Case No. 11-10113

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Netsphere, Inc. et. al.,
Plaintiffs

v.

Ondova Limited Company, et. al.,
Defendants

Novo Point, LLC and Quantec, LLC
Appellants

v.

Peter S. Vogel
Appellee

Appeal of Order Adding Novo Point, LLC and Quantec, LLC to Receivership
From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F

BRIEF OF APPELLANTS

Respectfully submitted,

/s/ Gary N. Schepps

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FOR APPELLANTS

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. Intervenor: 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, LLC
(2) Quantic, LLC

g. Appellee: Peter S. Vogel

2. ATTORNEYS

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c. 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
(1) Charla G Aldous

d. For Plaintiffs:

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

3. OTHER

a. Companies and 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 with unadjudicated potential fee disputes with Jeff Baron:

1. **Garrey, Robert (Robert J. Garrey, P.C.)**
2. **Pronske and Patel**
3. **Pronske and Patel**
4. **Carrington, Coleman, Sloman & Blumenthal, LLP**

5. **Aldous Law Firm (Charla G. Aldous)**
6. **Rasansky Law Firm (Rasansky, Jeffrey H.)**
7. **Schurig Jetel Beckett Tackett**
8. **Powers and Taylor (Taylor, Mark)**
9. **Gary G. Lyon**
10. **Dean Ferguson**
11. **Bickel & Brewer**
12. **Robert J. Garrey**
13. **Hohmann, Taube & Summers, LLP**
14. **Michael B. Nelson, Inc.**
15. **Mateer & Shaffer, LLP (Randy Schaffer)**
16. **Broome Law Firm, PLLC**
17. **Fee, Smith, Sharp & Vitullo, LLP (Vitullo, Anthony "Louie")**
18. **Jones, Otjen & Davis (Jones, Steven)**
19. **Hitchcock Evert, LLP**
20. **David L. Pacione**
21. **Shaver Law Firm**
22. **James M. Eckels**
23. **Joshua E. Cox**
24. **Friedman, Larry (Friedman & Feiger)**
25. **Pacione, David L.**
26. **Motley, Christy (Nace & Motley)**
27. **Shaver, Steven R. (Shaver & Ash)**
28. **Jeffrey Hall**
29. **Martin Thomas**
30. **Sidney B. Chesnin**
31. **Tom Jackson**

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

STATEMENT REGARDING ORAL ARGUMENT

Appellant does not believe oral argument would be helpful in determining the issues involved in this appeal. The issues are pure questions of law determined *de novo* and involve long established legal principles. Dispositive issues in the case have been authoritatively decided, *e.g., Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006) (receivership can not be used to adjudicate alter ego claims), *Gordon v. Washington*, 295 U.S. 30, 37 (1935) (receivership is authorized only as a step to achieve a further, final disposition of the property placed in receivership), *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (absent pleadings asserting a claim over the receivership property, an order appointing a receiver is void for lack of subject matter jurisdiction), *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989) (district court cannot modify an order then on interlocutory appeal), and *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990) (district court may impose an injunction only if the movant gives security proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined).

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STATEMENT OF THE JURISDICTION

The Fifth Circuit Court of Appeals has jurisdiction to hear this interlocutory appeal from an order of the District Court of the Northern District of Texas granting an injunction and appointing a receiver, pursuant to 28 U.S.C. §§1292(a)(1) and (2).

The district court lacked subject matter jurisdiction to enter the order because no claim for relief regarding the property ordered into receivership was pled. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (absent pleadings asserting a claim to support the receivership, an order appointing a receiver is void for lack of subject matter jurisdiction, in fact, "their proceedings are absolutely void in the strictest sense of the term").

ISSUES PRESENTED FOR REVIEW

ISSUE 1: WHERE NO CLAIM IS PLED AGAINST A NON-PARTY COMPANY OR ITS ASSETS, IS A DISTRICT COURT AUTHORIZED TO APPOINT AN EQUITY RECEIVER OVER THOSE ASSETS ?

ISSUE 2: IN THE ABSENCE OF A STATUTE, IS A COURT AUTHORIZED TO USE RECEIVERSHIP TO ENFORCE UNSECURED CREDITORS' CLAIMS BEFORE THEY HAVE BEEN REDUCED TO JUDGMENT ?

ISSUE 3: CAN A RECEIVERSHIP BE USED AS A VEHICLE TO MAKE THIRD PARTIES LIABLE AS 'REVERSE ALTER-EGOS' OF A PARTY ?

