No. **13-10696**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NETSPHERE, INCORPORATED; ET AL,
Plaintiffs,

vs.

JEFFREY BARON,
Defendant–Appellant,

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

vs.

PETER S. VOGEL,
Appellee,

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

APPELLANTS, NOVO POINT LLC'S AND QUANTEC LLC'S, OPENNING BRIEF

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Appellee,

CERTIFICATE OF INTERESTED PERSONS

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

Appellants:	***Represented by:***
• Jeffrey Baron	Leonard H. Simon William P. Haddock Pendergraft & Simon, LLP 2777 Allen Parkway, Suite 800 Houston, TX 77019 Tel. 713-528-8555 Fax. 713-868-1267
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• Quantec, LLC	Paul Raynor Keating 173 Balmes 2/2 08006 Barcelona Spain Tel. (415) 937.0836 Fax. (415) 358.4450
Appellee:	***Represented by:***
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Other Interested Parties:	***Represented by:***
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• Gardere Wynne Sewell LLP	Barry M Golden Gardere Wynne Sewell LLP Thanksgiving Tower 1601 Elm St Suite 3000 Dallas, TX 75201-4761 Tel. 214-999-3000 Fax. 214-999-3422 (fax)
• Dykema Gossett PLLC	David J. Schenck Dykema Gossett PLLC 1717 Main Street, Ste. 4000 Dallas, Texas 75201 Tel. 214-462-6455 Fax. 214-462-6401
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• Gerrit M. Pronske, et al. (the "Petitioning Creditors")	Gerrit M. Pronske Melanie P. Goolsby Pronske, Goolsby & Kathman, PC 2200 Ross Avenue, Suite 5350 Dallas, Texas 75201 Tel. 214- 658-6500 Fax. 214- 658-6509
• Netsphere, Inc., et al.	John W MacPete P.O. Box 224726 Dallas, TX 75222 Tel. 214/564-5205

/s/ Paul Raynor Keating
Paul Raynor Keating

STATEMENT REGARDING ORAL ARGUMENT

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

a. This appeal is not frivolous;

b. Some of the dispositive issues raised in this appeal, in particular the unique issues of: (1) whether Receivership fees and expenses can be charged against parties and assets that were not within the jurisdiction of the trial court – namely Novo Point and Quantec and who were not found to be culpable of any complained of conduct or the alter ego of Baron; and (2) the related due process issues, have not been authoritatively decided within this Circuit; and

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

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TO THE HONORABLE JUDGES OF SAID COURT:

Appellants Novo Point LLC ("Novo Point") and Quantec LLC ("Quantec") respectfully represent:

STATEMENT OF JURISDICTION

This is an appeal of a final *Order on Receivership Professional Fees dated May 29, 2013*, awarding fees to Receiver, Peter S. Vogel, Receiver's counsel, Dykema Gosset, PLLC and others and setting forth the priority of payment. This Court has jurisdiction under 28 U.S.C. § 1291.

This order was entered May 29, 2013, Notice of Appeal was timely filed on June 28, 2013.[1] *See* Fed. R. App. P. 4.

[1] The Notice of Appeal also seeks review of an associated *Order Granting Receiver's Fee Application Regarding Certain Miscellaneous Receivership Professionals*, signed May 23, 2013. (ROA.28113–114). As to this order, the Notice of Appeal was not timely. *See* Fed. R. App. P. 4. Therefore, Appellants herein abandon the appeal as to such *Order*.

ISSUES PRESENTED

1. Whether it was legal error to charge the estates of Novo Point and Quantec[2] with any amount of Receivers' fees and expenses, particularly those related to other estates within the Receivership without findings of alter ego or direct culpability.

2. Whether the District Court abused its discretion in entering the Fee Order in the amounts set forth therein and not allocating same to specific estates within the Receivership.

3. Whether the District Court abused its discretion and violated appellants' rights by excluding it from the Fee Application process and proceeding on an accelerated basis and denying funds with which to pay counsel and experts and by denying discovery.

[2] Novo Point and Quantec are hereinafter sometimes jointly referred to as the "LLCs".

STATEMENT OF THE CASE

On May 28, 2009, Netsphere, Inc. and others, filed a lawsuit against Jeffrey Baron and Ondova Limited Company ("*Ondova*") in the United States United States District Court for the Northern District of Texas, Dallas Division, Cause No. 3:09-CV-988 ("*Netsphere DC Case*"). (ROA.135–148). On July 24, 2009, Ondova filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code ("Ondova Bankruptcy"); Daniel J. Sherman was appointed as Trustee for Ondova. (ROA.642). At all times, Ondova's bankruptcy case was pending in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

Neither Novo Point nor Quantec was named as a party in the *Netsphere DC Case*. The complaint contains no allegations as against them. Neither Novo Point nor Quantec were named parties to the Ondova Bankruptcy.

The Netsphere DC case settled, assets were transferred and stipulated dismissal documents were fully executed by all parties including the bankruptcy trustee, Sherman at the end of July 2010, after the protracted settlement negotiations spanning six months. (ROA.1803-1812; 1691-1840 – entire Global Settlement Agreement; and 34789 – "The current status is that

parties are all complying with settlement agreement provisions in terms of payments and other activities, so there has been no problem").

A. The district court appoints a Receiver due to unresolved claims

Despite the settlement, on November 24, 2010, Ondova's Trustee filed an Emergency Motion for Appointment of a Receiver Over Baron. (ROA.1032–60). On the same date, the district court, in the *Netsphere DC Case*, entered an order ("*Receivership Order*") establishing an equity receivership over Baron's assets, and appointed Peter S. Vogel as the receiver ("*Receiver*"). (ROA.1135–48).

Pursuant to the Receivership Order, and the court's subsequent clarification orders, the Receiver, took possession and control over all of Baron's assets, including creditor-exempt assets ("*Baron Personal Assets*").

The asserted purpose of the Receivership was to stop Baron from hiring and firing attorneys and delaying the resolution of the *Netsphere DC Case* and secure funds to pay non-judgment claims of unspecified attorneys. (ROA.4762). It quickly broadened to become a means of resolving liquidity issues in the Ondova Bankruptcy[3] and the payment of the non-judgment

[3] Via payment of Trustee fees using funds from Novo Point and Quantec.

claims of the Petitioning Creditors they asserted against Baron.

B. The court authorizes the Receiver to take control of Novo Point, LLC and Quantec, LLC without a finding of alter ego.

Pursuant to an *Order Granting the Receiver's Motion to Clarify the Receiver Order With Respect to Novo Point, LLC and Quantec, LLC*, (ROA.3391–98) the Receiver took possession and control of Novo Point and Quantec, whose assets consisted almost entirely of cash and Internet Domain Names ("Domains") which generated substantial revenues ("LLC Assets"). (see e.g. ROA.4749).

During the hearing on December 17, 2010, which led to the inclusion of the LLCs, moving counsel admitted there was no motion asserting that the LLCs were alter egos of Baron but that the reason for inclusion was liquidity. (ROA.4758). The Court disclosed its goal to use the assets of Novo Point and Quantec to pay the debts of Baron. (ROA.4762).

Novo Point and Quantec are LLCs formed, and in good standing, under the laws of the Cook Islands[4] and owned entirely by, and form the

[4] There is no evidence to the contrary in the ROA.

principal assets of, The Village Trust[5], a trust created and existing under the Cook Islands. As the principal beneficiary of the Village Trust, the value of Novo Point, LLC and Quantec, LLC are of substantial import to Baron, forming the corpus from which he may benefit as a beneficiary.[6]

C. The appeal of the Receivership Order and the *Netsphere I* opinion directing the district court to review all prior receivership fees and expenses and apply a "meaningfully discount"

Twelve appeals to this Court were taken regarding the Receivership Order and related orders that were entered in the *Netsphere DC Case*.[7] These and other matters were resolved December 18, 2012, when this Court released its opinion in *Netsphere, Inc. v. Baron*. 703 F.3d 296 (5th Cir. 2012) ("*Netsphere I*").

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[5] See e.g. ROA.4758.

[6] The Trust, not Baron, owns and directs the LLCs. The statement in *Netsphere I* that they were "owned or controlled by Baron" is not a finding of alter ego.

[7] Eleven appeals were taken, and were consolidated into Appellate Case No. 10-11202. The Appellate Cases consolidated into Case No. 10-11202 were Appellate Case Nos. 11-10113, 11-10289, 11-10290, 11-10390, 11-10501, 12-10003, 12-10444, 12-10489, 12-10657, 12-10804, and 12-11082.

Concerning the Receivership Order, this Court held that the Reciver's appointment was improper and an abuse of discretion. *Id*. at 302, 310-11, 315. As to the LLCs this Court specifically found subject matter jurisdiction lacking. As this Court explained: "A court lacks jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy." *Id.* at 310. This Court then held:

> "The receivership also included business entities owned or controlled by Baron, including Novo Point, LLC and Quantec, LLC. Although Novo Point and Quantec were listed as parties on the global settlement agreement, they were never named parties in the Netsphere lawsuit or the Ondova bankruptcy. We conclude the district court could not impose a receivership over Baron's personal property and the assets held by Novo Point and Quantec."
>
> *Id.*

Following its conclusion that the imposition of the receivership was an abuse of discretion, this Court instructed the district court in unmistakably clear and unambiguous language to *reconsider and meaningfully discount* all fees and expenses previously paid by the Receiver. *Id.* at 313.

