No. 12-10003

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs

v.

JEFFREY BARON,
Defendant-Appellant

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

GARY SCHEPPS,
Appellant

v.

PETER S. VOGEL,
Appellee

Appeal of Orders in Receivership Imposed Ex Parte To Prevent Jeff Baron from Hiring Counsel and to Solicit and Prosecute Non-Diverse State Law Claims Alleged against Baron

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

APPELLANTS' REPLY BRIEFING

Respectfully submitted,

/s/ Gary N. Schepps

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FOR NOVO POINT, LLC, QUANTEC, LLC, JEFFREY BARON, and GARY SCHEPPS

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ABBREVIATIONS

"BRE." refers to Vogel's Appellee's Brief.

The "LLCs" refers to Appellants Novo Point LLC and Quantec LLC.

"Novo Point" refers to Novo Point LLC.

"Quantec" refers to Quantec LLC.

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REPLY STATEMENT OF FACTS

Vogel's argument relies on erroneous factual assertions, requiring clarification as follows:

1. No claim of any type was pled at any time against Novo Point LLC, Quantec LLC, or their assets.

2. The December 17, 2010 hearing was not an evidentiary hearing. SR. v2 p225, et. seq. Additionally, Baron was ordered, under threat of contempt, not to hire any attorney to defend himself. SR. v8 p1213.

3. Vogel's factual recitation omits key parts of the proceedings to make it erroneously appear that the District Court's ruling to make Novo Point LLC and Quantec LLC receivership parties was agreed. (BRE. 7). However as discussed below, it clearly was not. Instead, in the text misleadingly cited by Vogel, the parties were announcing that they had reached agreement on the form of a written order conforming to the Court's prior oral ruling.

The sequence of the proceedings was as follows:

i. Novo Point and Quantec filed an objection to the motion to include the companies into the receivership. R. 2711;

ii. A hearing was set. R. 1727;

iii. At the hearing:

1. The District Court ruled that the companies were going to be receivership parties. SR. v2p245.

2. The District Court then ordered what parameters were to be included in the written order, and instructed the parties to provide the Court with a conforming order. SR. v2 p246; after which

3. A conforming order was then submitted by agreement as the District Court instructed. SR. v2 p246. SR. v2 p294.

Obviously, there is a critical distinction between a party agreeing to a ruling and a party agreeing to the form of an order submitted in conformity with a ruling that has been made.

4. The Nov. 30, 2010 telephone hearing was not, as Vogel's argument misleadingly asserts, (BRE. 22) a hearing on the issue of whether the order appointing receiver included the LLCs. Rather, the hearing was held on: "[T]wo motions filed by the VeriSign, Inc. First is a motion to intervene in this case, and the second is to vacate certain provisions of the Court's order entered recently appointing a receiver" SR. v8 p1155.

5. Similarly, the language at the bottom of page 2 of the receivership order relates to the definition of "Receivership Assets" and not to the listing of the receivership parties as Vogel erroneously argues, (BRE. 23). R. 1620. Notably, it was expressly stated that "whether Novo Point and Quantec

have an argument against the jurisdiction, I would not waive, and I fully preserve." SR. v8 p1174.

6. Similarly, Vogel's argument erroneously argues that the LLCs' December 16, 2010 motion related to receivership assets. Instead, the motion sought an order to prevent Vogel from interfering with the companies' assets, specifically, from interfering with the deletion of erroneously registered domain name assets. R. 3928.

7. The record shows that in addition to not scheduling the mediation, Vogel refused to reply to Baron's counsel's repeated requests. In short, the record reflects that Vogel stonewalled Baron's counsel and torpedoed the mediation. R. 4481-4484.

8. Vogel's assertion that the case was not fully and finally settled has no support in the record. Notably, claims for Breach of settlement involve distinct causes of action and raise independent jurisdictional question. *E.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 380 (1994). No claim for breach of the settlement was pled.

9. The record does not support Vogel's irrelevant argument that Baron wrongfully didn't pay his former counsel. See e.g., SR. v6 p64-79.

10. The questions Baron refused to answer had nothing to do with either the claims pled before the District Court or the 'grounds' the District Court later offered for the receivership. R. 4608.

11. The record does not support Vogel's erroneous assertion that in November 2010, at a Bankruptcy Court status conference, Baron's counsel withdrew.