ISSUE 4: DOES A DISTRICT COURT HAVE JURISDICTION TO MODIFY OR 'CLARIFY' A RECEIVERSHIP ORDER THEN ON APPEAL TO ADD NON-PARTY COMPANIES INTO THE APPEALED FROM RECEIVERSHIP ORDER ?

ISSUE 5: IS A DISTRICT COURT AUTHORIZED TO IMPOSE AN INJUNCTION WITHOUT SECURITY REQUIRED FROM THE MOVANT SUFFICIENT TO COMPENSATE THE ADVERSE PARTY FOR THEIR DAMAGES IF WRONGFULLY ENJOINED ?

STATEMENT OF THE CASE

This is an interlocutory appeal by Novo Point, LLC, ("Novo Point") and Quantec, LLC ("Quantec") from an order modifying or 'clarifying' a receivership order then on appeal to include them, and placing all of their assets into receivership. R. 3934, 1575, 1699.

Novo Point and Quantec ("the companies") are not parties to the lawsuit. R. 38-51, 563-571. No claims were pled against the companies. Id. No motions have been filed seeking any relief from the companies other than to add them into the receivership. R. 15-37. The companies were not named in the original ex-parte receivership order. R. 1619. The companies were never sued or served with process. R. 15-37.

The lawsuit below had fully and finally settled well prior to the entry of the original receivership order. R. 2109.

The only ground found for adding the companies into receivership was that the definition of Receivership Parties in the original ex-parte order "had always included" them. R. 3934. The history of the proceedings leading up to the order adding the companies into the receivership is as follows:

The lawsuit below involved a business dispute. R. 65-66. On one side of the suit are the plaintiffs Munish Krishan, with Netsphere, Inc., and Manila Industries, Inc. R. 2. On the other side of the suit are Jeffrey Baron with Ondova Limited Company ("Ondova"). R. 3,5. Ondova was a domain name registrar registering domain names to customers throughout the United States. R. 40. Krishan sued Ondova alleging ownership to a portfolio of some domain names registered with Ondova. R. 65-66, 38-51.

At one point in the proceedings the defendant Ondova filed for bankruptcy protection. R. 889.[1]

After Ondova filed for bankruptcy, Novo Point LLC and Quantec LLC sought to intervene in the lawsuit below in order to protect their portfolios of domain names registered with Ondova. R. 836-842. The request to intervene was ultimately rejected because of the stay in place from the Ondova bankruptcy. R. 1134.

[1] The district judge wanted to force the defendants not to replace their attorney and ordered 50% of the income stream of Ondova (which had been interpled in an underlying state court action) to be paid to the plaintiffs, and 50% to be paid to the defendants' attorney Friedman as a court ordered non-refundable retainer. R. 367-368. Three weeks later, with 100% of its income having been diverted by the district judge (50% to the plaintiffs, 50% to the attorney Friedman), Ondova was in bankruptcy. R. 889.

Eventually, the lawsuit below fully and finally settled. R. 2109. The settlement was approved by order of the Ondova bankruptcy court in July 2010. R. 2225. In August 2010 all parties to the lawsuit entered a Stipulated Dismissal with Prejudice, dismissing with prejudice all claims and controversies in the lawsuit. R. 2346.

Then, on November 19, 2010, in the Ondova bankruptcy case one of the defendants below, Jeffrey Baron, filed an objection to a newly filed fee application of Munsch Hardt Kopf & Harr ("Munsch Hardt"). R. 1576-1577. Three business days later, Munsch Hardt responded by filing in the district court an unverified emergency motion on 'behalf' of Ondova to appoint a receiver over Jeffrey Baron and seize all of his assets. R. 1575. The sole ground averred in the motion necessitating the emergency appointment of a receiver was "to remove Baron from control of his assets and end his ability to further hire and fire a growing army of attorneys." R. 1578. The district court immediately granted the motion ex parte. R. 1604, 1619. The district court's order placed Jeffrey Baron into hands of the requested receiver, Peter Vogel. R. 1604-1616.

No hearing was held on the motion, no opportunity to respond to the motion was provided, and no bond was required of the movant as security should the injunctions and seizure of Baron be found to be wrongful. Id. The district court's order was entered without any findings of fact or law made in support. Id.

VeriSign, Inc., a non-party intervened, and filed an emergency motion to vacate and modify the receivership order. R. 1640. The district court granted the motion on November 30, 2010 and vacated the injunction order, but only as to VeriSign. R. 1695.

On December 2, 2010, Jeffrey Baron then filed a notice of appeal from the receivership order. R. 1699. The next day Baron filed a motion for emergency relief pursuant to Federal Rule of Appellate Procedure 8(a)(1). R. 1702.

