No. 10-11202
and Consolidated Cases

In the
United States Court of Appeals
for the Fifth Circuit

No. 10-11202
NETSPHERE, INC. Et Al,
Plaintiffs
v.
JEFFREY BARON,
Defendant-Appellant
v.
ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Ex Parte Order Appointing Receiver
Where No Claims were Pled in the Property Seized

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

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

PETITION FOR PARTIAL REHEARING

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

Cons. w/ No. 11-10290
NETSPHERE, INC. ET AL, *Plaintiffs*
v.
JEFFREY BARON, ET AL, *Defendants*

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*

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*

Cons. w/ No. 12-10003
NETSPHERE, INC. ET AL, *Plaintiffs*
v.
JEFFREY BARON, *Defendant – Appellant*
QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*

GARY SCHEPPS, *Appellant*
v.
PETER S. VOGEL, *Appellee*

Cons. w/ No. 12-10444

In re: NOVO POINT LLC, Petitioner

Cons. w/ No. 12-10489
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
v.
PETER S. VOGEL; DANIEL J. SHERMAN , *Appellees*

Cons. w/ No. 12-10657
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – *Appellant*

QUANTEC L.L.C.; NOVO POINT L.L.C., *Appellants*
v.
PETER S. VOGEL; DANIEL J. SHERMAN , *Appellees*

Respectfully submitted,

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FOR JEFFREY BARON

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ARGUMENT

ISSUE 1: A court lacking jurisdiction and authority to place property into receivership lacks the jurisdiction and authority to confiscate the property.

The Panel's opinion correctly recognized the controlling precedent of *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1028-1029 (5th Cir. 1931) that the District Court lacked the jurisdiction to seize the assets of Jeffrey Baron, Quantec LLC and Novo Point LLC because that property was not subject to any claim at issue before the court. However, the Panel's opinion erroneously ruled that based on equitable considerations the seized property could be confiscated to pay the receiver fees.

The Panel's disposition is contrary to the controlling precedent of this Court and the Supreme Court. Pursuant to this Court's precedent in *Cochrane*, **where the court lacks jurisdiction to impose a receivership over property, it does not acquire jurisdiction over that property through the receivership**. *Cochrane* at 1028. The Supreme Court has ruled that without jurisdiction over the property, the district court is "**without power to make any charge upon, or disposition of, the assets**". *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923).

In reaching the opposite result, the Panel's opinion erroneously relied on the Supreme Court's holding in *Palmer v. Texas*, 212 U.S. 118 (1909). The controlling precedent is *Lion Bonding*. In *Lion Bonding*, the Supreme Court dispositively ruled that the holding in *Palmer* does not apply where the trial court lacks the jurisdiction to impose the receivership. *Lion Bonding,* 262 U.S. at 642. ("The case at bar is

unlike *Palmer v. Texas*, 212 U.S. 118, 132, upon which the receivers rely. In that case the costs and expenses of a receiver erroneously appointed by the federal court were directed to be paid out of funds realized in that court. There, the Circuit Court had jurisdiction as a federal court; but the decree appointing the receiver was reversed, because it was erroneous").

The Supreme Court also expressed this rule in *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373-374 (1908), a companion case to *Palmer* heard in 1908. In *Atlantic Trust,* the Supreme Court recognized 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 ... As to such property **his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses**." *Id.*

The Panel's opinion erroneously looked to *WF Potts Son & Co. v. Cochrane*, 59 F. 2d 375, 377 (5th Cir. 1932), for guidance in a case where the court lacks jurisdiction over the receivership res. The *WF Potts* appeal did not involve a challenge to the disbursement of receivership assets. *Id*. at 378 ("they did not in the intervention, nor in any other way, make complaint of, or object to, the receiver's making necessary expenditures for the protection of the property"). Rather, the issue in *WF Potts* was the recovery from the plaintiff, WF Potts, for damages caused by the imposition of the receivership. *Id.*[1] Since the trial court's disposal of

[1] In computing those damages, this Honorable Court held that the amount of damages recovered

receivership assets was not challenged or considered in the *WF Potts* appeal, *WF Potts* offers no authority on the issue at bar. *Id*. at 378.