12. Gardere is Peter Vogel's own law firm. SR. v1 p1.

13. The Bankruptcy Judge's report referenced by Vogel did not recommend receivership for firing lawyers. R. 1567. Moreover, the report was one sided, deferring "to Mr. Vogel, Mr. Sherman" but not Mr. Baron. The 'recommendation' was issued in violation of the Rules of Bankruptcy Procedure, without notice, hearing, or allowing for the mandatory opportunity to object. R. 1568, 4135.

14. The agreed injunction Baron was alleged to have violated was a preliminary injunction only, and the contempt motion involved discovery matters and was not related to settlement of the lawsuit as Vogel's argument erroneously asserts, (BRE. 5). R. 572-674.

15. No term of the Global Settlement Agreement relates to Baron's hiring or firing of attorneys or paying their fees (other than to the District Judge's brother-in-law's partner, Aldous). R. 2109, et. seq.

16. There is no support in the record for Vogel's erroneous assertion that the appointment of a Chapter 11 trustee in the Ondova case resulted for Baron's refusal to comply with any orders.

17. Vogel's subpoena of Schepps' bank records sought a broad swath of material, including from other law firms. SR. v10 p3041.

ARGUMENT & AUTHORITY

REPLY ISSUE 1: APPEALABILITY

Vogel errs in arguing for an activist approach seeking to overturn established precedent based on Vogel's offered policy positions. (BRE. 2, fn1). The bedrock of our system of justice and the long-standing traditions of this Honorable Court are deeply rooted in the principles of stare decisis. *See e.g.*, *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998). For that reason, it has long been the firm rule of this Honorable Court that one panel may not overrule the decision of a prior panel, right or wrong. *Billiot v. Puckett*, 135 F.3d 311, 316 (5th Cir. 1998). By contrast, Vogel has successfully argued in the District Court that old law "from the handlebar-mustache era" should be abandoned. SR. v2 p335-337.

However, the controlling precedent of this Honorable Court rejects that view and "the earlier opinion controls and is the binding precedent in the circuit" unless superceded by an en banc decision or a decision of the Supreme Court. *Id.* Accordingly, as a matter of controlling precedent, 28 U.S.C. §1292(a)(2) grants appellate courts jurisdiction of

orders "appointing receivers ... or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." 28 U.S.C. 1292(a)(2); *e.g.*, *Resolution Trust Corp. v. Smith*, 53 F.3d 72, 77 fn2 (5th Cir. 1995).

REPLY ISSUE 2: JURISDICTION

Jurisdiction is a Dispositive Issue

Jurisdiction is a dispositive issue in this appeal. If the District Court lacked subject matter jurisdiction to impose the receivership, no further analysis is necessary to reverse the receivership order and order the assets seized returned to the original owners. There is controlling precedent directly on point. As a matter of controlling precedent, **a federal court lacks subject matter jurisdiction to impose receivership over private property for which "no claim of interest in or right to any of their subject-matter has been asserted"**. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1028-1029 (5th Cir. 1931).

Cochrane

Vogel's argument misstates the facts and holding of *Cochrane* and attempts to address the District Court's lack of subject matter jurisdiction by generally referencing vague 'ancillary jurisdiction'. Vogel's argument is erroneous, as discussed below. In *Cochrane*, the plaintiff requested "[T]hat the court appoint a receiver to take charge of

… **all** the [bond] issues". *Id.* at 1027. The *Cochrane* plaintiff's prayer was granted and– as requested by the plaintiff– the district court placed all the bond issues (series A-F) into receivership. *Id.* at 1028. However, outside of series E, no claim had been *pled* in the bond issues. *Id.* at 1027. A state court then appointed a trustee over the same *res*. *Id*. at 1028.