D. The involuntary bankruptcy filing

From the day the Receivership's initiation on November 20, 2010, until this Court reversed and vacated the Receivership Order on December 18,

2012, the LLCs, along with Baron, were in a financial lockdown of epic proportions, prohibited from conducting any business, and deprived of civil liberties. Novo Point and Quantec were prohibited from engaging legal counsel to defend themselves from the wrongful actions being undertaken by the Receiver and the Ondova Trustee.

Stay requests were denied, meaning, unfortunately, that the steamrolling impact of the Receivership and the wholly improper erosion of the LLCs' assets continued unabated. By the time this Court issued its opinion in *Netsphere I*, approximately $4 million in fees and expenses had been distributed to the Receiver, the Ondova trustee, and their attorneys, most of which came out of the assets of Novo Point and Quantec, two entities that were never litigants in the *Netsphere DC Case* or *Ondova bankruptcy* and were not owned by Appellant Baron.[8]

Approximately two hours after this Court issued its opinion in *Netsphere*—long before the issuance of the mandates on April 18, 2013—

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[8] The Village Trust was and is the owner of Novo Point, LLC and Quantec, LLC. Baron was and is the primary beneficiary of said trust. However, Baron did not own these entities, there was never a finding of alter ego by the District Court, and inclusion of these entities in the Receivership and the dissipation of such entities' cash and non-cash assets to pay the Receivership fees and expenses was beyond the jurisdiction of the District Court.

and in violation of the Receivership Order, (ROA.1146–47),[9] eight of the former attorneys (the "Petitioning Creditors"), led by Gerrit Pronske, filed a Chapter 7 involuntary petition against Baron in the United States Bankruptcy Court, Northern District of Texas, Dallas Division, case no. 12-37291 ("*Baron Involuntary Bankruptcy*").[10]

On June 26, 2013, the bankruptcy court entered an order for relief[11] in the Baron Involuntary Bankruptcy. Baron perfected an appeal to the District Court on July 8, 2013 resulting in a final judgment with Amended Memorandum Opinion and Order by the District Court on January 2, 2014, reversing the Order for Relief. *Baron v. Schurig*, No. 3:13-CV-3461, 2014 WL 25519 (N.D. Tex. Jan. 2, 2014).[12] This judgment and opinion has been appealed to this Court and the briefing completed. *See Schurig Jetel Beckett*

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[9] Not immediately dissolved following *Netsphere I* (ROA.26366)

[10] United States Bankruptcy Court for the Northern District of Texas, Dallas Division under case no. 12-37291. On December 19, 2012, the Petitioning Attorneys filed in an emergency motion in the Bankruptcy Court to appoint an interim trustee over Baron's entire estate, attempting to block this Court's Opinion. The orders and appeal followed.

[11] *See* 11 U.S.C. § 303 (describing the steps to obtain an order for relief in an involuntary bankruptcy case).

[12] The underlying claims were asserted based entirely upon a District Court order issued in the course of the Receivership that the District Court, on appeal from the Baron Involuntary Bankruptcy, held to be improper in light of *Netsphere I*. *Baron v. Schurig*, No. 3:13-CV-3461, 2014 WL 25519 (N.D. Tex. Jan. 2, 2014).

Tackett v. Baron, No. 14-10092.

As a result of the Baron Involuntary Bankruptcy, the LLCs and Baron remained in financial lockdown through January 2014, when the district court declined to issue a stay pending appeal. It was during this period that the district court commenced an expedited process of re-determining the Receivership fees and expenses, which led to the Fee Order and this appeal.

E. The Advisory on past and pending Receiver disbursements

On January 2, 2013, two weeks after the *Netsphere I* opinion, the district court, issued, *sua sponte*, an *Advisory on Past and Pending Receivership Disbursements* ("*Advisory*") in the *Netsphere DC Case*. (ROA.26477–79).[13] The Advisory specifically stated:

> - The fees incurred by the Receiver and his counsel, the Gardere law firm would be re-evaluated and paid at fifty percent (50%).
> - The fees incurred by the Dykema law firm in representing the receiver would be reevaluated and paid at ninety-five percent (95%).

[13] Issued without briefing, evidence or hearing. (ROA.128–30).

- All prior payments to the Trustee or Trustee's counsel would be disgorged and returned to the Receivership.
- All other miscellaneous requests for payments, including for experts, would be reviewed on an individual basis at a later date.

(ROA.206478).

F. This Court denies all pending motions and issues 8 mandates

On April 4, 2013, this Court denied all petitions for rehearing, and on April 19, 2013 issued eight Mandates, each filed with the district court on April 24, 2013.[14] (ROA.27967–81). This Court's opinion in *Netsphere I* was left unmodified; therefore, the district court held a mandate to wind-down the receivership, re-determine all fees and expenses (including those previously approved), apply a meaningfully discount to the receivership fees and expenses in a manner consistent with the Opinion, and thereafter, return the receivership assets to the rightful owners.

G. The district court imposes an exceedingly fast track to re-determine fees

[14] Each of the Mandates dealt with one or more of the twelve Consolidated Appeals.

The retirement of Judge Royal Ferguson, the presiding judge in the Netsphere DC Case, was imminent (ROA.31094) and his last day on the case was quickly approaching.[15] Judge Ferguson put the re-determination of fees matter on an exceedingly fast track. On April 5, 2013, Judge Ferguson entered a Scheduling Order (ROA.27155), which set the following deadlines:

1. All fee applications had to be filed on or before Wednesday, April 17, 2013.
2. Baron was given eight days to file objections.
3. The pre-trial hearing on the fee applications was set for April 29, 2013.
4. The trial on the fee applications was set for May 8, 2013.

(ROA.27155).

H. The Fee Applications[16]

On April 17, 2013, Ondova Trustee Daniel J. Sherman, filed his fee application requesting $1,219,775.68, consisting of $1,203,329.50 in profession-

[15] Judge Ferguson's announced retirement was to be effective on May 31, 2013, and that was his last day as the presiding judge on the case. (ROA.28171).

[16] The fee applications described in this Section G are collectively referred to herein as the "*Fee Applications*."

al fees and $16,446.18 in expenses, of which $379,761.18 had already been paid by the Receiver. (ROA.27173–27474).

On April 17, 2013, Receiver's former general counsel, Gardere Wynne Sewell, LLP, filed a fee application requesting $2,010,862.22, consisting of $1,956,737.00 in professional fees and $54,125.42 in expenses, of which $1,479,571.95 had already been paid by the Receiver. (ROA 27479–27510). This Fee Application incorporated 19 prior Fee Applications, thus totaling 15,775 pages of Fee Applications.

On April 17, 2013, Receiver's current general counsel, Dykema Gossett PLLC ("*Dykema*"), filed a fee application requesting $1,550,776.00 through March 2013 (net of voluntary and court-directed 5 percent reduction), consisting of $1,526,694.00 in professional fees and $24,082.00 in expenses, of which $737,276.73 was on hand in Dykema's trust account, and $398,893.91 had been paid by the Receiver. (ROA.27757–27860). This Fee Application totaled 103 pages.

On April 17, 2013, the Receiver filed an application requesting approval of the fees and expenses of the Receiver, the fees and expenses of former counsel for the Receiver, Gardere Wynne Sewell, LLP, the fees and expenses of the Receiver's current counsel, Dykema Gossett PLLC, and the fees

and expenses of numerous other professionals. (ROA.27511–27756). This Fee Application totaled 245 pages.

In all, fees and expenses were requested as follows:

Claimant	Total Amount Requested	Amount Previously Paid	Amount Owed
Peter S. Vogel, Receiver	$1,250,680.00	$708,926.00	$527,576.00
Gardere Wynne Sewell, LLP[17]	2,010,832.22	1,479,571.05	531,290.27
Dykema Gossett, PLLC[18]	1,550,776.00	1,136,170.64[19]	354,777.69
13 law firms outside of Texas	19,559.41	19,559.41	0.00
Thomas Jackson	69,007.50	69,007.50	0.00
Joshua Cox	61,968.75	53,235.60	8,733.15
James Eckels	64,787.50	61,637.50	3,150.00
Jeffrey Harbin	13,913.62	13,913.62	0.00
Gary Lyon	16,462.50	16,462.50	0.00
Grant Thornton, LLP	121,390.53	109,301.53	12,089.00
Martin Thomas	95,285.52	95,285.52	0.00
Damon Nelson	306,262.92	287,962.92	18,300.00
Matt Morris	54,572.50	0.00	54,572.50
Total	$5,635,498.97	$4,051,033.15	$1,510,488.61

[17] Gardere Wynne Sewell, LLP filed a separate fee application that was duplicative. (ROA.27479–27510).

[18] Dykema Gossett, PLLC filed a separate fee application that was duplicative. (ROA.27757–27860).

[19] Dykema Gossett, PLLC filed a separate fee application that was duplicative. (ROA.27757–27860)

Claimant	Total Amount Requested	Amount Previously Paid	Amount Owed

(ROA.27513-14).

The district court's schedule provided only 8 days to review over 16,000 pages of Fee Applications incorporating thousands of time entries over a time period that spanned 29 months.

I. Requests/Motions to seek funding for attorney and expert witness fees, for permission to conduct limited discovery, and to continue the matter, to enable presentation of a viable defense to the fee applications are repeatedly denied.

a. Appellants Novo Point and Quantec Were Denied Representation or Discovery.