Whereas *WF Potts* did not address the question of vacating disbursements by a receiver appointed by a court lacking subject-matter jurisdiction to seize the assets, the holding of this Honorable Court in *Speakman v. Bryan*, 61 F.2d 430, 431 (5th Cir. 1932), expressly addressed the issue.[2] This Honorable Court, relying on *Lion Bonding,* held that the general rule– that the allowance of disbursements by a receiver whose appointment was improvidently made, to be charged upon equitable principles against the property to the extent that they have inured to its benefit– **does not apply "where the court appointing the receiver is entirely wanting in jurisdiction as a court"**. *Speakman* at 431.

"[N]o pussy-footing around is allowed on jurisdictional issues." *In re Southmark Corp.*, 163 F.3d 925, 929 (5th Cir.1999). The Supreme Court has ruled that "**If there were no jurisdiction, there was no power to do anything** but to strike the case from the docket ... and the award of costs and execution was consequently void. " *Mayor v. Cooper*, 73 U.S. 247, 250-251 (1868). The Supreme Court has held moreover that "the rule, springing from the nature and limits of the judicial power of the United States, is inflexible and without exception". *Mansfield,*

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from the plaintiff should be reduced by "all expenses incurred by the receiver which the court finds have inured to its [the trust's] benefit, or it would have had to make had the trust not been taken over by the receiver" *Id*. at 379. For that calculation, "each trust should have charged to it all expenses incurred by the receiver which the court finds have inured to its benefit". *Id*. The calculation and application of charges in *Potts* was applied "as between it [the plaintiff] and the receiver. *Id*. at 378.

[2] *Speakman* is a companion case to *WF Potts Son & Co. v. Cochrane*, also authored by Judge Hutcheson in 1932.

C. & LMR Co. v. Swan, 111 U.S. 379, 382 (1884). As a matter of binding precedent, "the **judicial power of the United States must not be exerted in a case to which it does not extend**," and "applies equally in every case where the jurisdiction does not appear from the record." *Id.*

This rule is mandatory and fundamental to American Jurisprudence. *E.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838) (jurisdiction is required to "exercise any judicial power"). This Honorable Court has ruled that when the district court lacks jurisdiction, the Court of Appeals has jurisdiction on appeal only for the purpose of addressing the lower court's lack of jurisdiction. *Griffin v. Lee*, 621 F.3d 380, 384 (5th Cir. 2010).[3] As a matter of controlling precedent, "that the court, not having jurisdiction of the res, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established." *Fall v. Eastin*, 215 U.S. 1, 11 (1909).

Actions taken by a court beyond its authority are not mere error but, pursuant to the binding precedent of the Supreme Court, are absolutely void. *E.g.*, *Windsor v. McVeigh*, 93 U.S. 274, 282-283 (1876). The Supreme Court ruled in *Windsor* that unauthorized court action "**would not be merely erroneous they would be absolutely void; because the court in rendering them would transcend the limits of its authority**". *Id*. at 282. An example offered by the Supreme Court was that

[3] As a matter of controlling precedent, the District Court below lacked not only subject-matter jurisdiction over property seized, but also lacked subject-matter jurisdiction over the non-diverse state law attorney fee claims for which it attempted to provide a remedy. *Griffin* at 388.

"The decree of a court of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the Chancellor. And the reason is, that the courts are not authorized to exert their power in that way". *Id.* at 283. As the Supreme Court ruled in *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945), when a court has "no judicial power to do what it purports to do" then "its action is not mere error but usurpation of power".

In the case at bar, the district court lacked jurisdiction and authority as a court to impose the receivership over Baron and the other receivership entities. Accordingly, as a matter of controlling precedent, the District Court was without power to make any charge upon, or disposition of the seized assets, and its orders to do so are absolutely void. *Lion Bonding* at 642; *Speakman* at 431; *Windsor* at 282.