The issue raised on appeal was one of jurisdiction: "if the federal court had jurisdiction of the properties in question, it had a right to continue possession of the property and to refuse to deliver it [to the state court]". *Id.* The *ratio decidendi* of Cochrane turned on the question "[D]id the plaintiffs' pleadings put their subject-matter at issue, or bring them within the ambit of the court's jurisdiction". *Id.* at 1029. This Honorable Court found that "[N]othing was alleged to set up any claim against or charge upon the other securities" and thus the district court lacked subject matter jurisdiction over the property. *Id.* Therefore, the receivership over the property was "absolutely void in the strictest sense of the term". *Id.*

The requirement that a controversy involving the property be pled in a complaint before a court may exercise jurisdiction over the property is not trivial. The Supreme Court has held that the case-or-controversy requirement is **"founded in concern about the proper — and properly limited — role of the courts in a democratic society".** *Allen v. Wright*, 468 U.S. 737, 750 (1984). The Supreme Court further held that limiting the exercise of judicial power to authorized matters pled before the court is fundamental to restraining "the powers of an unelected, unrepresentative judiciary in our kind of government". *Id.* For that reason, in examining a court's jurisdiction there must be a careful examination of "a complaint's allegations" and "the particular claims asserted." *Allen,* 468 U.S. at 752. In the case at bar, no claims were pled against non-parties Novo Point LLC, Quantec LLC, their assets, or any of the property seized by Vogel.

Subject Matter Jurisdiction Cannot be Waived

Contrary to Vogel's erroneous argument, (BRE. 22-28), subject matter jurisdiction cannot be waived nor created by the consent of the parties. *Freytag v. Commissioner*, 501 U.S. 868, 897 (1991).

Accordingly, Vogel's argument fails even to assert a basis for subject matter jurisdiction over Novo Point LLC, Quantec LLC, and their assets.[1]

Ancillary Jurisdiction over Ancillary Claims Requires Pleading an Ancillary Claim

Contrary to Vogel's erroneous argument, 'ancillary jurisdiction' still requires that dispute over the 'ancillary' subject matter be pled before the court. Congress has codified the concepts of ancillary jurisdiction in the supplemental jurisdiction statute, 28 U.S.C. § 1367. Id. at 165. *E.g.*, *Griffin v. Lee*, 621 F.3d 380, 385 (5th Cir. 2010). Section 1367(a) extends supplemental jurisdiction only to "claims". 28 U.S.C. § 1367. Accordingly, as a matter of statutory law, to support ancillary subject matter jurisdiction (now "supplemental jurisdiction"), there must still be a dispute pled over that supplemental subject matter. 28 U.S.C. § 1367(a).

Limits of Ancillary Jurisdiction to Protect Judgments Dovetails the *In Rem* aspect of Receivership

Although not addressed by Vogel's briefing, federal courts have also recognized a second type of 'ancillary jurisdiction' to protect their

[1] No allegation of 'vexatious litigation' has been made against either company.

judgments. Notably, such jurisdiction does not allow a court to "exercise jurisdiction over new claims not addressed in the judgment the court is seeking to protect." *Royal Ins. Co. of America v. Quinn-L Capital Corp.*, 3 F.3d 877, 882 (5th Cir. 1993). In determining whether a court's jurisdiction is 'threatened', the distinction between *in rem* and *in personam* claims is critical. As a matter of binding precedent, *in personam* claims are not viewed as "interfering with the jurisdiction" of a court. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 642 (1977). By contrast, where two competing *in rem* claims are made in and to the same *res,* the second claim threatens a court's jurisdiction over the first. *Id.*

This distinction dovetails with the limited circumstance in which a federal court is authorized to impose receivership. A court has authority to impose a receivership over property only in order to protect the court's jurisdiction and conserve the *res* pending adjudication of the claim for final disposition of the property. *E.g.*, *Forgay v. Conrad*, 47 U.S. 201, 204-5 (1848) ("to preserve the subject-matter in dispute ... until the rights of the parties concerned can be adjudicated"); *Gordon v.*

Washington, 295 U.S. 30, 36-37 (1935) ("Where a final decree involving the disposition of property is appropriately asked .. may appoint a receiver to preserve and protect the property pending its final disposition"). Notably, receivership is not authorized as an *in personam* remedy and "there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition." *Gordon,* 295 U.S. at 37.

The scope of a federal court's authorization to impose a receivership is strictly limited to *in rem* claims because "[t]he English chancery court from the beginning declined to exercise its jurisdiction for [any other] purpose." *Id.* This Honorable Court has expressly recognized that limitation. *E.g. Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954) (reversing receivership because "In the case at bar, the plaintiffs, though asking for a receiver ... are not asking for a final disposition of the property."). In short, receivership is an *in rem* remedy. *E.g.*, *Sumrall v. Moody*, 620 F.2d 548, 550 (5th Cir. 1980). Therefore, it should not be surprising that as a matter of binding precedent, subject matter jurisdiction to impose a receivership requires

a claim pled in and to the property subjected to receivership. *Cochrane,* 47 F.2d at 1028-1029 (5th Cir. 1931).