The District Court did not include Appellants as an interested party in the context of the May 28 2014 Order on Receivership Professional Fees.[20] This continued a trend established as early as February 10, 2011, when the court limited the LLC's "authorized counsel" to Mr. Jackson and Mr. Cox,

[20] ROA.28124. The Order references the parties as "All parties in interest have responded … including: the Receiver and Dykema Gossett LLP ("Dykema") … the Petitioning Creditors ... Jeffrey Baron ... and Netsphere. With the permission of this Court, the Trustee filed a post-trial brief"). Nowhere was there a mention of an appearance on behalf of the LLCs.

stating that he "wouldn't expect to receive any motions on behalf of the LLC's except for those people" and would not "recognize the authority" of any other counsel for the LLCs. Both Mr. Jackson and Mr. Cox were thereafter retained by Receiver's counsel; they represented the interests of the Receiver and not the LLCs.[21] The absence of counsel actually representing the LLCs is reflected in the District Court's Docket, which is devoid of filings by the LLC's other than those pertaining to appeals.

b. Baron's requests for fees and discovery are denied.

The preclusion of the LLCs left Baron as the only voice against the storm. At the hearing on April 4, 2013, which resulted in the District Court's *Scheduling Order* of April 5, 2013, Baron requested fees for attorneys and experts to contest the coming fee applications. (ROA.27872). Cut off from his assets and without funding to mount a defense to the voluminous fee applications, Baron filed a motion on April 17, 2013, attempting to seek funding from the Receivership estate to pay the professional fees necessary to proceed forward with his defense of the fee applications. (ROA.27475-

[21] As reflected in the *Fee Application For Receiver And Receivership Professionals* ROA.27511–27756.

77). The District Court summarily denied his request. (ROA.27863-64).

On April 19, 2013, Baron filed a *Motion for Discovery, for Continuance and to Reconsider Funding for Jeffrey Baron's Counsel*. (ROA.27872-99). On April 22, 2014, the court denied the motion. (ROA.27911-17). In denying the request for fees, the District Court attempted to differentiate between the right to "retain" counsel and the right to "pay" counsel, finding that the right to "retain" counsel alone was sufficient even though there was no means to pay.[22] The District Court found that it could not "fairly" allow a payment for Baron's attorney (a solo practitioner) and experts and not the others. This of course ignored the fact that all those making fee applications had previously received millions in fees and cost reimbursements. Discovery was denied. Although the other parties had a long history of objecting to Baron's discovery, the court found the motion improper for want of a statement that a formal pre-motion conference had actually been held. (ROA.27872-99).

Such a sudden desire for equity fails to resonate given the overall history of this case and the abuse of the innocent non-party LLCs by stripping

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[22] This is puzzling; Baron's not paying his attorneys was the basis for the Receivership.

their assets in an effort to satisfy debts and cash needs of third parties to whom they owed no obligation.[23]

On May 8, 2013, the first day of the hearing, Steve Cochell, Baron's counsel, orally moved for a continuance citing compelling reasons, including that the parties had spent the prior two weeks in court ordered mediation attempting to settle the entire case. (ROA.27156, 27158, 31088–89). The motion was denied. (ROA.31089).

J. The Objections to the Fee Applications

The parties filed the following objections to the Fee Applications:

1. Receiver's Objection to Trustee's Fee Application. (ROA.27925–27).
2. Receiver's Supplemental Response and Objection, objecting to the Ondova Trustee's Fee Application. (ROA.27928–33).
3. Petitioning Creditors' Omnibus Comment to Receivership Professionals' Fee Applications. (ROA.27984–90).
4. Baron's Preliminary Objections to Trustee, Trustee's Counsel, Receiver and Receiver's Counsel Fee Claims. (ROA.27991–28005).

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[23] Nothing in the *Netsphere I* Opinion suggested Baron should be precluded from conducting discovery or deprived of funding to pay counsel and expert witness fees in order to adequately prepare for and present his defenses in connection with the Court's mandate. *Netsphere I*, 703 F.3d at 296.

5. Netsphere Parties' Objections to the Attorney Fee Requests in Connection With the Wind-Up of the Receivership. (ROA.28014–18).

K. The hearing & post-hearing briefing on the Fee Applications

The court held hearings on the Fee Applications from May 8–10, 2013[24]. The Receiver, Dykema and the Ondova Trustee filed the following post-hearing briefs:

1. Receiver and Dykema filed a Consolidated Post-Hearing Brief addressing some of the legal issues raised at the fee application hearing. (ROA.28019–28).
2. The Ondova Trustee filed a Letter Brief. (ROA.28079-82).

Baron filed the following post-hearing briefs:

1. Response to the Receiver's Post-Hearing Briefing. (ROA.28083–95).
2. Reply to Trustee's Letter Brief. (ROA.28096–97).
3. Supplemental Argument on Fees (ROA 28109–12).

The Petitioning Creditors filed a Supplemental Objection to the Final Application for Allowance and Subsequent Payment of Compensation for

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[24] The Transcript is at ROA.31081–21256. It bears the date May 9, 2013 on page one, but the date of the hearing is reflected on the Docket Sheet as May 8. (ROA.120).

For May 9, 2013, the Transcript is at ROA.31284–31367.

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

Services and Reimbursement of Expenses to Dykema Gossett PLLC, as Attorneys for Peter S. Vogel, Receiver. (ROA 28115–120).

L. The district court enters the Receivership Fee Order

On May 29, 2013, the District Court entered its *Order on Receivership Professional Fees* ("*Receivership Fee Order*"). (ROA.28124–69). The Receivership Fee Order differs from the Advisory (ROA.26477–79) in the following respects:[25]

Applicant	Advisory	Receivership Fee Order
Ondova Bankruptcy Trustee	Disgorgement of all prior payments, and no award of unpaid fees and expenses	No disgorgement of prior payments, and no award of unpaid fees and expenses
Receiver, Peter S. Vogel	Meaningful Discount: 50% of all prior payments and discount of 50% unpaid fees and expenses	Meaningful Discount: 30% of all prior payments and discount of 50% unpaid fees and expenses
Gardere Wynne Sewell, LLP	Meaningful Discount: 50% of all prior payments and discount of 50% unpaid fees and expenses	Meaningful Discount: 27% of all prior payments and discount of 27% unpaid fees and expenses

[25] Comparing ROA.28124–69 with ROA.26477–79.

Applicant	Advisory	Receivership Fee Order
Dykema Gossett, LLP	Meaningful Discount: 5% of all prior payments and unpaid fees and expenses	Meaningful Discount: 2% of all fees and expenses from 7/6/2012–12/18/2012; 10% of all fees and expenses from 12/18/2012–4/4/2013; and 5% of all fees and expenses during month of April 2013

SUMMARY OF THE ARGUMENT

This appeal stems from a Fee Order approving fees and expenses to be charged against the Receivership. In approving fees, the court did not (1) hold evidentiary inquiry into Baron's conduct post entry of Receivership or post *Netsphere I,* (2) hold evidentiary inquiry or make findings attributing conduct of Baron to the LLCs or inquire into the issue of alter ego or culpability of the LLCs, (3) require the fee applicants to allocate amounts to the various estates within the Receivership as required by *Bank of Commerce & Trust Co. v. Hood; Bank of Commerce & Trust Co. v. Hood*, 65 F.2d 281, 283-4 (5th Cir. 1933), (4) require the fee applicants to satisfy the requirements of *Moody* and *Johnson* as applicable, (d) allocate awarded amounts to specific estates as required by *Bank of Commerce & Trust Co*, but rather allowed all

amounts to be paid by the LLCs; or (5) inquire into any of the prior fees or expenses paid by the Receivership to any other person except as to those presented by the Ondova Trustee, Receiver, and Receiver's counsel, although instructed to do so in *Netsphere I*.

The Court further compounded its errors by (1) precluding Novo Point and Quantec from participating in the Fee Application process or being represented by counsel and (2) conducting the Fee Application process on an unfairly rapid time-schedule while denying Baron, the only opposing party allowed to be present, fees with which to pay counsel and experts and a right of even limited discovery, all in violation of the due process rights of Novo Point, Quantec and Baron.

ARGUMENT

I.

The district court abused its discretion by ignoring this Court's mandate in *Netsphere I* when it entered the Fee Order

The manner in which the lower court enforces an appellate court's mandate is reviewed *de novo*. *United States v. Kellington*, 217 F.3d 1084, 1092

(9th Cir. 2000). Lower courts are obligated to execute the terms of the mandate, but they are free to do issue other orders not prohibited by the mandate. *Id*. Where on remand, the trial court is ordered to conduct a hearing and enter findings of fact, such findings are reviewed on a like standard of review as required for findings of fact made in the original hearing. *Deputy v. Lehman Bros., Inc.*, 345 F.3d 494, 509 (7th Cir. 2003) (reversing a trial court's decision excluding expert testimony, stating that any subsequent review would be under an abuse of discretion standard, assuming the trial court properly applies the *Daubert* standards).

The *Netsphere I* Opinion instructed the District Court to review and reconsider *all* prior expenditures, subjecting them to scrutiny and a "meaningful discount". The District Court failed to fulfill its mandate in several ways.

First, the Fee Order did not address *all* prior expenditures. The Receiver employed approximately 24 professionals, who were paid fees from the receivership estate.[26] (ROA.27925). However, the lower court only reconsidered fees and expenses of four professionals and in doing so failed to

[26] As shown below, most of these were paid using the assets of Novo Point and Quantec.

implement the court's mandate. The failure of the Receiver to properly subject all prior disbursements to the District Court was the fault of the Receiver, who alone should now bear the burden.