The underlying precedent involved has been addressed by the Supreme Court in the modern context in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). In striking down the legal effect of subpoenas, the Supreme Court ruled that the "power of a court cannot be more extensive than its jurisdiction" *Id*. at 76. The Supreme Court ruled that "The challenge in this case goes to the subject-matter jurisdiction of the court and hence its power to issue the order. … [is not a mere nicety of legal metaphysics. It rests instead on **the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from**

the very wrong asserted here, the excessive use of judicial power." *Id*. at 77.

If this Honorable Court allows the Jeffrey Baron to be stripped of millions of dollars of assets by a court lacking jurisdiction over those assets and lacking authority under the law to seize those assets, then **he has not been protected from the wrong of the court's unauthorized seizure.** If the confiscation of private property by a court lacking jurisdiction[4] and authority to seize the property is affirmed, then, by the decision of this Honorable Court, we have lost "a central principle of a free society".

Because the jurisdictional issue is dispositive, equitable considerations are not a factor. However, if such considerations were a factor, the Panel's decision omits critical equitable considerations and is based on an erroneous apprehension of the key facts, as discussed below.

ISSUE 2: The Panel's Opinion misapprehends key operative facts.

Sherman worked a complete rhetorical recasting of the facts. He was successful doing so in the Bankruptcy Court, and with Vogel's assistance, in the District Court. This is the last opportunity to correct the apprehension of this Honorable Court.

POINT ONE: There were not 45 unpaid lawyers, or a stream of mass unpaid 'serial lawyers'. Baron changed lawyers, not 45 or 19 times, but twice in the district

[4] In the case at bar, there are three fundamental jurisdictional limits involved: (1) the jurisdiction of the federal court does not extend to non-diverse state law claims, (2) the court lacks jurisdiction over property not at issue in the litigation, and (3) the court lacks jurisdiction to seize assets located outside of the territorial jurisdiction of the court.

court and three times in the bankruptcy court.[5]

The bulk of so-called 'unpaid' lawyer claims, are from firms such as Carrington Coleman that worked for Ondova and filed claims in the Ondova Bankruptcy. **Baron provided for the payment of those lawyer's fees, in full, through the Ondova Estate** as part of the Global Settlement Agreement.[6] Sherman obligated himself to immediately provide for the payment of the lawyer claims. R. 2258-2259. Baron paid and Sherman physically had possession of the funds– **$2,095,589.36 in cash**. SR.v10 p4229, SR.v18 p181. But instead of paying the claimants as agreed in the Global Settlement, Sherman started to put the money into his own pocket. SR. v18 p235. On November 19, 2010, Baron objected. *Id*.

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[5] The district court lawsuit was answered by the Bell Team. Then, four days after being assigned to the case, Hon. Judge Furgeson threatened death as a sanction for contempt, R. 218, and warned "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'm telling you don't screw with me", R. 223. Perhaps the Court meant it all in jest, but the next business day, the Bell Team filed for immediate, emergency withdrawal. R. 138. The local rules of the Northern District of Texas require a client's signature to grant withdrawal without hearing. The Bell Team did not have such a signature since Mr. Baron did not agree for their emergency withdrawal. *Id.* There was no allegation of unpaid fees. Still, the next day, the Court granted the withdrawal without hearing. R. 146. Although he was left without counsel, no delay was granted to Baron. *Id*. Baron retained the (1) Friedman-Hall team and eventually hired (2) Gary G. Lyon as a lower cost replacement counsel. R. 1535.

In the bankruptcy court, Keiffer was Ondova's bankruptcy counsel. Baron was threatened with jail if he did not fire Keiffer, SR. v18 p185, and he was replaced by (1) Pronske. R. 1157. In September 2010 Baron hired (2) Ferguson, a new lawyer he hoped could facilitate the immediate closing of the bankruptcy. Ferguson was unable to help and (3) Thomas was hired. Doc 1126-1 at 17-18, Two other lawyers appeared briefly for Baron on specific issues, Jones and Broome, neither was hired as bankruptcy counsel.