Peter Vogel, the receiver, then immediately filed a motion to appoint himself as receiver over Novo Point, LLC and Quantec, LLC, by 'clarification' of the appealed from order to have 'always included' the companies. R. 1717. The district court did so on December 17, 2010. R. 3934.

STATEMENT OF FACTS

The Appellants Novo Point and Quantec

Novo Point, LLC and Quantec, LLC, exist as legal entities pursuant to the laws of the Cook Islands. R. 850, 2110. A treaty between the United States and the Cook Islands obligates the United States to recognize Cook Islands' sovereignty.[2]

The companies are not parties to the lawsuit below, and no claims were pled against them. R. 38-51, 563-571. The motion to place the companies into receivership failed to specify any substantive grounds or legal basis to place a receivership over the companies. R. 1717-1718. Similarly, the district court made no findings supporting a receivership over the companies. R. 3934-3941.

Together, the companies' assets included approximately 200,000 unique domain names. SR. v2 r41. Pursuant to the court approved settlement agreement in the Ondova bankruptcy, all other parties' rights in the domain names owned by Novo Point and Quantec were quitclaimed to the two companies, and all parties to the lawsuit below,

[2] 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, ratified by the US Senate June 21, 1983.

released the companies from all potential rights, claims, actions, and liabilities. R. 2109, 2225. Approximately $1,500,000.00 was paid on the companies' behalf in order to secure the releases and quit claims. Id. The companies have not been sued, and no party has filed any claim that the companies have breached the global settlement in any way. R. 15-37.

SouthPac Trust International

The 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).[3]

Jeffrey Baron is a beneficiary of the trust agreement defining SouthPac's obligations as trustee with respect to its ownership of the

[3] SouthPac is not a party and has not been served with any process in the lawsuit at bar.

companies.[4] R. 788. This fact is of record and was express and known by all parties and the bankruptcy court, and was express in the global settlement agreement approved by the bankruptcy court. R. 2109, 2225

The Appellee

The Appellee is attorney Peter Vogel. Peter Vogel is not a party to the lawsuit but is both the receiver and the movant for the companies to be placed under ***his own*** receivership. R. 1717.

In July 2009 the district court decided to employ Peter Vogel as a special master in the case. R. 394.

In July 2010, the lawsuit fully and finally settled and in August, 2010, a stipulated dismissal of all claims was executed by all parties to the suit. R. 2109, 2225, 2346.

Yet, on October 13, 2010, after ex-parte conferences with the district judge (R. 1248, 1253, 1258), the Ondova bankruptcy court filed a report recommending that Peter Vogel be appointed mediator to resolve disputed attorney's fees claims with regard to some of Jeffrey

[4] The trust was designed to eventually act as a foundation to support research on a cure for Type I, juvenile onset Diabetes (a disease which has afflicted Jeff Baron since early childhood). R. 788-789.

Baron's former attorneys. R. 1558. There is no explanation why Peter Vogel would be an appropriate mediator with respect to the disputed attorneys fees—the disputes have no connection with the discovery issues Vogel presided over as special master. Still, on October 19, 2010, the district court ordered that Peter Vogel would be paid as a mediator between Mr. Baron and non-party attorneys. R. 1570.

On November 24, 2010, the day non-party attorney statements regarding the mediation were ordered to be provided to Peter Vogel in his new role as mediator, the district judge suddenly placed Jeffrey Baron in the hands of Peter Vogel in his new role as receiver. R. 1574, 1619. [5]

[5] Peter Vogel appears legally ineligible to be appointed receiver because at the time he was employed by the judge as a special master. 28 U.S.C. § 958. Notably, on multiple occasions over the previous year before the case settled, the district judge expressed his intention to appoint a receiver over Jeff Baron and/or Ondova, and in particular to give Peter Vogel the role, offering a wide range of justifications for doing so. R. 204, 225, 283-285, 445, 1304-1305, 1308-1309, 1312-1314, 1319.

The justification set forth in the motion for receivership is odd, at best. The asserted 'ground' of the unverified motion was to stop Baron from hiring lawyers, because the mediation of non-party fee disputes with Peter Vogel mediator had 'failed'. R. 1575-1578. Since the mediation had not yet started, the justification that 'the mediation failed' makes no sense factually. The justification of imposing a receivership to stop an individual from hiring an attorney also lacks rationality. If the court had jurisdiction and the concern was payment of disputed fees, the district court could have simply ordered Mr. Baron to pay them.

