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

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

PRELIMINARY RESPONSE TO TENTH MOTION FOR FEES FOR VOGEL'S LAW FIRM

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

COMES NOW Appellants Jeff Baron, Novo Point LLC, and Quantec LLC, and subject to the Fifth Amendment objection and motion previously filed in this cause[1] and incorporated herein by reference, make this preliminary response with respect to 10-11-11 MOTION filed by Appellee Mr. Peter S. Vogel in 11-10113, 11-10290, 11-10390, 11-10501 to supplement the record on appeal with Receiver's Tenth Gardere Fee Application [6923954]. The Appellants also incorporate by reference Document 00511600278 in case 10-11202 filed on 9/12/2011.

I. ARGUMENT AND AUTHORITY

Legal Analysis of the Fee Request

This Honorable Court has held that compensation paid from a receivership estate must be for actual services provided to that estate. *E.g.*, *Commodity Credit Corporation v. Bell*, 107 F.2d 1001, 1001 (5th Cir. 1939); *Securities and Exchange Com'n v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) ("The court in equity may award the receiver fees from property securing a claim if the receiver's acts have benefited that property."). No allegation has been made and no evidence has been offered to sustain a showing that the fee request is for reasonable or necessary fees to the benefit of any estate, nor are the fees segregated between estates. The limitation upon attorneys to charge only a reasonable legal fee and to charge only

[1] Document 00511592562 filed in Case 10-11202 on 09/04/2011.

for legal services that are actually provided is a legal and ethical duty imposed by law in Texas. *Lee v. Daniels & Daniels*, 264 SW 3d 273, 280-281 (Tex.App.-San Antonio 2008, pet. denied)(noting "[A]ttorneys are members of an ancient profession with unique privileges and corresponding responsibilities" and rejecting the right of attorney to seek fees where "None of that time was spent engaged in 'legal services' performed or rendered on behalf of Cummings, his client.").

Further, pursuant to Texas law, an attorney is paid (when they actually do work on behalf of a client providing legal services) not solely based on their work, but also based on their loyalty to the client. *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). Vogel's law firm has not been loyal to any of the receivership estates in Vogel's hands. Rather, Vogel has worked in clear conflict of interest between various estates and against the estates. For example, Vogel and his law firm have worked to liquidate the assets of Novo Point, LLC and Quantec, LLC instead of defending the companies against claims asserted against Baron. Similarly, Vogel and his law firm have clearly been acting as prosecutors against Baron and his estate, actively soliciting claims against the estate and arguing actively against the interests of the estate. At the same time Vogel has held the conflicted position of being charged with defending LLC assets against 'claims' made against Baron, while at the same time Vogel has prosecuted the claims and forcibly sought to liquidate company assets to pay 'Baron' claims. Similarly, in acting as receiver both of Baron and of AsiaTrust, Vogel is clearly conflicted over the adverse claims

of AsiaTrust against Baron, and to claims by former attorneys employed by AsiaTrust who seek to make Baron personally liable for the fees due from AsiaTrust. This Honorable Court has held that "[W]here an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation." *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1256 (5th Cir. 1986). The Supreme Court has explained the rule as follows:

> "[R]easonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. *American United Mutual Life Ins. Co. v. City of Avon Park*, 311 U.S. 138. Where a claimant, … was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. *Cf. Jackson v. Smith*, 254 U.S. 586, 589.

Woods v. City Nat. Bank & Trust Co. of Chicago, 312 U.S. 262, 268 (1941). Notably, Vogel is also conflicted as a fiduciary and partner of Gardere. On one hand as a fiduciary for Gardere Vogel is charged with maximizing the fees received by Gardere and paid a bonus based on the more he bills on Gardere's behalf. At the same time, Vogel is charged as a fiduciary for the receivership estates and has the conflicting duty to conserve estate property and minimize unnecessary fees and

charges.

Further, a 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 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). 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). Much of the asserted charges are for work that could have been performed (had it been necessary to perform) by less costly non-legal employees. *See Matter of US Golf Corp.*, 639 F.2d 1197, 1202 (5th Cir. 1981).