Second, in reviewing those fee applications actually addressed in the Fee Order, the court misapplied both the instructions and guidance of *Netsphere I* and the otherwise applicable law, none of which was rendered inapplicable by this Court's opinion in *Netsphere I.*

The District Court should have assessed all prior fee/expense awards by first making sure they were proper and sufficiently detailed and allocated by estate. Thereafter, the District Court should have assessed the requests to determine which fees were legally permissible as against each estate; and in the case of the LLCs held an appropriate trial on the issue of alter ego and/or direct culpability. Thereafter, the court should have applied the *Moody* test as to Receiver claims and the *Johnson* test as to counsel claims. Finally, the District Court should have exercised its discretion and, taking into account actually established evidence, subjected each separate

fee to a "meaningful discount", applicable as to each estate.[27]

In the context of the LLCs, the fees should have been disallowed completely (and all prior payments recovered) either as a function of their not being legally permissible, or as a result of the LLC's lack of culpable conduct, applying the "meaningful discount" to reduce the claims to zero and ordering disgorgement. While this may well mean that the Receiver and other professionals are left unpaid, such is mandated by the U.S. Supreme Court decision in *Lion Bonding Co.*, 262 U. S. at 641–42; *Beach v. Macon Grocery Co.*, 125 F. 513, 515 (5th Cir. 1903).

The Fee Order reveals the District Court did not engage in the proper assessment. For the most part, the court's failure was the direct result of the fee applicants' failure to meet the most basic of requirements in submitting their requests.

A. Authorizing the Receiver to liquidate and/or use *any* of the assets of Novo Point or Quantec to pay the Receiver's professional fees

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[27] This Court's warning in *ASARCO, LLC V. Jordan Hyden Womble Culbreth & Holzer, P.C. (Matter Of ASARCO, LLC)*, No. 12-40997 (5th Cir. April 30, 2014) against the "conspiracy of silence" and its reference to no "black hats in fee litigation" strongly suggests that professional fees should be exposed to the same adversary process as other facts required to be determined by the courts.

and expenses was an abuse of discretion

The charging of the LLC's assets with *any* fees or expenses of the Receivership raises the issues of abuse of discretion with questions should be reviewed *Bolloré S.A v. Import Warehouse, Inc.*, 448 F.3d 317, (5th Cir. 2006); *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737 (5th Cir. 2003).

Assuming an assessment of *any* fees or costs against the LLCs was legally permissible, the issue of the amount of fees and expenses and allocation thereof over the various estates held in Receivership should be reviewed *de novo* under the abuse of discretion standard. *See Commodity Futures Trading Comm'n v. Morse*, 762 F.2d 60, 63 (8th Cir. 1985).

1. The district court lacked subject matter jurisdiction over Novo Point, LLC and Quantec, LLC

Courts have finite bounds of authority and cannot simply seize private property that is not subject to a claim pending before the court. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 77 (1988).

In *Atlantic Trust Co. v. Chapman*, the Supreme Court enunciated the fundamental principle of receivership law that a court is prohibited from using property of a non-party to pay a receiver's expenses. (208 U.S. 360,

376–76 (1908). These principles are well established and have long been reiterated by this court. For example, in *Beach v. Macon Grocery Co.*, 125 F. 513 (5th Cir. 1903), the court stated:

> "[T]he receiver has, by no law, been imposed upon the defendant. Neither is there any equitable principle which should require him to pay, before he can secure a return of his property, the expenses of the unlawful proceeding by which it has been taken and withheld from his possession. To require that payment from him or his property would be a wrong which the court has neither the power nor the disposition to inflict upon him. It may be a hardship upon the receiver himself, but it is one of the risks which he has voluntarily assumed"[28]

Accordingly, in *Netsphere, Inc.*, this Court held that the court lacked subject matter jurisdiction over the LLCs explaining: "[a] court lacks jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy." 703 F.3d at 302, 310–11, 315. The Court further held:

> The receivership ordered in this case encompassed all of Baron's personal property, none of which was sought in the Netsphere lawsuit or the Ondova bankruptcy other than as a possible fund for paying the unsecured claims of Baron's cur-

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[28] *C.f.*, *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908) (approving holding that "If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action").

> rent and former attorneys that had not been reduced to judgment. The receivership also included business entities owned or controlled by Baron, including Novo Point, LLC and Quantec, LLC. Although Novo Point and Quantec were listed as parties on the global settlement agreement, they were never named parties in the Netsphere lawsuit or the Ondova bankruptcy. We conclude the district court could not impose a receivership over Baron's personal property and the assets held by Novo Point and Quantec.
>
> *Id.*

Because the District Court lacked subject matter jurisdiction over Novo Point and Quantec in the first place, it could acquire no jurisdiction simply by imposing a receivership.[29] It is submitted that on remand the court should have removed the LLCs from the impact of further proceedings. *See Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1028 (5th Cir.1931) ("courts may not seize property without jurisdiction and then claim jurisdiction over the property because it is in the possession of the court.").

Where as here a receiver holds multiple estates in a single receivership, the separate estates must be separately managed and fees must be charged

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[29] The April 19, 2013 mandates included one disposing of Appellate Case No. 11-10113. (ROA.27968–69), an appeal from several orders entered by the District Court reflected in a Notice of Appeal filed on January 18, 2011. (ROA.3763–65). Among the orders appealed was the order entered on December 17, 2010, where the District Court ordered that Novo Point, LLC and Quantec, LLC be included in the Receivership. (ROA.3391–98). The Mandate reversed said order and remanded the matter to the District Court for further proceedings in accordance with the *Netsphere, Inc.* opinion. (ROA.27968–69).

against each estate as if separate receivers had been appointed for each. *Bank of Commerce & Trust Co. v. Hood*, 65 F.2d 281, 283-4 (5th Cir. 1933). The need for separate estates was no surprise to the Receiver or his counsel. The point was made during the initial December 17, 2010 hearing that lead to the LLCs being included within the Receivership:

> MR. JACKSON: Your Honor, again, part of the agreement is Quantec and Novo Point's money is Quantec and Novo Point's money to be used for their purposes and their purposes only, and our point in that agreement is they are separate and distinct from any of these other problems involving Baron. So our funds are to be used for the business purposes of Quantec and Novo Point only.
>
> THE COURT: I appreciate that clarification. I didn't realize that. Well, we're running out of money. Let's do this.
>
> MR. LOH: To some extent, I would take issue with that from a technical standpoint. But Quantec and Novo Point are the only two entities now that have any money.[30]
>
> (ROA.4826).

Novo Point and Quantec each constituted a separate estate within the Receivership. However, no attempt was made to segregate estates such that

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[30] The "technical point" reference does not challenge the underlying agreement; only its implementation. Apparently, shortly after this hearing, Mr. Jackson, along with Mr. Cox, were retained by the Receiver and ceased being "independent" counsel for the LLCs; there is no evidence of the "agreement" in the record or any request by the Receiver to be relieved of its obligation to separately account for each estate.

fees, costs and expenses were properly charged.

Nowhere in *Netsphere I* did this Court rule upon the question as to which receivership estate should be charged with expense. While this Court found equity dictated that the fees would not be abated, it issued this ruling based upon the actions of Baron – not the LLCs. The *Netsphere* Opinion stated there was an equitable basis for assessing reasonable receivership expenses as against Baron. No such findings were made as to Novo Point or Quantec. Similarly, there were no findings that either LLC was Baron's alter ego such that the equitable findings as against Baron could be imputed.

In the absence of findings as against the LLCs, the District Court was faced with an instance where subject matter jurisdiction being absent along with culpability, controlling Supreme Court precedent required the party whose property was seized be made whole fully and all of his property restored, even to the extent that a receiver and his professionals are not paid. *See Lion Bonding Co.*, 262 U. S. at 641–42; *Beach v. Macon Grocery Co.*, 125 F. 513, 515 (5th Cir. 1903).

In ordering that all fees and expenses (including those previously approved and paid) be "meaningfully discounted", this Court left the court

with two guiding principles. First, the court had lacked subject matter jurisdiction over Novo Point and Quantec, a fact to be considered in reassessing all fees and expenses. Second, the Receivership as to Baron was an abuse of discretion but that due to Baron's own conduct, Baron was to bare otherwise proper Receivership fees and expenses at a "meaningfully discounted" rate. The District Court was thus ordered to reconsider the matter in light of the applicable law and the instructions set out in the *Netsphere I*. The District Court failed in its task by ignoring both the mandate and the law.

2. *The LLCs were neither alter egos of Baron nor independently culpable and there has been no determination to the contrary.*

In the absence of findings in *Netsphere I* that Novo Point and Quantec were culpable, the District Court was required to determine if Baron's conduct could be legally imputed. No such determination was made (the preclusion of the LLCs from the courtroom would make it impossible).

The absence of any determination that Novo and Quantec are alter egos of Baron renders any attempt to charge them with any Receivership expenses legally impermissible. *See Bolloré S.A.*, 448 F.3d at 324.

Even if a trial as to alter ego were held, Novo Point and Quantec would

both prevail as a matter of law. Cook Islands law does not recognize the concept of alter ego.[31] Texas law would render the same result. "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". Baron does not own Novo Point or Quantec. His being a beneficiary of the Trust does not alter this legal reality. (See e.g. ROA. 4758).

While *Netsphere I* referenced Novo Point and Quantec as being "owned or controlled" by Baron, such is not itself a finding of alter ego, particularly given this Courts subsequent conclusion that the District Court lacked subject matter jurisdiction over the LLCs.[32] This Court treated them as distinct both as to jurisdictional rational and culpability (referring only to Baron as culpable).

Nor has there been any determination that the LLCs are otherwise di-

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[31] Cook Islands Ltd. Liab. Cos. Act 2009 §45. The Cook Islands is recognized by the United States; 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, obligates the United States to recognize Cook Islands' sovereignty. The Court is requested to take judicial notice of the Treaty.