Peter Vogel and the 200,000 domain names

By the time Jeffrey Baron was placed in Peter Vogel's hands, the domain names were clearly not owned by Jeff. By virtue of the execution and consummation of the global settlement agreement, and **pursuant to the order of the bankruptcy court approving the agreement**, the domain names are owned by Novo Point, LLC and Quantec, LLC, and all claims against the domain names were fully and finally released. R. 2109, 2225.

As discussed above, a stipulated dismissal of all claims in the lawsuit had been entered into in August, 2010. R. 2346.

Still, Peter Vogel sought to get the domain names into his hands, and accordingly, on December 3, 2010, filed a motion to

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Notably, the order appointing Peter Vogel as receiver was not file stamped and was filed initially by Peter Vogel, himself, personally. R. 1604, 27 (entered by "Vogel, Peter" 11/24/2010). The order was issued *ex-parte* and without notice, hearing, supporting affidavits, or the entry of any findings in support.

Post-appeal, various new justifications for the receivership (not appearing as grounds in any motion) have been offered by the district court: that Jeff Baron defrauds lawyers, that Jeff is in contempt of court (no show cause order ever issued, no contempt hearing was ever held), that the global settlement is in danger (what term of the agreement was breached, or how the district court has subject matter jurisdiction, or why a party's right to trial would be waived if breach were alleged is not explained), that Jeff is vexatious (but has never been sanction by any court), etc. SR. v2 p345-358.

Mr. Baron sought stay of the receivership order on his own behalf with respect to his separate appeal, but his request for stay was denied.

make himself receiver of the companies owned by SouthPac, Novo Point, LLC and Quantec, LLC. R. 1717. The district court obliged. R. 3934.

The Timeline: Post-Appeal Tampering with the Receivership Order

Mr. Baron appealed from the receivership order and his notice of appeal was filed on December 2, 2010. R. 1699. The next day, Mr. Baron filed a motion for emergency relief pursuant to Federal Rule of Appellate Procedure 8(a)(1).[6] R. 1702. At that point– after an appeal had been taken, Peter Vogel filed his motion to take possession of Novo Point, Quantec, and their domain names by having the district court 'clarify' the original receivership order. R. 1717.

The companies filed a formal objection to being added to Peter Vogel's receivership. R. 2711. An expedited hearing was set for December 17, 2010. R. 1727. **At the hearing, no evidence was offered, yet, the district court ruled early that the companies "are going to be receiver parties".** SR. v2 p245.

[6] The motion was express in its specific designation that it was an emergency motion and the provision of the Rule of Procedure under which the motion was filed: "NOW COMES Jeffrey Baron, Appellant, and files pursuant to Federal Rule of Appellate Procedure 8(a)(1), this Emergency Motion". R. 1702.

By 'fiat', not based on any evidence, the companies were thus ordered to be receivership parties. Id. Notably, (1) The companies are not parties to the lawsuit below (R. 38-51, 563-571); and (2) No claims were filed against the companies in the district court—just Peter Vogel's motion to make himself receiver of the companies. R. 1717. No clerical error was alleged in the motion, and Novo Point LLC and Quantec LLC were added to the receivership, not substituted for companies that were removed.[7] Id.

Receiver's Efforts to prevent this Appeal

Peter Vogel has made strenuous efforts to prevent the companies' appeal to this Court. First, Peter Vogel moved for the district court simply to strike the companies' notice of appeal. R. 4652 (Doc#234). Then, **Peter Vogel went on an 'acquisitions spree'** for his receivership. Following his acquisition of Novo Point and Quantec, Peter Vogel moved for the district court to place over a dozen additional entities

[7] The receiver, in seeking to expand his own receivership, noted that the original receivership order purported to apply generally to "any entity under the direct or indirect control of Jeffrey Baron, whether by virtue of ownership, beneficial interest, a position as officer, director, power of attorney or any other authority to act." In other words, Vogel argued that the receivership order placed an undetermined amount of unnamed companies into receivership, without service upon them or notice to them. R. 1717.

into his hands, including SouthPac Trust Limited, and the companies' current manager, Corporate Director Management Services, LLC (CDMS). R. 3952, SR. v1 p40. Again the district court obliged Peter Vogel, and on February 3 and 4, 2011, without service of process, pleadings, notice, subject matter jurisdiction, any allegation of grounds, supporting affidavits, hearing, or the entry of any findings in support, SouthPac Trust Ltd., CDMS, and almost a dozen additional companies from various jurisdictions around the world were ordered added to Peter Vogel's receivership. SR. v2 p365, 405.

Notably, Peter Vogel and his firm have been on a billing frenzy with his receivership, with a team of lawyers billing literally around the clock. The monthly income to Peter Vogel and his law firm from this receivership is staggering. SR. v2 p55, 156. Critically, there is no judgment nor claim pending in the district court (against *any* party) pursuant to which the receiver's billing has been in service of.