Finally, Vogel and his firm should not be paid from receivership assets for work done in defending Vogel or in engaging in a controversy with parties to the lawsuit. *E.g*. *In re Marcuse & Co.*, 11 F.2d 513, 516 (7th Cir.1926) (the receiver has ordinarily no justification for engaging in a controversy with one who claims adversely to him and because "the receiver was without authority to participate in the litigation involving the … liability of these men, there should be no allowance against the estate of attorney's fees for such services."); *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534-535 (3rd Cir. 1970) ("the receivers' expenses and costs in defending their allowances on appeal are not proper charges against the receivership estate").

The Fifth Amendment Question

Baron repeatedly moved in the District Court 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). Baron has made a similar motion before this Honorable Court. That motion is pending ruling, and, to this point, Baron has not been permitted to (1) Earn wages and engage in business transactions to earn money to pay an attorney; (2) Be allowed access to his own money held by the receiver to pay an attorney to represent him; nor (3) Hire paid legal counsel. However, 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, and is pending ruling by this Honorable Court.

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 <u>paid</u> 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 instant proceedings, Jeffrey Baron is being denied this fundamental right. Accordingly the substantive motions pending against Baron and his property while he is being deprived of his basic constitutional right to pay an attorney to represent him should be denied. Because the undersigned is a solo

practitioner with no funding for discovery or manpower to perform itemized review of fee applications, or manpower to attend all of the various bankruptcy court proceedings, etc., the representation provided Baron is limited in scope to appellate legal issues. Baron is entitled as a matter of constitutional right to more. A citizen is entitled to use their own money to hire paid legal counsel to fully represent them, including conducting discovery, attending hearings, reviewing line by line items on fee applications, hiring expert witnesses to provide evidence that fee requests are not reasonable, to investigate the claims against them, etc.

The Sherman-Vogel Fraud Issue

In September 2010 the Ondova bankruptcy estate had some $2,000,000.00 in cash and only around $900,000.00 in claims— ie., more than a million dollar cash surplus. This was achieved when Baron agreed for Ondova to take all of the settlement proceeds in the global settlement because he was promised by the Ondova chapter 11 trustee (Sherman) that:

> "[I]f I were going to be entering into this settlement agreement, that … once the creditors were paid, that there would be a significant amount of money that was left over, that would come back, that would stay, you know, in a company that I would have at the end of the day. … I was told that obviously if you look at the settlement agreement, I individually am not getting any, a

> penny from it myself. … the settlement agreement was that Ondova was going to be able to walk away out of the bankruptcy, after it paid its creditors, with a large amount of cash, and we were thinking maybe even a million dollars."
>
> Proceedings before the Bankruptcy Court on 9-15-2010. Doc 470, Page 95 in Ondova Bankruptcy (case no. 09-34784-sgj11),

Sherman should have immediately closed the Ondova bankruptcy in September 2010 when there was the Million Dollars cash surplus. Instead, Sherman kept the bankruptcy open and ran up over $300,000.00 in additional attorney fees. When that happened, Baron objected. Within three business days of Baron's objection, Sherman and Vogel had Baron placed into receivership (with Vogel as receiver) *ex parte* in the district court case (where Vogel was employed as special master). Sherman notably did not act on his own, but filed his motion seeking to appoint Vogel as receiver over Baron only after secret consultations with Vogel.[2] After consulting with Vogel, Sherman filed his receivership motion **falsely representing that the Bankruptcy Judge ordered that if Baron fired his counsel and proceeded *pro se* that a receivership was to be placed over him.**[3] What the Bankruptcy Judge actually stated was:

[2] SR. v5 p238.
[3] R. 1576.

> "I am thinking very, very carefully about doing a Report & Recommendation to Judge Will Furgeson that he appoint a receiver over Mr. Baron and his assets pursuant to 28 U.S.C., 20 Section 754 and 1692 **so that a receiver can seize assets and perform the obligations of Jeff Baron under the settlement agreement.**"
>
> Ondova Bankruptcy Doc 470 at 58.