[6] Baron funded $1.8 in cash into the Ondova estate, sufficient to pay all the claimant attorneys and other creditors in full, and still leave a million dollar cash surplus, and the other assets of Ondova intact. Doc. 1126-1 at 17; Bkr. Doc 535 at 66. Although not technically Ondova claimants, Aldous and Rasansky by mutual agreement, were also to be paid by Sherman through the Ondova Estate. R. 2239.

It took Baron's unpaid appellate counsel a long time to figure it out: After Baron provided the aforementioned funding, by September 2010, Sherman held in his hand over **$2 Million in cash** and an additional $330,000 in cash escrow[7], **to pay around $800,000 in claims**[8]– mostly the attorney claims. SR.v10 p4229.

Sherman refused to pay the creditors, and then came to the District court saying—**'look at this long line of unpaid creditors-- drastic action is necessary against Baron!'**

The Panel's opinion holds that Baron brought the receivership upon himself. Baron could have paid the creditors directly instead of giving Sherman the money and trusting Sherman to pay them. But Jeff Baron paid. **It was Sherman that refused to pay** the creditors. The receiver, Vogel, didn't complain. The Judge didn't know.[9]

POINT TWO: The Bankruptcy Court recommended and requested a mediator[10] **not** a receiver. The Bankruptcy Court set (and continued) a show cause

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[7] SR. v10 p4446; SR. v9 p105.

[8] Bkr. Doc 535 at 66:21-22.

[9] **The trustee clearly fooled the District Court** into thinking that the Ondova estate lacked the funds to pay the creditors. On January 2, 2011 in declining to vacate the receivership the District Judge explained explicitly, "**This receivership could be over tomorrow if we could just get sufficient funds to make sure that the bankruptcy court is appropriately funded in such a way that it could be closed.**" R. 4587:12-16. Clearly the Court was not aware that Sherman held over $2.3 Million in cash from Baron, SR.v10 p4229; SR.v18 p181; SR.v10 p4446, and could have paid every claim in full and still have a whopping cash reserve left over R. 4587:24, 4587:1; Bkr. Doc 535 at 66:21-22; Doc 1132 at 2:11-13.

[10] R. 1588. The Bankruptcy Judge stated two things. [1] "[Baron] **can** proceed pro se." And, [2] "[If Baron] does not cooperate in connection with final consummation of the Global Settlement Agreement, he can expect this court to recommend to His Honor that he appoint a receiver over Mr. Baron … to seize Mr. Baron's assets and perform the obligations of Jeffrey Baron under the Global Settlement Agreement." *Id.;* R. 1590 ("The bankruptcy court now recommends that His Honor appoint his Special Master, Peter Vogel, to conduct a global mediation") .

hearing to determine **if Baron was complying with his obligations under the Global Settlement**, and if not, why the court should not then make a Report to Judge Furgeson that he appoint a Receiver over Baron to seize his assets and perform his obligations.[11] The Bankruptcy Court did not find non-compliance with the settlement[12] and accordingly, **the Bankruptcy Court did not request a receiver**. SR. v18 p235-243. Rather, **a *mediator* was requested**. R. 1590.

Sherman, however, slyly misrepresented the situation. Sherman subtly conflated the Bankruptcy Judge's recommendation and falsely reported that:

> "The Bankruptcy Court gave Baron two options: (1) retain Gary Lyons and Martin Thomas through the end of the Bankruptcy Case, or (2) proceed pro se. If Baron chose the latter opinion, the Bankruptcy Court advised Baron that it would recommend to this Court that it appoint a receiver over Mr. Baron and all of his assets." R. 1576.

Sherman's deception was subtle—falsely representing that if Baron proceeded *pro se*, then on that basis the Bankruptcy Court wanted a receiver over Baron. That deception has been, to this point, *highly* effective.

Sherman's subtle redrafting of the Bankruptcy Judge's recommendation still required Baron to be proceeding *pro se*. So, Sherman made the completely fabricated and false[13] representation that Baron's bankruptcy counsel, Martin Thomas, was unpaid and therefore withdrew. R. 1576.