ARGUMENT SUMMARY

It appears that placing the Novo Point, LLC and Quantec, LLC's assets into receivership was intended either (1) to provide assets for the receiver to bill against; or (2) as some kind of pre-trial collection device for un-pled, un-liquidated fee disputes concerning Jeffrey Baron not pending before the district court.[8] Assuming the justification is unpaid fee disputes with Jeff Baron, the receiver's "grab" of Novo Point and Quantec is an attempt to treat the corporate form of the companies as a complete nullity.

Dispositive Issues Authoritatively Decided

The Fifth Circuit and/or the Supreme Court have directly addressed issues dispositive to this appeal. These include:

(1) Determination of alter-ego liability is a substantive claim requiring trial on the merits. Receivership and turnover remedies may not be used provide substantive remedies.

[8] Since the fee disputes against Mr. Baron were not pled in the trial court, the district court lacks subject matter jurisdiction over the disputes. Had they been pled, since the disputes involve state law claims between non-diverse parties, the district court would still not have subject matter jurisdiction over the fee disputes. *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010). If the court had subject matter jurisdiction over the claims, there is still no basis in law to use a receivership to enforce unsecured creditors' claims before they have been reduced to judgment. *E.g.*, *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

Accordingly, receivership cannot be used to impose alter-ego liability. *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317, 323 (5th Cir. 2006)

(2) There is no basis in law to use a receivership to enforce unsecured creditors' claims before they have been reduced to judgment. *E.g.*, *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

(3) A district court is not authorized to appoint a receiver to seize property unless there is claim seeking further disposition of that property pled before the court. *Gordon v. Washington*, 295 U.S. 30, 37 (1935); *Tucker*, 214 F.2d at 631.

(4) A district court is not authorized to appoint a receiver, as a matter of subject matter jurisdiction, where no pleadings puts the property subject to the receivership at issue. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931).

(5) A district court may impose an injunction only if the movant gives security proper to pay the costs and damages sustained by

any party found to have been wrongfully enjoined *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 131 (5th Cir.1990).

ARGUMENT & AUTHORITY

ISSUE 1: WHERE NO CLAIM IS PLED AGAINST A NON-PARTY COMPANY OR ITS ASSETS, IS A DISTRICT COURT AUTHORIZED TO APPOINT AN EQUITY RECEIVER OVER THOSE ASSETS ?

Standard of Review

Questions of law are review *de novo. E.g. In re Fredeman Litigation*, 843 F.2d 821, 824 (5th Cir. 1988); *Gandy Nursery, Inc. v. US*, 318 F.3d 631, 636 (5th Cir. 2003).

What is an Equity Receiver ?

Where a final decree involving the disposition of property is appropriately pled, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954).

The Limit of a Court's Authority to Appoint an Equity Receiver

Receivership of property is a special remedy that is allowed only as a step to achieve a further, final disposition of that property. This fundamental rule was established by the Supreme Court in *Gordon v. Washington*, 295 U.S. 30, 37 (1935). The Supreme Court established in *Gordon* that "[T]here is **no** occasion for a court of equity to appoint a

receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose." *Id.* (emphasis).

Receivership is not Authorized as an Independent Remedy

The law is clear and well established– the appointment of a receiver may not be used as a means to provide substantive relief and can be ordered only ancillary to a claim for substantive relief sought involving the property. *Kelleam v. Maryland Casualty Co. of Baltimore*, 312 U.S. 377, 381 (1941) ("This Court has frequently admonished that a federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief which is sought"); *Tucker*, 214 F.2d at 631-2. As explained by the Fifth Circuit in *Tucker,* a court "may appoint a receiver to preserve and protect the property pending its final disposition" only where "a final decree involving the disposition of property is appropriately asked". *Tucker* at 631. Before asking for the appointment of a receiver, a party must first plead a claim "for a final disposition of the property". *Id.*

The Prerequisite Requiring a Claim Be Pled Seeking Final Disposition of the Property Before a Receiver Is Appointed Over It is Jurisdictional

Equity jurisdiction of the district court is limited to the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act of 1789. *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999)(citing *Gordon*). Similarly, the inherent powers doctrine derives from the same authority, and is subject to the same limitation. *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978); *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1409 (5th Cir. 1993). Accordingly, absent a statutory grant of authority, the district court's authority to issue writs is bounded and limited by the authority exercised by the chancery court.