[32] Obviously, had this Court concluded that the LLCs were the alter ego of Baron the fact that they had not been individually named as parties in the *Netsphere DC Case* would have been of little import.

rectly culpable. Neither could be held *vexatious* under the governing law of Texas and there has been no evidence that they were responsible for any delay in proceedings.[33] While they did file numerous appeals, they prevailed on virtually all of them; their right of appeal was their only recourse given that the District Court denied them any right to participate.

3. The Receiver and his professionals have been improperly paid from the liquidation of assets owned by, and cash generated by, Novo Point, LLC and Quantec, LLC

As noted earlier, multiple estates require separation. When a receiver holds more than one estate, *Bank of Commerce & Trust Co. v. Hood* requires that the source of payment for receiver's expenses be the estate to which the expense relates.

> "[An] accurate 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" 65 F.2d at 284.

Netsphere I did not render this rule superfluous.

Neither the Receiver or its professionals, nor the Trustee and its counsel (or anyone else), attempted to segregate fees or expenses as to applicable estates within the Receivership. Virtually every Receiver Report

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[33] See Tex. Civ. Prac. & Rem. Code § 11.054.

accompanied a request for payment. The Receiver simply charged Novo Point and Quantec because they had the money.

For example, *The Receiver's Report Of Work Performed In May 2012* (ROA.24106) shows over $ in payments. The LLCs paid for all or virtually all of this amount.[34]

In issuing its Fee Order, the District Court made no attempt to allocate the Receivership fees and expenses to any particular estate. (ROA.28124). Thus, both the fee applications and the resulting orders violated the legal principles laid out long ago *Bank of Commerce & Trust Co. v. Hood*.

Because Novo Point and Quantec were unable to participate, it is impossible to determine exactly which fees and expenses were paid from which estate.[35] However, from the summary reports filed by the Receiver,

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[34] Appellant has found a total of 20 such reports, (ROA.17146, 17080, 17333, 18432, 18239, 18504, 18167, 19456, 19222, 20872, 24106, 15917, 15854, 15598, 15661, 14177, 14126, 13943, 13892, 13246). Appellants note that some of the amounts appear to be for the preservation of assets. As to domain registration fees and management fee payments to Damon Nelson, for example, the LLCs do not request disgorgement. As to other expenses, disgorgement is not sought to the extent the Receiver can show them to be reasonable and necessary for the preservation of assets. Such is equitable given the appellant's inability to conduct discovery or mount a meaningful defense in the context of the Fee Order.

[35] See Footnote 34, supra.

it would appear that the vast majority of all Receivership fees and expenses were charged to the Novo Point and Quantec estates.[36]

4. Conclusion

Under controlling precedent, Novo Point and Quantec, as non-parties, may not be charged with the Receiver's professional fees and expenses incurred in an unauthorized receivership because the District Court lacked subject matter jurisdiction over them *and* because there have been no findings of culpability that would expose their assets to any form of "equitable" contribution. Where there is no subject matter jurisdiction, invoking an equitable resolution for the payment of some but not all of such fees and expenses out of the property owned by entities over which the District Court never had subject matter jurisdiction would be unlawful. *Lion Bonding & Surety Co. v. Karatz,* 262 U.S. 640, 641–42 (1923). Thus, "meaningful discount" as applied to Novo Point and Quantec means nothing short of a full reimbursement of all amounts paid (to the extent paid from their assets) and a rejection of any further charges as against their assets.

B. As a matter of law, a non-receivership professional, such as the

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[36] See Footnote 34, supra.

Ondova bankruptcy trustee, cannot be awarded fees and expenses, even where their services might have benefitted the receivership estate

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

1. In Netsphere I, this Court reversed the order awarding the Ondova Bankruptcy Trustee's fees and expenses

By this Court's Mandates, most if not all of the orders awarding fees and expenses to the Receiver's professionals and the Ondova Trustee were expressly reversed, including, specifically, the *Order Granting Motion of Daniel J. Sherman, Chapter 11 Trustee for Ondova Limited Company, for Reimbursement of Fees and Expenses From the Receivership Estate* (ROA.21409-10), by which the Ondova Trustee was paid $379,761.18. *See* Court's Mandate issued in Appellate Cases 12-10489, 12-10657 and 12-10-804. (ROA.27979–

10). The reversal was mandated by This Court with full knowledge of the equitable issues related to Baron. Notwithstanding such reversal, the District Court impermissibly permitted the Trustee to retain this same amount as a part of its Fee Order. (ROA.28124, p. 28148).

2. The district court correctly ruled, on January 2, 2013, that no more fees and expenses would be awarded to the Ondova Bankruptcy Trustee and that disgorgement was in order

On January 2, 2013, the district court issued an Advisory on Past and Pending Receivership Disbursements (the "Advisory"), noting:

> Finally, the Court reads the Fifth Circuit opinion to preclude payment of the Trustee's fees. Although the Fifth Circuit placed no blame on the Trustee in moving for the Receivership, recognizing that he did so on the recommendation of the bankruptcy court, the Fifth Circuit did acknowledge that "[w]hen a receivership is improper or the court lacks equitable authority to appoint a receiver, the party that sought the receivership at times has been held accountable for the receivership fees and expenses." . . . ***In light of the Trustee's role in pursing the Receivership and the Fifth Circuit's opinion which only authorizes payment of fees to the Receiver and his counsel, this Court believes that it was not and is not authorized to pay any of the Trustee's expenses from Receivership funds.*** Accordingly, the Trustee will be instructed to return all previously paid amounts back to the Receiver. The Court will not require the Trustee to pay the Receivership fees and expenses.
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> (ROA.26478) (emphasis added).

3. The district court erred by doing a 180-degree turn and disavowing the January 2, 2013 ruling.

Inexplicably, the District Court made a 180-degree turn in the Receivership Fee Order by not ordering disgorgement of the $379,761.18 previously awarded. The reasoning of the District Court in the Receivership Fee Order is convoluted and internally inconsistent. The District Court denied the newly requested fees, finding no legal entitlement. The court denied recovery *quantum meruit finding* that the services were not rendered to the Receivership but were undertaken "in the course of the Trustee's independent duties to the Ondova estate as well as its duty to defend the Receivership as the moving party." (ROA.28146-7). The court went on to conclude:

> Having found that the Trustee is not a Receivership professional, the Court may not reimburse the Trustee for fees incurred. It is therefore irrelevant to consider the Johnson factors or§ 330(a)(l) of the Bankruptcy Code. *See Johnson v. Georgia Highway Express*, *Inc.*, 488 F.2d 714 (5th Cir. 1974).
>
> (ROA.28147).

However, when it came to the disgorgement issue, the court abandoned its earlier reasoning stating that because the Trustee's counsel had "sought to do duty to their clients and to both the District Court and the Bankruptcy Court", it would be "inequitable" to require disgorgement. (ROA.28148). The Court described the payment as being "in recognition of

the valuable appellate work that was incurred as a result of Baron's excessive appeals." (Id). This is odd given that the Receiver himself not only *opposed* the Trustee's fee request but strenuously argued that any prior payments should be returned. *(ROA.27925-33).*

> In the final measure, the Trustee's counsel defended the Receivership on appeal not because the Receiver engaged or hired them, but because they were quite properly defending their own client, the Trustee, against the very real risk that he would be held responsible for the costs of an improper Receivership.
>
> *(ROA.27931).*

The Receiver argued that the "Court's Advisory of January 2, 2013 was precisely correct and that the *Netsphere I* opinion required discouragement. (ROA.26477–79).

> The real reason for the court's position was solely to punish Baron.
>
> … It [the retention] in no way is designed to compensate the Trustee or his counsel for any work which they were obligated to do as the Trustee in the Ondova case, but to account for Baron's complicity in the additional fees that were incurred [as a result of Baron's excessive appeals]."
>
> (Id).

In the present case, it was Ondova's Bankruptcy Trustee who sought the imposition of the unlawful receivership. No assessment of the *Johnson* factors was undertaken. No reference was made to Novo Point or Quantec.

The fees were recognized as not properly due but awarded anyway as a punitive sanction against Baron for raising appeals – most, if not all, of which were successful.[37] And, they were paid not by Baron but by the LLCs!

As to Barron of course this amounted to an abuse of discretion. However, as to the LLC's the absence of any finding that they were directly culpable or the alter ego of Baron, it also amounts to an error of law because these amounts were paid using the assets of the LLCs.[38]

The Trustee and its counsel should receive nothing and all amounts previously paid should be disgorged.

C. As a Matter of Law, the Receiver and His Professionals Should Not Be compensated For Defending the Imposition of the Receivership

The prevailing view among the circuits is that the defense of the imposition of receivership is not an awardable expense because it provides no benefit to estate. The Third Circuit applies the "American Rule" requiring

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[37] Nor does the Receivership Order attempt to link any of the prior fees to specific work in relation to any appeal. It is plainly and simply a punitive damage award as against Baron.

[38] Or if this Court concludes the LLCs to be the alter ego of Baron, also an abuse of discretion.

that each party pay his own expenses including receivers in defense of receivership fees. *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 535 (3rd Cir. 1970). Likewise, the Seventh Circuit refuses to authorize receivership fees when the receiver is engaging in controversy as a litigant advocating a position where he is not acting as a neutral. *In re Marcuse & Co.*, 11 F.2d 513, 516 (7th Cir. 1926).[39]

Similarly, this Court, in *Speakman v. Bryan*, 61 F.2d 430 (5th Cir. 1932) affirmed that the costs, expenses, and disbursements incurred by a receiver whose appointment was improvidently made, or who has taken wrongful possession of property, can charge such fees and expenses against the receivership property only to the extent that the services rendered have benefited or the receivership estate. *Id at p.* 431.