Conclusion

As discussed above, the requirement of subject matter jurisdiction is the **first line of defense in protection of liberty** against unauthorized intrusion. *Allen,* 468 U.S. at 750. A federal court may not act without subject matter jurisdiction and attempts to do so are "absolutely void". *Cochrane*, 47 F.2d at 1029. No claim was pled against Novo Point LLC or Quantec LLC or in or to their property. Therefore, without a claim in or to the property pled before the federal court, a receivership order over that property is "*coram non judice*" and "void in the strictest sense of the term." *Cochrane*, 47 F.2d at 1028-1029. Accordingly, as a matter of binding precedent, the property ordered seized must be returned to its original owners from whom it was seized. *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923) ("As the lower federal courts lacked jurisdiction, they are necessarily without power to make any charge upon, or disposition of, the assets"). Any other result would throw out the Constitution, as follows:

Article III curtails the power of the federal court to the adjudication of the cases and controversies that are brought before it. To allow a federal court subject matter jurisdiction over all of a litigant's (and non-litigant's) property rights, where no claim in or to that property has been pled before the court, would release the court from the shackles of Article III. The Supreme Court has warned of the despotic danger of allowing a court jurisdiction over the rights and property of the community at large, holding:

> **"[W]e have no authority to craft a 'nuclear weapon' of the law like the one advocated here. ... It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, ... but still acting with a despotic and sovereign authority."**
>
> *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999)

It brings no solace that a court would be 'limited' to exercising its 'nuclear weapon' to instances where a litigant is labeled 'vexatious'. There is no objective legal standard for such a label. As demonstrated by the Appellee's briefing in this very case, the filing of appeals from a district court's orders is sufficient to be labeled a "vexatious appellate

litigant". (BRE. 8). By opening the gates to judicial action without the requirement of subject matter jurisdiction, nobody is safe. Novo Point LLC and Quantec LLC were not litigants in the lawsuit below. No claim of any sort was pled against them, or their assets. Yet, simply by labeling Baron a 'vexatious litigant', the Appellee would have this Honorable Court remove the constitutional constraints of subject matter jurisdiction and allow the federal court to do its will with the assets of these companies. To date, the District Court has had its way with the assets of Novo Point LLC and Quantec LLC. To date, unless reversed by this Honorable Court, most of the assets have been liquidated (apparently, some 60 Million Dollars in assets) with almost all of the proceeds going directly into the pockets of the Appellee and his law firm. That is in addition to the million dollars in cash cleaned from Baron's savings accounts, and placed, indeed, into the pockets of the Appellee and his law firm.

It may be, as Vogel argues, more efficient (BRE. 19) to seize wide swaths of private property from the community and redistribute it to Vogel and his law partners so that an individual will not be able to pay

for legal counsel. That way, the court will not have to deal with the bother of attorneys protecting the individual's rights. But that is not justice, nor liberty, nor due process. Moreover, while it may serve a public purpose to seize the property of Novo Point and Quantec, the Constitution requires just compensation for the taking.

REPLY ISSUE 3: MOOTNESS

Interim Fee Awards are Not Mooted by their Payment

As a well-established rule of law, an appellate court is fully empowered to reverse the order to pay the money even after the money is paid. This is because if the order is reversed, the aggrieved party can recover his money back. *Eg., Dakota County v. Glidden*, 113 U.S. 222, 224 (1885). A case is only moot when the parties lack a legally cognizable interest in the outcome. *E.g., Powell v. McCormack*, 395 U.S. 486, 496 (1969). The Supreme Court has held that a case is justiciable when the court can order specific relief through a decree of a conclusive character. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). This Honorable Court can issue a decree of conclusive character with respect to each of the matters involved in the instant appeal, *e.g.*,

declaring the challenged orders void for want of jurisdiction, and ordering that the property taken from the Appellants be remitted to them.