As the Supreme Court explained in *Gordon*, the chancery court did not authorize a court to appoint a receiver of property where no pleading sought final disposition of the property taken into the receivership– and the district court is therefore not authorized to do so either, absent a specific statutory authorization. *Gordon,* 295 U.S. at 37.

The Subject Matter Jurisdiction Corollary

There is a Subject Matter Jurisdiction corollary to the limitation of equity power of the court with respect to receivership– an order appointing a receiver is void for lack of subject matter jurisdiction where no pleadings puts the property subject to the receivership at issue. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (absent pleadings asserting a claim to support the receivership, an order appointing a receiver is void for lack of subject matter jurisdiction, in fact, "their proceedings are absolutely void in the strictest sense of the term"). The Fifth Circuit explained in *Cochrane*, "unless the subject-matter was by proper pleadings already before the court" "it had no jurisdiction over these properties, [and] its order appointing a receiver to take charge of them was void". *Id.* at 1028-1029.

No Primary Remedy was Pled in the District Court Below

In the district court below, no other remedy besides receivership has been sought against Novo Point and Quantec. Novo Point and Quantec were not parties in the lawsuit below and no claim of any type was pled against them.

Like the respondent in *Gordon*, no party made any claim against the companies or the companies' property. Like in *Gordon*, the movant seeking to place the companies into receivership was not shown to be a creditor, much less a judgment creditor. Accordingly, as in *Gordon*, the district court below exceeded its authority in ordering Novo Point and Quantec's assets to be seized by a receiver and the receivership must be vacated.

Similarly, as in *Cochrane,* no pleading in the district court below put the companies' assets at issue. Accordingly, as in *Cochrane*, the district court below lacked subject matter jurisdiction to seize the assets, and the order appointing a receiver to do so should be declared void.

ISSUE 2: IN THE ABSENCE OF A STATUTE, IS A COURT AUTHORIZED TO USE RECEIVERSHIP TO ENFORCE UNSECURED CREDITORS' CLAIMS 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*, 318 F.3d at 636.

As a Matter of Longstanding Legal Precedent, NO.

An unsecured creditor has, in the absence of statute, no substantive right, legal or equitable, in or to the property of his debtor. This is true, whatever the nature of the property; and, although the debtor is a corporation and insolvent. The only substantive right of a simple contract creditor is to have his debt paid in due course. His adjective right is, ordinarily, at law. He has no right whatsoever in equity until he has exhausted his legal remedy. Accordingly, a court does not have equitable jurisdiction to use receivership to enforce unsecured creditors' claims before they have been reduced to judgment. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923); *e.g., Williams Holding Co. v. Pennell*, 86 F.2d 230 (5th Cir. 1936).

ISSUE 3: CAN A RECEIVERSHIP BE USED AS A VEHICLE TO MAKE THIRD PARTIES LIABLE AS 'REVERSE ALTER-EGOS' OF A PARTY ?

Standard of Review

The Fifth Circuit has held that a district court's decision to grant appoint a receiver is subject to "close scrutiny" on appeal. *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954). A receivership is an "extraordinary" equitable remedy to be "employed with the utmost caution" and "granted only in cases of clear necessity." 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). The appointment of a receiver is generally recognized to be reviewed for abuse of discretion. *See* 7 Moore et al., ¶ 66.05[1]; *and Aviation Supply Corp. v. RSBI Aerospace, Inc.*, 999 F.2d 314, 317 (8th Cir.1993).

However, issues based on questions law underlying a court's decision are subject to independent review, *de novo*. *In re Fredeman*, 843 F.2d at 824.

Receivership Can Not be Used to Determine an Alter Ego Claim

Receivership cannot be used to determine (or bypass the determination) of an alter ego claim. It is long settled law that receivership "determines no substantive right; nor is it a step in the determination of such a right." *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

Bollore SA v. Import Warehouse, Inc.

The issue was presented to the Fifth Circuit 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. The Fifth Circuit 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. The Fifth Circuit 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 the Fifth Circuit 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 pled against Novo Point or Quantec, and no such trial was ever held.

Like in *Bollore*, because no independent trial was held against Novo Point or Quantec to establish an alter ego claim, the receivership order must 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 pled 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. *Cook Islands Ltd.Liab.Cos.Act 2009 §45.*[9]

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[10], the receivership of the companies must be dissolved.

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 any one but a party; a court of equity is as much so limited as a court of law …. its jurisdiction is limited to those who

[9] 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.

[10] There is not even any judgment against Jeff Baron.

therefore can have their day in court". *Alemite Mfg. Corporation v. Staff*, 42 F.2d 832 (2nd Cir.1930).

