Mr. Baron can spend on a car, etc. The receivership has dragged on for more than three months. **About half of Jeff Baron's non-exempt assets have been taken and redistributed to Peter Vogel and his law firm.** No claim is pending against Jeff Baron in the district court. Intervention by this Court is necessary.

Jeff can neither earn nor accumulate any income—all his assets and income now belong to the district court through its receiver. As matter of law Jeff Baron is suffering irreparable injury.

IV. CONCLUSION

If the Justices of this Court will not intervene to protect a citizen of this circuit, with whom a district judge has become so embroiled as to order the **ex-parte seizure** of the party and all of his property – who will ?

Calming intervention is desperately requested from this Court. Freezing the proceedings below to allow this Court to decide on the legality of the receivership protects all interests. Allow Jeff Baron to go to sleep at night without having to worry that tomorrow his retirement accounts (exempted from execution by Texas law) will be liquidated. No trial has been held, and no judgment has been taken against Jeff Baron.

V. PRAYER

Wherefore, Jeff Baron prays that this Court grant this motion, if possible within the next 10 days, and reconsider Jeff Baron's application for a stay pending appeal, and to stay or partially stay the order and jointly and in the alternative to grant such relief as this Honorable Court finds just.

/s/ Gary N. Schepps

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VI. TABLE OF AUTHORITIES

FEDERAL CASES

Atlantic Trust Co. v. Chapman, 208 US 360, 370 (1908)10

Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009)15

Tucker v. Baker, 214 F.2d 627, 631 (5th Cir. 1954)..... 7

FEDERAL STATUTES

28 U.S.C. § 1654.....17

28 U.S.C. §1292(a)(2) 7

28 U.S.C. 95810

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 and by e-mail to:

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CERTIFIED BY: /s/ Gary N. Schepps
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CERTIFICATE OF CONFERENCE

Counsel for Appellee stated they intended to file an opposition.

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