POINT THREE: Sherman falsely represented to the District Judge that Jeff

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[11] Sherman Record Supplement Vol. 5 Page 37.

[12] On October 28, 2010, **Sherman himself reported that there had been full compliance.** SR. v18 p181. Notably, the Pronske claim had been filed a week earlier, on October 20, 2010, SR. v18 p239. Clearly, from Sherman's own viewpoint that did not involve any non-compliance. SR. v18 p181.

[13] R. 1575. As explained by Thomas in refusing the Receiver's pressure to submit a claim against Baron—Baron was still his client and had paid Thomas **in full**.

Baron was not complying with the Court's order to mediate former attorney's alleged claims, SR. v2 p293, was not cooperating with the mediator, R. 1577:20-22, and was obstructing the mediation efforts, R. 1871. Sherman argued that because **Baron was violating the Court's mediation order**, the Court **needed to "appoint Mr. Vogel as the receiver** in essence **to make sure that a mediation of those attorneys' fees claims can occur**." SR. v2 p293. The District Court believed the *allegations*. SR v2 p353:16-18.

When Sherman was placed under oath, a very different story was revealed: It wasn't Baron who violated the Court's order. Rather, Vogel had reported to Sherman that the mediation failed because **the lawyers refused to mediate**. Doc 1126-1 at 23:8.[14] Both Sherman and Vogel knew this, *Id*., but misled the District Court to believe the opposite. **That is bad faith.**

POINT FOUR: The Receiver, not Baron, ran up the receiver's fees. When the receivership was imposed, Baron immediately turned over his papers and documents. R. 3891. From that point he was penniless, helplessly dependent upon the monthly stipend of the receiver, and essentially erased as a person under the law by the Receivership order.

The Receiver, with unrestrained freedom,[15] generated massive fees through a

[14] Vogel knew that Baron was interested in mediating the claims and his counsel actively contacted Vogel regarding the mediation. R. 4482, 4484.

[15] The District Court provided no oversight of Vogel's fees. Not one line of Vogel's billing was challenged or found unreasonable or unnecessary by the Court. The Receiver was entirely excused from meeting the 'Johnson' factors in his billing. *E.g.*, SR.v2 p413, v6 p103, v19 p366.

steady stream of **manufactured wrongdoing alleged against Baron**.[16] Whatever Baron did, the receiver invested in vigorously arguing it was obstructive.[17]

Jeff Baron, on the other hand, did absolutely nothing other than what his unpaid counsel told him to do. **If the advice of Baron's unpaid counsel is to be faulted in any regard, Baron cannot be held responsible.** By *ex parte* order, Baron's money was seized, R.1604-6, his trial counsel was fired by the Receiver, R. 3890-2, and he was ordered not to hire any counsel. SR. v8 p1213. Literally the only lawyer who would agree to help was Gary Schepps. R. 1712-3. Baron had no choice in the matter[18] and he cannot be penalized in equity for any advice he received—he was denied the right to hire counsel of his choice and had his counsel forced upon him, and, limited, unpaid counsel at that.

POINT FIVE: As a matter of law, neither the hiring or firing of lawyers, nor

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[16] E.g., On March 30, 2011, Vogel sent an email instructing Baron as follows: "**Subject: Jeff Baron Tax Return Tele-conference / Please dial in to 866-420-4353/code 826697 / Thank you.**" SR. v5 p102-8. Baron and his appellate counsel called the number as requested, and were immediately accused of 'intimidation'. SR. v4 pp1920-4. Vogel was apparently unaware that his email contains an electronic marker identifying his computer and claimed that Baron "threatened and intimidated" by breaking into a secret conference call "to obstruct the work of the Receiver." SR. v4 pp1920-4. When confronted with the email proof that Vogel had staged the incident, Vogel suggested the email evidence was fake and, alternatively, that his computer 'spontaneously' drafted the directive for Baron to 'please dial in'. SR. v5 p211.