ISSUE 4: DOES A DISTRICT COURT HAVE JURISDICTION TO MODIFY OR 'CLARIFY' A RECEIVERSHIP ORDER THEN ON APPEAL TO ADD NON-PARTY COMPANIES INTO THE APPEALED FROM RECEIVERSHIP ORDER ?

Standard of Review

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

The Prior Ex-Parte Receivership Order was Applied to Novo Point and Quantec "Based on" the District Court's December 17 Order

On December 17, 2010, Novo Point, LLC and Quantec, LLC were added into a receivership order. R. 3934. The companies were not parties to the original order and were not named in it. R. 1619-1632. The 'clarification' order is explicit that the original ex-parte receivership order applies to Novo Point and Quantec "based on the Clarification". R. 3934.

Jurisdiction Divested by Appeal

Jeffrey Baron, an original receivership party, 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 the order. *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.* Accordingly, the district court below had no jurisdiction over the receivership order after the appeal was filed.

Accordingly, as a principle of well established law, **"[T]he district court lacks jurisdiction 'to tamper in any way with the order then on interlocutory appeal' "** ***Coastal Corp. v. Texas Eastern Corp.*****, 869 F.2d 817, 820 (5th Cir. 1989).** The district court lacked the authority to alter the status of the receivership order then on appeal. *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990).

Therefore, the December 17, 2010 order to modify the original receivership order to include Novo Point, LLC and Quantec, LLC is void for the district court's lack of post-appeal subject matter jurisdiction over the appealed order. *Id.*

Vogel's Post-Appeal Arguments

In response to the companies' appeal of the order adding them into the receivership, in an attempt not to lose "control over the hundreds of thousands of domains names which are the only money-making assets currently visible to the Receiver, other than stocks and bank accounts" (SR v1 p43), Vogel filed a motion to "Clarify" that the companies' legal manager be also added to the receivership. SR v1 p40. In that motion Vogel represents that "Mr. Baron has created a new legal entity" and has done so for the purpose of 'obstruction'. Id. The assertions are wholly unsupported and raise serious concerns with respect to the receiver's attempts to have the assets of Novo Point and Quantec placed in his hands. Vogel's motion is replete with post-appeal 'arguments' in support of adding the companies into the receivership built on a series of representations by Vogel that are not supported by the record. SR. v1 p40-45. A summary of those arguments follows:

1. Novo Point and Quantec Actually Moved for the Order.

Vogel represents in his Fourth motion to "Clarify" that Novo Point and Quantec actually "requested an Order from the Court clarifying

that the Receiver Order includes the LLCs". SR. v1 p41. Vogel also argues that the companies did not object to being included in the receivership, and entered into an agreed order to be placed in receivership. SR. v1 p41-42.

Contrary to Peter Vogel's representation, Novo Point and Quantec objected to Vogel's motion to add the companies to the receivership and did so formally. R. 2711.

Further, while counsel cooperated in drafting the order they did so only after the court ruled that the companies would be included in the receivership. SR. v2 p245.

2. Typographical Error.

The Appellee, Vogel, has offered post-appeal arguments that the "Clarification" merely corrected a 'clerical error' which corrected a "INC" which had appeared by mistake where a "LLC" was intended. SR. v1 p41. However, Vogel's position again is not supported by the record.

There are two very distinct sets of companies. One set are corporations based in the US Virgin Islands. R. 2109. The other set are limited liability companies based in the Cook Islands. R. 2110. The

original order appointing receiver explicitly identified the corporations (with the word corporation spelled out), and expressly identified the US Virgin Islands (e.g., "Novo Point, Inc., a USVI Corporation"). R. 1619. Those corporations, Novo Point, Inc. and Quantec, Inc. are both parties to the global settlement agreement. R. 2109, 2275, 2277. The identities of each company is clearly laid out in the settlement agreement, and the movant for the original receivership, the Ondova trustee Sherman, was himself a party. R. 2234, 2262.

There was no typographical error. The Cook Islands LLCs were simply not included in the original order. R. 1619. The 'clerical error' argument is clearly groundless as Novo Point, Inc. and Quantec, Inc., were not replaced in the receivership by the LLCs. R. 3934. Rather, the LLCs were added. *Id.* Peter Vogel is currently the receiver for Novo Point, Inc. and Quantec, Inc., and the district court has entered orders specifically regarding those entities. [Doc#406].

Perhaps the issue of names seems so important because no motion ever set out substantive grounds to place Novo Point, LLC or Quantec, LLC into receivership. Since there is no complaint, service of

process, or answer, the entire receivership is as flimsy and arbitrary as the name written down in an order.