However, in November when Sherman and Vogel had Vogel appointed *ex parte* as receiver over Baron, Baron had already fully performed all of his settlement agreement obligations.[4] Thus, Sherman did not allege Baron was in breach of the settlement. Rather, Sherman's motion falsely represented the receivership was to be imposed merely if Baron fired his bankruptcy counsel and proceeded *pro se*. Of course, Sherman and Vogel still had to show that Martin Thomas (who was Baron's counsel in the bankruptcy court) was fired. So a fraudulent story was fabricated that Baron filed an ethics complaint against Thomas, didn't pay him, and thereby caused Thomas to withdraw.[5] The story was false and fabricated, but it was not the only one. Since Baron was also represented in the bankruptcy court by Stan Broome, Sherman and Vogel had to also use another story. Accordingly, with Broome's participation a false claim was

[4] I has been alleged that a *de minimis* $2,500.00 payment obligation had been skipped.
[5] R. 1576.

fabricated that (1) Broome's fee contract contained no provision capping his monthly fees at $10,000.00 per month; (2) Baron wrongfully refused to pay more than that amount, and thus (3) Broome was owed tens of thousands of dollars and withdrew. Of course, when Vogel produced Broome's contract the "claim" was shown to be completely fabricated. See SR. v8 p1212 (the written contract terms in Broome's contract, imposing a $10,000.00 per month cap on fees incurred); SR. v5 pp426-430 (Broome's fraudulent statements denying the existence of such a term in his contract).

Vogel was intimately involved in the *ex parte* proceedings appointing himself as receiver over Baron, and Vogel personally filed the receivership order. R. 27, 1604. Baron appealed the receivership and Vogel then, on his own motions, moved for a long list of companies to be added as receivership parties and placed in his hands as receiver. Other than brutally punishing Baron— limiting his access to medical care, keeping him from owning an operating vehicle, traveling outside of Dallas, having heat or air-conditioning, being allowed to earn any money or engage in any business transactions, burning up his COBRA coverage, etc.— literally, the receivership has achieved nothing other than to: (1) prevent Baron from hiring any legal counsel, (2) create a list of groundless, non-diverse state law attorney fee 'claims' against Baron (solicited by Vogel); and (3) provide a platform for Sherman and Vogel to run up fee demands to a combined total of over **FOUR MILLION DOLLARS.**

Notably, every possible thread of an excuse has been used by Vogel to churn the file to run up fees. When no excuses could be found, Vogel and his firm have fabricated new ones. See, e.g., pdf page 14, et.seq., of the "GENERAL RESPONSE TO MOTIONS FOR FEES FOR VOGEL, HIS PARTNERS, AND OTHER "RECEIVER PROFESSIONALS" (Document 00511600278 in case 10-11202 filed on 9/12/2011) (describing the Vogel's orchestrated attempt to falsely make it appear that Baron was harassing, intimidating, and 'obstructing'), and SR. v4 pp102-110 (the smoking gun emails with Vogel's office's digital IDs proving the affair was completely and 100% a concocted, fabricated set-up by Vogel). At the same time, Vogel and his firm abandoned even the most basic duties with respect to protecting receivership assets. Vogel refused to defend international arbitration disputes and has simply defaulted on what now appears a mass of disputes involving the loss of millions of dollars in assets, Vogel has failed to fulfill basic duties such as filing tax returns and paying taxes, etc. Document 00511604732, filed by Appellants on 09/16/2011 in Case 10-11202, and Document 00511598319 in case 10-11202 filed on 9/09/2011, detailing Vogel's conduct in these respects are incorporated herein by reference.

As a fundamental principle of equity, "Fraud vitiates everything it touches." *White v. Union Producing Co.*, 140 F.2d 176, 178 (5th Cir. 1944). Accordingly, Vogel and his firm Gardere should not be allowed to profit from the fabricated claims, and the resulting appointment of Vogel as receiver over Baron (and other

receivership parties) that was obtained by fraud. This is especially true where Vogel was employed in the role of special master at the time he was also (secretly) involved in the *ex parte* proceedings to appoint himself paid receiver over Baron, and where he has used his position as receiver to enrich himself while abandoning his most basic fiduciary obligations to protect multiple receivership estates.

WHEREFORE, Vogel's motion should be denied and overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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