The manner of billings submitted by the Receiver made it impossible to discern what services were in fact rendered, how they benefited each estate, which were rendered as receiver and which improperly rendered as cumulative "lead counsel", and which, if any services were for the benefit

[39] Such would be further rationale for denying the Trustee's fee application and requiring discouragement.

of the Receivership as a whole, and therein which benefited each estate – for example the LLC estates – as to which such fees should not be awarded. The manner of billing prevented the District Court from fulfilling its obligations.

As applied to this case, the district court should have required the Receiver and his professionals to present invoices that were broken down by task and by estate so that proper analysis could be undertaken. As presented, there was no basis upon which the District Court could reasonably conclude its work in accordance with the law and the mandate of *Netsphere I*. In reaching any decision in the Fee Order, the court thus acted improperly requiring reversal.

The Fee Order is replete with justifying references to Baron's numerous appeals. The court ignored the fact that while the Receiver most often induced the rulings that resulted in "all those appeals" Mr. Vogel did not prevailed on the merits in defending a single one. Following the issuance of *Netsphere I* it was the Receiver who sought *en banc* review by the Fifth Circuit – a request that evidently no member of this Court supported. How is such activity justified as "benefiting the estate(s)"?

Indeed, by seeking orders for the payment of fees and expenses, the Re-

ceiver is not only asking to be principally rewarded for *unsuccessfully* defending appeals and an *en banc* petition, he is asking that they be paid by Novo Point and Quantec, both innocent parties who successfully and intelligently exercised their rights of appeal. [40]

Although a bankruptcy matter, the LLCs proffer guidance in *ASARCO, LLC v. Jordan Hyden Womble Culbreth & Holzer, P.C. (Matter Of ASARCO, LLC)*, No. 12-40997 (5th Cir. April 30, 2014). Therein, the court stated:

> *No side wears the black hat for administrative fee purposes.* In the absence of explicit statutory guidance, requiring professionals to defend their fee applications as a cost of doing business is consistent with the reality of the bankruptcy process. The perverse incentives that could arise from paying the bankruptcy professionals to engage in satellite fee litigation are easy to conceive.

Although the *Asarco* Court allowed that fees for defense could be permitted where "an adverse party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons," this would not apply herein. In *Netsphere I* this Court found that Baron's conduct (not the LLCs') contributed to the *imposi-*

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[40] Baron filed eleven appeals, ten of which were reversed and remanded Appeal Nos. 10-11202 (1 order), 11-10113 (2 orders), 11-10289 (18 orders), 11-10290 (13 orders), 11-10390 (16 orders), 12-10003 (2 orders), 12-10489 (7 orders), 12-10657 (4 orders), 12-10804 (6 orders), 12-11082 (5 orders). One was dismissed (Appeal No. 11-10501 was dismissed as Carington, Coleman, Sloman & Blumenthal, LLP had filed a motion for rehearing that was still pending when the appeal was taken.). Seventy-four District Court orders were reversed by this Court and remanded. Baron did not create chaos: he simply ethically and successfully appealed the District Court's orders.

tion of the Receivership. There has been no finding that Baron or the LLCs acted improperly since that time and the success of the appeals bears this out.

II.

Even if authorized under the rules of equity, the district court abused its discretion by entering the Fee Order

A. The district court erroneously awarded fees under patently defective Fee Applications

Ordinarily, the expenses and fees of a receivership are charged against the property being administered. *Atlantic Trust Co.*, 208 U.S. at 375–76; *Netsphere, Inc.*, 703 F.3d at 311. In considering compensation to the Receiver, the court administering the receivership may consider all factors involved in the particular receivership to determine an appropriate fee. *Gaskill v. Gordon*, 27 F.3d 248, 253 (7th Cir. 1994); As stated in *S.E.C. v. Striker Petroleum, LLC*:

> The Fifth Circuit has not required district courts to evaluate the *Johnson* factors when making fee awards in receiverships (as opposed to awards under civil rights fee-shifting statutes). And because the *Johnson* factors address fee applications by lawyers,

> and receivers need not be lawyers, it is at least questionable whether the factors should be adopted for all receivership fee applications (a number of the factors do not literally apply to non-lawyers, even if they provide guiding principles for evaluating the fee applications of non-lawyer receivers).
>
> No. 3:09-CV-2304, 2012 WL 685333, at *3 n. 10 (N.D. Tex. Mar. 2, 2012).

In the Southern District of Texas, it has been determined that the following factors are particularly significant when it comes to fee applications by receivers:

1. The complexity of the problem faced by the receivership;
2. The ability, reputation and professional qualities of the receiver and assisting professionals necessary for the job;
3. The time and value of the labor necessarily expended;
4. The results achieved; and
5. The ability of the receivership estate to afford the requested fees and expenses.

> *S.E.C. v. W.L. Moody & Co., Bankers (Unincorporated)*, 374 F.Supp. 465, 480 (S.D. Tex. 1974), *aff'd*, 519 F.2d 1087 (5th Cir. 1975)

This is similar to, but is not as extensive as, what must be proved for the recovery of attorneys' fees under *Johnson v. Georgia Highway Exp., Inc.* 488 F.2d 714, 717–19 (5th Cir. 1974) (listing 12 factors that must be proved for an award of attorneys' fees). A *Moody* analysis was not undertaken by the Receiver and not present in the Fee Order.

Counsel for receivers must justify their fees using the 12 factors articulated in *Johnson v. Georgia Highway Exp., Inc.* 488 F.2d 714, 717–19 (5th Cir. 1974).

1. The Court Improperly Awarded the Receiver Fees.

The first task of the District Court was to determine what subsets of fees were attributed to Mr. Vogel's role as a receiver (as opposed to what the court properly found – duplicative efforts as "lead counsel") and thereafter to apply the *Moody* test to determine the amount of the subset should be paid.

Vogel's time entries precluded the District Court from determining value to the estates or applying the *Moody* (or any other) test.[41] For example, in his December 31, 2012 Fee Application (ROA.27571–92), three invoices are attached for September, October and December 2012, covering 45 time entries. Nearly every single entry is identical, reading as follows:

Review pleading, files, emails, send emails, and related conver-

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[41] In the Receivership Professionals' Fee Application (ROA27511–27756), in Section II entitled "Receivership Fees and Expenses," Vogel recites that he submitted applications for fees and expenses from September 1, 2012–October 31, 2012, and from December 1–28, 2012, as detailed in the invoices attached to a prior application. (ROA.27513–14).

sations with Receiver's counsel.

This type of billing continued in 2013. (ROA.27594–611). The Receiver also attached invoices for work performed by the Receiver from the commencement of the Receivership on November 24, 2010, through August 2012. (ROA.27614–734). The non-specific time entries in all of these invoices failed to inform the District Court and Appellants as to who Mr. Vogel talked to, for how long and why, the nature of the tasks performed and their relationship to this case. And, it prevented the District Court, or Appellants, from understanding which estate should be charged with what amount. The submission of a "summary" as a part of the supporting briefs did not cure the defect. Nor did any testimony provided, which was non-specific as to time entries.

The District Court first found that no reimbursement would be made for time spent as "lead counsel" reasoning that as a receiver, Mr. Vogel had retained counsel to act in that capacity and awarding recovery for "lead counsel" activities would be duplicative. (ROA.28160). The analysis, however, begs the question. With such summary, block form billing, how did the District Court properly exercise any discretion (as opposed to guessing)? The nature of the Fee Applications themselves precluded the court

from following the law and properly discerning what amount was attributed to "lead counsel" activities as opposed to activities as a receiver.

Even if the *Moody* factors could have been considered, they would not result in a finding favorable to the Receiver.

The business of the LLCs was not complex; they held cash and revenue-generating domain names. Revenue was received monthly by wire transfer from a single source.[42] The only business decision was to determine whether certain domain names had generated sufficient revenues to be renewed. Registration fees were paid to two registrars and renewals oc-

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[42] A description of the domain name business is set out in *The Southern Company v. Dauben, Inc.,* No. 08-10248 (5th Cir. 2009). The LLC's business is frankly one often run by two "domainers in a garage". The domains generated revenues via PPC – those irritating undeveloped websites that contain 7-10 links we have all seen PPC sites earn revenues from people who type the domain into their browser – known as direct navigation. Revenues are earned as a result of users clicking on the links that are essentially advertisements. Payments are made by a handful of third party PPC Providers (such as in this case Domain Holding Group) who actually produce the PPC webpages on an automated basis. Contracts with the PPC providers are largely automated and based on a percentage of revenue generated. In most instances, large domain name portfolio holders (such as the LLCs) receive 80-90% of the revenue earned by the PPC providers. The only activity required of the domain name owner is to alter "name server" associated with the domain name (which can be accomplished by bulk instruction) so that the domain name is "forwarded" to the PPC provider. Once the name server is set, there is no further work for the domain name owner other than to perhaps liaison with the PPC Provider to improve the revenue stream. Payments are by monthly or bi-weekly by wire transfer to specified bank accounts. There is no evidence that the Receiver undertook any of this work – leaving it instead to contractors such as Domain Holdings Group.

curred automatically unless prevented. The non-judgment claims of the Petitioning Creditors had not been paid. The "thousands" of UDRPs[43] remained either unresolved or defaulted without any defense having been mounted by the Receiver. (ROA.28549–70, 28577–28667). The amounts due to the Village Trust by Netsphere under the Global Settlement Agreement remained unpaid and the Receiver failed to initiate any action to enforce payment.[44] In distributing the LLCs' assets, the Receiver made little effort to determine the authorized person to whom they should be tendered.