[17] E.g., in May, 2012, the Court entered an order that allowed, for the first time, Baron to retain trial counsel for a limited purpose. SR. v15 p1954. The Receiver then billed for filing a six section objection to Baron's ***hypothetical*** failure to obtain trial counsel, accusing Baron on May 15, 2012 of his possible future refusal to comply with the order to retain counsel because "retaining new counsel would be a step towards ending the Receivership in an orderly fashion". SR. v15 p2907, et. seq. Then, less than a month later when Baron sought approval to hire trial counsel as ordered, the Receiver billed for taking the opposite position and, on June 14, 2012, filed a seven page objection accusing Baron of threatening to "cause chaos by extending the length and increasing the costs of the Receivership" by retaining counsel. SR. v16 p1159, et.seq.

[18] Baron's motions to be allowed paid counsel were denied. E.g., R. 2719, 3557.

the non-payment of lawyers[19] can create any claim in the bankruptcy court. Only the substantial contribution of a benefit to the bankruptcy by a creditor gives rise to a claim.[20] Payment or non-payment of the lawyer is irrelevant. If the lawyer was not paid, he stands in the shoes of the creditor to present the creditor's claim.[21]

Similarly, hiring, firing, or non-payment of lawyers is not vexatious litigation in a civil case. When a party substitutes attorneys inopportunely, the only one they vex is themselves. No delay was ever caused when Baron's counsel changed.

POINT SIX: Baron did not take Ondova Bankrupt until after he was notified that the discovery contempt hearing would not be held.[22] The false allegation is just more of the 'he deserves it' taint that the Trustee and Receiver successfully piled on Baron in the lower courts– after the receivership was imposed *ex parte* and Baron was denied paid trial counsel to defend him.

ISSUE 3: The Panel's decision erroneously affirms depriving Jeff Baron of substantial property interests without Due Process of law and errs in labeling Baron as a "vexatious litigant" when the charge was raised only after Baron was stripped *ex parte* of all his assets, his documents and evidence, and Baron was denied discovery and prohibited from hiring paid counsel to defend himself.

Through an *ex parte*, off-the-record hearing,[23] all of Baron's money, property, and future wages were seized,[24] **his "AV" rated trial lawyer was fired by the**

[19] By a creditor, such as Baron, to a bankruptcy case, such as Ondova's.
[20] 11 U.S.C. 503(b)(3)(D); *e.g.*, *In Re DP Partners Ltd. Partnership*, 106 F. 3d 667, 671-673 (5th Cir. 1997).
[21] 11 U.S.C. 503(b)(4); *e.g.*, *In Re Consolidated Bancshares, Inc.,* 785 F.2d 1249,1253 (5th Cir. 1986).
[22] SR. v18 Doc 1038-1 p157; R. 919.
[23] R. 3924; SR. v5 p321; SR. v11 p83.
[24] R.1604-6.

Receiver, R. 3890-2, and his documents and records were seized. Baron was ordered not to hire any counsel to defend himself. SR. v8 p1213. At that point, Baron had no choice of counsel and literally the only counsel who would agree to help was Gary Schepps, but only as appellate counsel. R. 1712-3.[25]

On December 13, 2010,[26] Baron notified the District Court that **Schepps was an appellate lawyer and his representation was "strictly with respect to appeal** of the order appointing receiver". R. 2718. Baron requested to be allowed to use his own money to hire "experienced and specialized counsel" both "to conduct discovery and to "prepare and defend" the charges raised against him. R. 2719. Baron was "unable to retain counsel to defend or even object to the [allegations] ... because his money has been seized and this [District] Court has ordered him not to retain any counsel". *Id.*

In response, the District Court ruled that the pending FRAP 8(a) (Vacate or Stay) hearing would be "limited to the appeal of the Order Appointing Receiver". R. 3557. District Court ruled that Baron's pending motion presented "the same issue" as the motion for stay pending before the Fifth Circuit. *Id.* Fn 1. The District Court refused to allow Baron to hire paid counsel. *Id*. The unpaid appellate counsel handling the January 4, 2011 hearing, Barrett, did not even know how to establish a predicate for expert testimony. R. 4479-4481.

