No. 11-10501

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. ET AL,
Plaintiffs

v.

JEFFREY BARON,
Defendant – Appellant

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

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

v.

PETER S. VOGEL; DANIEL J. SHERMAN,
Appellees

Interlocutory Appeal of Orders
in Receivership on Appeal

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

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

No. 10-11202

In the
United States Court of Appeals
for the Fifth Circuit

NETSPHERE, INC. Et Al, Plaintiffs

v.

JEFFREY BARON, Defendant-Appellant

v.

ONDOVA LIMITED COMPANY, Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

Cons. w/ No. 11-10113

NETSPHERE INC., Et Al, Plaintiffs

v.

JEFFREY BARON, Et Al, Defendants

v.

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

v.

PETER S. VOGEL, Appellee

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

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Cons. w/ No. 11-10289

NETSPHERE, INC., ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant- Appellant

v.

DANIEL J SHERMAN, Appellee

Interlocutory Appeal of Orders in Receivership on Appeal

Cons. w/ No. 11-10290

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, ET AL, Defendants

v.

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

v.

PETER S. VOGEL, Appellee

Cons. w/ No. 11-10390

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant – Appellant

v.

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

v.

ONDOVA LIMITED COMPANY, Defendant – Appellee

v.

PETER S. VOGEL, Appellee

Cons. w/ No. 11-10501

NETSPHERE, INC. ET AL, Plaintiffs

v.

JEFFREY BARON, Defendant – Appellant

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

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

v.

PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

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

Respectfully submitted,

/s/ Gary N. Schepps

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CERTIFICATE OF INTERESTED PERSONS

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

1. PARTIES

a. Defendant: JEFFREY BARON

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

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

d. Intervenor: VeriSign, Inc.

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

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

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

2. ATTORNEYS

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

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

d. For Intervenor Rasansky and Aldous:

Aldous Law Firm
Charla G Aldous

f. For Plaintiffs:

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

3. OTHER

a. Companies and entities purportedly seized by the receivership:

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

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

b. Receiver / Mediator / Special Master: Peter Vogel

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

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

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

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

STATEMENT REGARDING ORAL ARGUMENT

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

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STATEMENT OF THE JURISDICTION

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

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

ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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[1] R. 1578 (paragraph 13, "the appointment of a receiver is necessary under the circumstances in order to remove Baron from control of his assets and end his ability to further hire and fire a growing army of attorneys."), 1619-1632. One reason cited by Sherman in his motion was that three business days before, Baron had hired an attorney to assist in objecting to Sherman's Attorney's fee application in the bankruptcy court where Baron is a creditor. 1576-1577.

[2] R. 1576.

[3] R. 4593-4594.

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

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

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

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

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

[10] R. 3891.

[11] SR. v8 p1007.

[12] R. 1699-1700.

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

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

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

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

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

million dollars. SR. v8 p990-992.

The "Claims" Solicited by the Receiver

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

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

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

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

SR. v5 p139 [Doc 445].

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

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

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

the following:[16]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 28 U.S.C. §144 Affidavit

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

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

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

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

ARGUMENT SUMMARY

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

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

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

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

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

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

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

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

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

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

ARGUMENT & AUTHORITY

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

Standard of Review

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

Appeal Divests the District Court of Jurisdiction Over the Matter Appealed

Jeffrey Baron filed a notice of appeal from the receivership order on December 2, 2010. R. 1699. The filing of a notice of appeal is an event of jurisdictional significance– it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The divesture of jurisdiction of the trial court involves all those aspects of the case appealed. *Id*. As a matter of established law, the district court loses jurisdiction over all matters which are validly on appeal. *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) ("rule which we follow rigorously"). The sole authority of a district court with respect to a

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

The District Court was Divested of Jurisdiction over Receivership Res

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

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

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

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

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

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

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

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

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

Standard of Review

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

Argument

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

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

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

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

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

Standard of Review

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

Argument Overview

This issue addresses the question:[18]

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

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

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

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

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

The District Court's Erroneous View of Equity Receivership

In the erroneous view of the District Court:

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

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

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

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

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

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

Overview of Equity Receivership Power

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

Equity Receivership is Only Authorized as an Interlocutory, Ancillary Remedy

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

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

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

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

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

Carrington-Coleman's Erroneous Argument

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

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

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

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

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

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

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

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

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

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

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

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

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

Unsecured Creditors Have No Rights in the Property of their Debtor

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

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

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

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

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

Exercise of Receivership Power Must be Closely Scrutinized

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

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

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

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

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

Standard of Review

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

Subject Matter Jurisdiction

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

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

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

Abuse of Discretion

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

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

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

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

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

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

The Seventh Amendment

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

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

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

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

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

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

Standard of Review

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

Argument

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

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

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

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

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

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

Standard of Review

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

Argument

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

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

1975)(emphasis) that:

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

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

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

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

Standard of Review

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

Established Limitations on Receivership Fees

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

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

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

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

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

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

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

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

Vogel Was Prohibited by Law from Being Appointed Receiver

Background

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

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

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

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

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

Standard of Review

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

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

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

Receivership May Not be Used to Determine an Alter Ego Claim

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

Bollore SA v. Import Warehouse, Inc.

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

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

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

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

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

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

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

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

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

Novo Point and Quantec Are Not Parties to the Lawsuit

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

Materially Missing Steps with Respect to the LLCs

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

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

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

Standard of Review

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

Argument

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

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

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

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

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

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

PRAYER

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

(1) That the challenged orders be reversed.

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

(3) That costs be taxed against the Appellees.

Respectfully submitted,

/s/ Gary N. Schepps

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QUANTEC, LLC., and
JEFFREY BARON

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 12,836 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using MS Word 2000 in 14 and 15 point century font.

DATED: October 6, 2011.

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

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

CERTIFIED BY: /s/ Gary N. Schepps
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