As to value, the Receiver's Reports show that most of the work was performed in relation to other estates but merely paid for by the LLCs.

The Receiver cannot claim the result was successful and the Receiver is not an innocent party in its failures. As noted elsewhere, much time was spent on unsuccessful appeals brought about by the Receivers own unlaw-

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[43] A proceeding brought pursuant to the Uniform Domain-name Dispute-Resolution Policy incorporated within each domain name registration agreement. A UDRP is a paper-only ADR procedure. The sole remedy for a prevailing complainant is either transfer of the domain name to complainant or cancellation of the domain name registration. No monetary award is possible. See: https://www.icann.org/resources/pages/udrp-2012-02-25-en.

[44] The Receiver sought only an order that directed the wrong person to pay the amounts and apparently made no further efforts.

ful positions. Although having participated in hearings and having filed at least one motion for an *Order to Show Cause re* Authority in the *Ondova* bankruptcy directing that Mr. Payne and Ms. Katz show authority, no order was pursued.[45] When Baron raised the issue in the context of the Court's orders authorizing the distribution of remaining assets, the Receiver objected. All the while the Receiver was aware that the only recognized counsel of the LLCs – Mr. Cox and Mr. Jackson – were both on the Receiver's payroll *and* that the court had previously precluded any other counsel from appearing on the LLCs' behalf. That the Receiver instead chose to dump the assets by delivering to a person over Baron's objection was a derogation of his obligations as a receiver.[46] In short, the LLCs, who pre-receivership, were in no danger and had no claims against them, were used as a bank account to satisfy the needs of others. They exited with domain names but no cash and the Receiver tendered control to an unauthorized

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[45] The issue of Mr. Payne and Ms. Katz' authority to act for the LLCs was the subject of great concern to Judge Jernigan in the Ondova Bankruptcy, so much so that she authored a letter to this Court in connection with *Netsphere I* expressing her concerns. A copy of the letter is found at ROA.21487–85).

[46] As a result, the issue of Mr. Payne and Ms. Katz and their wrongful control over the assets of Novo Point and Quantec is the subject of new litigation before the District Court in the form of *Novo Point LLC and Quantec LLC v. Elissa Katz and Christopher Payne*, U.S. District Court, N.D. Texas, Dallas Div., 3:14-CV-1552-L.

person. While the other estates within the Receivership may have been more complicated, such does not justify charging the LLCs with Receiver's fees or expenses.[47] This is hardly the success meeting the requirements of *Moody*.

The last *Moody* factor must be judged in light of the Receivership estates' ability to pay – without regard to the LLCs. The Receivership was entirely improper as to the LLCs and use of their funds was impermissible.

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

As a matter of law, the Receiver and his legal counsel did not met their evidentiary burden to support their fees. There is a clear problem with the "block billing" presented by Vogel and his counsel in their Fee Applications. The term "block billing" refers to the method by which each lawyer enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks. Such practices are unacceptable when

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[47] A later 2013 Application for Receiver Fees contains a report showing earlier references to 17 entities to be managed was either a sham or that all entitles other than Novo Point and Quantec were quickly dispersed with as entities having no assets following the establishment of the Receivership. (See: Doc 1324 and 1326).

a fiduciary applies for payment of fees from the estate for their services because, unlike applicants in ordinary attorney fee applications, a receiver and his attorneys have an extremely high duty to account to the estate for disbursements from the estate.

A party does not have the right to bill for time that is not properly documented. *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 784 (1989). As a matter of established law, block billing is inadequate to support a fee award. *E.g.*, *Kearney v. Auto-Owners Ins. Co.*, 713 F.Supp.2d 1369, 1378 (M.D. Fla. 2010); *Seastrunk v. Darwell Integrated Technology, Inc.*, No. 3:05-CV-0531, 2009 WL 2705511, at *8 (N.D.Tex. Aug. 27, 2009) (reducing award in block billing case). Yet, in the instant case, the Receiver and his counsel all submitted Fee Applications supported entirely by block billing, which makes it impossible to exercise billing judgment.[48]

For example, in the invoices attached to its Fee Application, Dykema submitted multiple tasks in single entries making it impossible to under-

[48] The failure to exercise billing judgment should result in denial of fees. *See Walker v. U.S. Dep't of Housing & Urban Dev.*, 99 F.3d 761, 770 (5th Cir. 1996) (block billing rejected).

stand what amount of time was spent on any one task.[49] More importantly, such billing makes it impossible to assess the application of any task, fee or expense in the context of any specific estate.

Nowhere, either in the body of the Fee Applications or in the invoices attached, is there any attempt to segregate the time billing entries by task or by estate. In a section of its Fee Application entitled "Dykema Gossett PLLC's Role in the Receivership Case," Dykema attempts to summarize the different tasks performed by the firm, but no attempt is made to advise the reader of the amount of time spent on each task by each lawyer, the hourly rates of such lawyers and the total amount charged for performing such task or how they relate to any particular estate. (ROA.27761–65).

Block billing is not allowed in bankruptcy proceedings because of the need to protect the bankruptcy estate. The standard for receiverships should be no different. As a bankruptcy lawyer, Mr. Jeffrey Fine, a senior partner with Dykema, was well aware that block billing was a serious problem in terms of safeguarding and accounting for the funds in the receivership estate and no doubt aware of the Complex Guidelines. Thus, in

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[49] *See* Dykema Fee Application (ROA.27757–27860) and, in particular the invoices of Dykema attached to its Fee Application (ROA.27814–47).

addition to failing to meet their burden to support the fees, as fees, the Receiver and Dykema have failed to satisfy their burden to articulate and establish the necessity and basis for their fees.[50]

Receiver's counsel further hindered the court by heavily redacting items from the billing sheets submitted, an example of which is shown below:

01/01/13	CDKR	DRAFTING OF MOTION FOR [redacted] VERSION. CONFERENCE CALL WITH COUNSEL FOR TRUSTEE. FOLLOW-UP CONFERENCE CALL WITH MR. SCHENCK.
01/02/13	CDKR	DRAFTING EDITING AND REVIEW OF MOTION FOR [redacted] (8.0) FILING AND SERVICE OF MOTION FOR [redacted] 5) DRAFTING OF MOTION TO [redacted] (1.) FILING AND SERVICE OF SAME. STRATEGY CONFERENCE WITH MR. SCHENCK.(NC)

(ROA. 27814). From the above example it is impossible to tell what motion was prepared let alone why it was beneficial to any particular estate. The one thing it does convey are charges by an attorney for "filing and service of [motions], a clerical task for which legal fees should not be awarded.

A court facing allocation in a multi-estate receivership cannot remedy the issue of block billing and redactions. The failure cannot be "cured" by

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[50] With automated billing systems it would have been a small task for the fee applicants to have created billing codes which would have accurately separated time by estate (e.g. client) and function (legal vs clerical, project-based, etc). The Receiver and its counsel volunteered for the job. They knew what was expected. That they failed in such a simple task should be heavily weighted by this Court in its considerations.

simply "guestimating" or reducing fees as a penalty for improper billing. The actions of Receiver and his counsel not only hindered the Court from determining value to the estates, it prevented the court from assessing, as to any estate, the any of the *Moody* factors as applicable to the Receiver and the *Johnson* factors as they relate to counsel fees. As such, the applicants themselves rendered application of the law impossible.

Because the defect applied as to both current and prior fees, the Fee Order should be overruled (at least as to the LLCs) and this Court should issue a judgment that the applicants receive nothing and be required to disgorge all amounts previously received from Novo Point and Quantec.

B. The district court made numerous unsupported findings in the Fee Order

There are numerous myths that have been perpetuated by the adversaries throughout this case. Acting with caution that this Court may determine that Novo Point and Quantec should be assessed fees and expenses, they are alternatively addressed herein.

1. There has never been an adjudication that any appellant, or their counsel, are vexatious litigants, and there are no facts in existence that would support such a finding.

While the Opinion in *Netsphere I* made reference to the Receivership be-

ing "primarily of Baron's own making", such a finding was limited to the events at the outset of the Receivership and did not reference the LLCs. *Netsphere I* contained no findings as to subsequent conduct. The Fee Order referenced only Baron's many appeals, which purportedly reeked havoc on the proceedings. (ROA.28124). The propriety of these appeals has been addressed above. Successful appeals cannot possibly constitute vexatious conduct and any havoc cannot be attributed to the successful appellant.

There are no facts that Appellee or any of the Interested Parties can point to supporting a finding that any of the LLCs is a "vexatious litigant." None fall within the definition of a vexatious litigant under Texas law. None were ever held in contempt or sanctioned by the district court.[51] Nor, as addressed, can they be found the alter ego of Baron.

While Baron (not the LLCs) was penalized for failing to appear at a

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[51] In *Netsphere, Inc.*, this Court pointed out:

> If the district court entered a sufficiently specific order, it could have held Baron in contempt, imposed a fine or imprisoned him for "disobedience . . . to its lawful . . . command." 18 U.S.C. § 401. At oral argument in the appeal, it seemed conceded that no clear order existed. Instead, the receiver and trustee cited only to hearings at which the district court admonished Baron not to hire or fire any more attorneys. Whether there was a clear order ultimately does not matter in our resolution.
>
> *Netsphere, Inc.*, 703 F.3d at 311.

deposition in the Ondova Bankruptcy matter, such was addressed by precluding his ability to contest a motion for fees therein and was unrelated to the *Netsphere DC Case* resulting in a substantial contribution award. If any appellant herein were a "vexatious litigant," one would expect to find in this vast record on appeal at least one order granting a motion requesting that their attorneys be sanctioned (or at least cautioned) for engaging in vexatious conduct.[52] This Court can search the record on appeal and it will find no such document.