Baron was entitled to representation by counsel of his choice with respect to

[25] For one hearing Schepps was assisted as appellate counsel by Barrett, unpaid, R. 4395-4396.
[26] Well prior to Baron's FRAP 8(a) Vacate & Stay hearing.

the hearings in the District Court, and was denied that basic right.[27] As a matter of the controlling precedent of this Honorable Court, "there is a constitutionally guaranteed right to retain hired counsel in civil matters" and "[t]he right to counsel in civil matters 'includes **the right to choose the lawyer who will provide that representation**.'"[28]

Baron was also entitled to reasonable notice of the specific allegations against him and a meaningful hearing.[29] However, neither the allegation that Baron was "vexatious" nor the list of offenses he allegedly committed and mentioned in the Panel's opinion were raised in the Trustee's motion for receivership. R. 1575. Similarly, no hearing was held on the charge that Baron 'ran up' receivership costs.

The Controlling precedent of this Honorable Court is clear: (1) "The right of defendants to present controverting factual data is illusory unless there is adequate notice of plaintiffs' claims."[30]; and (2) Adequate notice must "describe the specific

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[27] *E.g.*, *Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1181 (5th Cir. 1992).

[28] *Id.* at 1180-1. The controlling precedent of this Honorable Court is well established that: "the fifth amendment to the United States Constitution establishes 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), "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement", *Id.* at 1118, and "[t]his right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights." *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 942, 946 (5th Cir. 1981).

[29] *Goldberg v. Kelly*, 397 U.S. 254 (1970); *World-Wide Volkswagen Corp. v. Woodson*, 444 US 286, 291 (1980); *In re Oliver*, 333 U.S. 257, 273 (1948)(" right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence"); and *e.g., Ferring BV v. Barr Laboratories, Inc*., 437 F.3d 1181, 1203 (Fed. Cir. 2006)("It is improper, and unfair, to require nugatory evidence on a point that was not raised in the motion"); *Dailey v. Vought Aircraft Co.*, 141 F. 3d 224, 233 (5th Cir. 1998)("notice of the charges made" is "required by the United States Constitution").

[30] *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 356 (5th Cir. 1971).

conduct" alleged.[31] However, prior to the January 4, 2011 hearing, the District Judge ruled that the scope of the hearing would be "the same issue" as the motion for stay pending before the Fifth Circuit. R. 3557 n.1. Moreover, although the Receiver stripped Baron of his documents, the District Court denied him discovery.[32] Such proceedings do not comport with the Due Process of law and are void.[33]

CONCLUSION & PRAYER

Prayer is made for a partial rehearing of the Panel's ruling as to (1) the disposition of the property found to have been improperly ordered seized by the District Court but that was not ordered returned to the receivership parties, and (2) the Panel's findings of bad faith conduct by Jeffrey Baron.[34]

The property that the Panel's ruling does not return to its owners was seized without authority in law, without jurisdiction, and without Due Process and should not be forcibly confiscated to pay the costs of defending an unauthorized, Constitutionally prohibited seizure of property outside of the court's jurisdiction. The receivership parties should be restored to their state as of November 23, 2010.

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[31] *Thornton v. General Motors Corp.*, 136 F.3d 450, 451-2 (5th Cir. 1998).

[32] R. 3891, 3556. *Cf. Williamson v. Tucker*, 645 F.2d 404 (5th Cir. 1981)(district court must give an opportunity for discovery).

[33] *Pennoyer v. Neff*, 95 US 714, 737 (1878); *Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949) ("reached without due process of law is without jurisdiction and void").

[34] Although Baron was denied a Due Process hearing on the allegations, the Panel decision has already been cited by the Receiver as the 'law of the case' that Baron was vexatious, caused a great problem, and drove up fees. Doc. 1127 at 3.

Respectfully submitted,

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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.

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