Notably, in Vogel's Fourth motion to clarify (filed after this appeal was taken), Peter Vogel admits that the motivation to seize the LLC companies was that they owned 200,000 domain names, ie., not any conduct on the part of the companies. SR v1 p41.

3. The Judge requested he do it.

In his motion, Vogel also avers that the district judge in a phone call hearing instructed him to file a motion to include Novo Point, LLC and Quantec LLC into his receivership. SR v1 p41. No such allegation was made by Vogel in his original motion to add the companies to his receivership (R. 3934), and no evidence of such instruction was offered at the hearing held on his motion on December 17, 2010. SR v2 p225-310. Had the district court requested that a motion be filed, the fact remains that Novo Point, LLC and Quantec, LLC were not parties to, nor named in the original ex-parte receivership order. R. 1619-1632.

ISSUE 5: IS A DISTRICT COURT AUTHORIZED TO IMPOSE AN INJUNCTION WITHOUT SECURITY REQUIRED FROM THE MOVANT SUFFICIENT TO COMPENSATE THE ADVERSE PARTY FOR THEIR DAMAGES IF WRONGFULLY ENJOINED ?

Standard of Review

A district court's decision to grant an injunction is normally reviewed under an abuse of discretion standard. *Mississippi Power & Light v. United Gas Pipe Lin*e, 760 F.2d 618, 621 (5th Cir.1985). However, issues based on questions of law underlying the order are subject to independent review, *de novo. In Re Fredeman*, 843 F.2d at 824.

The Appellants Have Been Placed Under an Injunction

The challenged order states that Novo Point, LLC and Quantec, LLC are included under the definition of Receivership Parties in the ex-parte receivership order over Jeffrey Baron. R. 3934. The challenged order is explicit that "based on the Clarification" the receivership order applies to Novo Point and Quantec, and requires their compliance. Id.

The ex-parte order which now applies to the companies ("based on the Clarification") states expressly that the receivership parties be "restrained and enjoined" the taking of any of a long series of actions

basic to their operations, such as spending money. R. 1619, 1621. The order also enjoins "Commencing, prosecuting, continuing, entering, or enforcing any suit or proceeding". R. 1630. As a matter of law, the order is therefore an injunction. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 130 (5th Cir.1990) ("The challenged order prevents Schreiner Bank from taking any 'further action in any state or federal court.' It therefore is an injunction").

An Injunction Order Issued in Violation of Rule 65(c) Must be Vacated

Rule 65(c) states that "The court may issue a preliminary injunction or temporary restraining order only if the movant gives security ... proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined". Fed.R.Civ.P. 65(c). Failure to require the posting of a bond by the movant constitutes reversible error as a matter of law. *Phillips,* 894 F.2d at 131. Accordingly, since no security was required from nor provided by the movant, the order imposing injunctions against Novo Point and Quantec must be reversed. R. 1619-1632.

CONCLUSION

The receivership against the companies should be vacated for three fundamental reasons: (1) A court is not authorized to use receivership to enforce unsecured creditors' claims before they have been reduced to judgment. *Pusey*, 261 U.S. at 497; (2) A receivership can not be used as a vehicle to make third parties liable as 'reverse alter-egos' of a party. *Bollore*, 448 F.3d at 323; and 3) Because there was no pleading seeking any further disposition of the property seized, the district court lacked authority to issue a receivership over the companies' property. *Gordon,* 295 U.S. at 37.

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

(1) That this Court vacate the district court's order placing Novo Point, LLC and Quantec, LLC into receivership.

(2) That this Court order that Novo Point, LLC and Quantec, LLC may recover the costs of the receivership from those who have wrongfully provoked it. With respect to that request, the Fifth Circuit has established that where the facts as here show that a

receivership was instituted and property was seized upon an unfounded claim, the parties whose property has been wrongfully seized are entitled, on equitable principles, to recover costs from those who have wrongfully provoked the receivership. *Porter v. Cooke*, 127 F.2d 853, 859 (5th Cir. 1942). As a matter of law, there was no rightful claim to appoint a receiver over Novo Point, LLC and Quantec, LLC .

(3) That this Court order the return of all property the district court below ordered taken from Novo Point, LLC and Quantec, LLC pursuant to the receivership, including all 'fees and charges' of the receiver and his employees, agents, 'professionals' and attorneys, because the district court was without jurisdiction and authority to impose a receivership upon the companies or to take its assets.

(4) That this Court order that all costs of this appeal be taxed against the Appellee and awarded to the Appellants.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains under 9,000 words.

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DATED: March 28, 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 and by e-mail to:

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