The district court never conducted a hearing to determine whether Baron, Novo Point, Quantec, or any attorney working on their behalf, engaged in any alleged vexatious or bad faith conduct and no order finding as much has ever been entered by the court. This failure prevented the court from assessing a "meaningful discount" to any otherwise proper Receivership fees and expenses.

2. Appellants did not engage in discovery abuse

There is no order (let alone evidence) that any appellant ever engaged in discovery abuse or refused to comply with the district court's orders on

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[52] 28 U.S.C. § 1927.

discovery. The district court's comments in the Fee Order regarding Baron's conduct in discovery are completely unsupported by the record.

3. Conclusion

Judge Ferguson was clearly frustrated over this proceeding since its inception. While that frustration is understandable, the findings in the Receivership Fee Order reflect the court's refracted perceptions. Indeed, such comments could be seen to suggest bias and lack of impartiality on the part of the District Court. This was not something that grew over time. From day one, Judge Furgeson was unduly aggressive and extreme in his dealings with Baron and his counsel. Judge Ferguson's comments at the first status conference in this case set the tone for the entire case. Addressing Baron's attorneys, Judge Furgurson stated on the record:

> MR. BELL: Yes, your Honor, absolutely. I don't think your Honor needs to modify that order, and I'm okay with it, and I believe Mr. MacPete is as well.
>
> 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.
>
> (ROA.29510).
>
> THE COURT: 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.
>
> (ROA.29515–16).

The day following, Baron's lawyers promptly filed an emergency motion to withdraw (ROA.191–4), which was granted the following day (ROA.190–200), leaving Baron without counsel during a temporary injunction proceeding and requiring Baron to comply with discovery and produce thousands of documents and attend depositions *pro se*.[53] The tone was such that the issue resurfaced during the December 17, 2010 hearing on the Receivership wherein counsel if he would be in danger of sanction for representing Baron. (ROA.4771-2).

III.

The district court abused its discretion and violated Appellants' due process rights by precluding their participation in the Fee Applications proceedings and proceeding on an unreasonably accelerated basis, refusing to allocate funding to pay counsel

[53] Baron did not fire these lawyers as Judge Ferguson suggested in the Receivership Fee Order. They quit, having been understandably disturbed over the overly aggressive comments made by Judge Ferguson at the June 19, 2009, status conference.

and an expert witness, and refusing to grant a continuance requested by Baron who was the sole party then capable of objecting to the fee requests on the LLC's behalf.

This Court has long maintained that "the right to retained counsel in civil litigation is implicit in the concept of the Fifth Amendment due process." *R.B. Potashnick v. Port City Construction Co.,* 609 F.2d 1101, 1117 (5th Cir. 1980). Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. *Goldberg v. Kelly*, 397 U.S. 254, 270–71 (1970). The right to counsel in civil matters "'includes the right to choose the lawyer who will provide the representation.'" *Texas Catastrophe Prop. Ins. Assoc. v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992) (quoting *McCuin v. Texas Power & Light Co*., 714 F.2d 1255, 1257 (5th Cir. 1983)). The meaning of these decisions cannot be limited to the right to selection of whatever lawyer will work for free.

As of the Fee Orders, the Court had improperly imposed a Receivership for over 2½ years, freezing the assets of all appellants. Novo Point and Quantec were not permitted to be present; they were unwanted and uninvited. They were not given notice and had been expressly instructed that

the court would not recognize attorneys on their behalf other than those retained by the Receiver. They had at most only an indirect voice via Baron.

Baron was not only forced to defend against the Fee Applications on an incredibly accelerated basis imposed by the District Court, but also was simultaneously ordered to participate in mediation and forced to defend himself at trial in the complex Baron Involuntary Bankruptcy set to be heard in the middle of May 2013, against another team of highly skilled lawyers—all this while Baron was deprived of the use of any of his funds to hire counsel.[54] The issues were extraordinarily complex, and the documents and evidence were voluminous. Penniless, Baron faced a team of professionals who had already been paid millions of dollars (largely if not entirely from LLC funds) and who were seeking more. The Receiver, the Ondova Trustee and their counsel presented over $6 million in billings, incorporating thousands hours of time and numerous time entries covering a 290 month period. To defend against the Fee Applications on the accelerated time schedule set by the District Court required experienced lawyers

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

and experts familiar with the issues.

There can be no doubt that the continuous asset seizure from November 2010 forward imposed by the District Court together with the involuntary bankruptcy implicated the procedural protections mandated by the Due Process Clause of the Fifth Amendment for both Baron and for the LLCs. *See*, *e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 11–12 (1991) (holding that due process protection is merited when there is deprivation of property and deprivation need not be "complete, physical, or permanent" to merit protection but that "even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protections.").

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

What constitutes a "meaningful" opportunity to be heard varies with

the circumstances and the interest at stake. Due Process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334; *see also Goldberg*, 397 U.S. at 268–69 ("the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard"). In the present litigation, however, the effect of the Court's rigid freeze on funds for Baron's defense including funds to his counsel, for experts and other costs and expenses precluded appellants from mounting all but a minimal defense and prevented them from having any meaningful opportunity to be heard.

To defend himself at a hearing on substantial Fee Applications covering three of the largest law firms in Dallas, Texas, a time period from November 24, 2010, to April 30, 2013, involving a small army of lawyers, and an enormous volume of time entries, Baron required a skilled legal team including staff and experts. He and the LLCs had the resources to do so but they were all firewalled behind the cloak of Receivership.[55] Baron made several pleas to the district court for access to funds required to defend

[55] Baron held funds in exempt IRA and similar accounts, all of which were controlled by the Receiver. The LLCs of course had cash and a continuing revenue stream from their domain names.

himself—all were refused in their entirety. Baron was left with unpaid counsel and no experts, in both this trial and the involuntary bankruptcy trial. Baron's unpaid counsel probably did they best they could be expected to do without resources, but that effort was woefully inadequate, considering the enormous scope and scale of the task. The process adopted by the District Court on an expedited basis to accommodate the judge's scheduled retirement did not constitute a "meaningful opportunity to be heard."

CONCLUSION & PRAYER

The difficulties recognized by this Court in *Netsphere I* seem only to have grown over time, resulting in a grave and substantial harm to Novo Point and Quantec. The LLCs have been struggling to keep pace; challenged by the need to expeditiously respond to a growing number of issues while being deprived of the financial means to do so.

What began as a means to prevent Baron from hiring and firing counsel grew to include a need to pay for the, as yet unsubstantiated, claims of the Petitioning Creditors for legal fees owed them by Baron. It ended up as a

free-for-all in which the LLCs, legally independent entities, were illegally sucked into the Receivership for the sole apparent reason to act as the bank account for the Receiver, his attorneys, and, it seems, anyone else who could dream up a claim against Baron. At the end of the day, the LLCs have been forced to expend millions upon millions to finance a fight in which they had no dog. They were not in any manner culpable of any of the activities which formed the basis for the Receivership and have done nothing since which could be seen as culpable. They certainly received no benefit. A court should not be able to act under in equity to accomplish a task which is legally prohibited.

The opposition and the District Court have run roughshod over the rights of the LLCs, depriving them of their assets, civil liberties and the most basic due process – the right to be heard. The LLCs feel like any one of your Honors who, being mistaken for your neighbor, has had their identity stolen, forcibly evicted from your home by a gang of outlaws asserting authority, and are forced to sit outside in the cold, left to stare in the window as the gang feasts on your food and uses your property as they please. This is pillage and it must stop.

The LLCs request that this Court issue a judgment overturning the Fee

Order, denying the Fee Applications in their entirety and order full restitution of all of the LLCs assets improperly expended too the LLCs. As concerns the LLCs, the Receivership and the improper Fee Applications are the fault of the fee applicants. Remand would be inappropriate. *See Lee v. Interstate Fire & Cas. Co.*, 86 F.3d 101, 105 (7th Cir. 1996) (Remand for development of a factual record is inappropriate where a plaintiff fails to meet his burden of persuasion and never suggested to the trial court that additional evidence was necessary). A remand is unnecessary when the trial court's error is directly traceable to the failure of the party with the burden of proof to articulate and identify the evidence. *United States v. Microsoft Corp.*, 253 F.3d 34, 81-82 (9th Cir. 2001).

WHEREFORE, for the foregoing reasons, appellants Novo Point and Quantec requests that this Court:

1. Reverse the district court's Fee Order finding that no fees should be charged as against their assets, that any prior fees and expenses charged to the LLCs should be disgorged and tendered to the manager of the LLCs, Mr. David McNair;
2. Issue judgment as to prior recipients whose prior awards were not reviewed in the Fee Order:

(a) that such fees and expenses, to the extent received, be ordered disgorged under the premise that payment by the LLCs was impermissible and that because *Netsphere I* mandated their reconsideration, by failing to submit their prior awards for reconsideration they waived their rights to retain them, or, alternatively,

(b) that the issue be remanded with instruction.

3. Grant such other and further relief as is just and proper.

Respectfully Submitted,

/s/ Paul Raynor Keating

Attorney for Appellants Novo Point LLC and Quantec LLC

CERTIFICATE OF SERVICE

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

The undersigned further certifies that a true and correct copy of this Appellants' Brief was served on counsel who do not participate in the Appellate CM/ECF system by courier in accordance with Fed. R. App. P. 25 and 5TH CIR. R. 25 on 21st day of July 2014.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,878 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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Dated: July 18, 2014