It should be of no surprise that as a matter of controlling precedent, even after fees have been paid "the disbursement of fees to attorneys is still capable of resolution [on appeal]". *E.g., In re SI Restructuring, Inc.*, 542 F.3d 131, 136 (5th Cir. 2008). This is because, as discussed above, the payment of fees does not make them unrecoverable. *See Shipes v. Trinity Industries, Inc.*, 883 F.2d 339, 344 (5th Cir. 1989). Accordingly, it is a matter of settled law that "There is thus no impediment whatever" to review on appeal of interim fee awards. *Massachusetts Mutual Life Insurance Company v. Brock*, 405 F.2d 429, 431 (5th Cir. 1968). Rather, the "[C]ourt has an inherent power to order attorneys to whom fees were paid over by their clients pursuant to court order to repay the fees should the order be reversed". *Palmer v. City of Chicago*, 806 F.2d 1316, 1319 (7th Cir. 1986).

Vogel's Reliance on *Lee-Vac* and on Bankruptcy Law Analogy is Misplaced

As a matter of controlling precedent this Honorable Court has held that "**[R]eliance on *Lee-Vac*[2] is misplaced. That case was an appeal from an order in a bankruptcy proceeding governed by Rule 805 of the Rules of Bankruptcy Procedure**". *Citibank, NA v. Data Lease Financial Corp.*, 645 F.2d 333, 336 (5th Cir. 1981) (holding that intervening rights of the third party purchasers do not moot appeal). In a diversity action, state law determines the nature of the rights created by sale orders. *Id.*; *Erie R. R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). This Honorable Court has held that "It is to that [state] law we must turn to determine whether the subsequent sale vested the third party purchaser with rights that would not be affected by a reversal of either the sale or the confirmation order." *Data Lease Financial Corp.* at 336.

No rule of Texas law prevents the return of property from bona fide purchasers where its sale was not authorized or where the authorizing order is reversed on appeal. Accordingly, this Honorable

[2] BRE. 10, 13-14.

Court has recognized that pursuant to Texas law, a bona fide purchaser does not cut off the legal owner's right in property, but instead, the purchaser acquires the rights of an equitable assignee of the debt or lien in relation to the property which was judicially sold. *See In re Niland*, 825 F.2d 801, 813-814 (5th Cir. 1987). Further, the purchasers in the case at bar have not been shown to qualify as bona fide purchasers under Texas law. A purchaser who pays a grossly inadequate price cannot be considered a good-faith purchaser for value. *E.g.*, *Phillips v. Latham*, 523 S.W.2d 19, 24 (Tex.Civ.App.– Dallas 1975, writ ref'd n.r.e.). Moreover, pursuant to Texas law, one who claims to be a good faith purchaser has the burden of proof on that issue. *Id.*

Moreover, as a matter of binding precedent, because the District Court lacked subject matter and territorial jurisdiction to impose a receivership over the property of non-parties Novo Point LLC and Quantec LLC, "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". *Fall v. Eastin*, 215 U.S. 1, 11 (1909). As held by the Supreme Court, "neither the decree nor the commissioner's deed

conferred any right or title". *Id.* at 6.

The Bank Records

The issue of the bank records is not moot for several reasons. First, the bank's fees still need to be paid. This is a substantive issue of state law. Second, the control of the documents now in Vogel's hands is still at issue. Pursuant to state law substantive privilege Vogel may not show the records to others, etc. Further, this Honorable Court can issue a claw-back order and require the documents be returned, if found to have been obtained in violation of the state privilege or federal law. A ruling by this Honorable Court can protect the further violation of the privilege and privacy rights involved. The relief requested is not merely hypothetical.

REPLY ISSUE 4: FICTIONAL LAW, THE PURPOSE OF THE RECEIVERSHIP AND VOGEL'S STATEMENT OF FACTS

Vogel's "Facts"

Vogel's statement of facts offers hyperbolic argument unsupported by the record. First, Vogel argues (without record support) that Baron has an "insatiable appetite for litigation" and that Baron breached the contract subject of the underlying, settled lawsuit. (BRE. 4). Vogel colors hiring and firing of counsel as some inherently dangerous and evil activity, such as the open storage of hazardous materials. (BRE. 4). Vogel then nonsensically cites to a post-receivership order, which prohibited Baron from access to hired counsel, as support for the argument that the receivership resulted from Baron's 'tactics'.

The District Court's Findings

The post-appeal purpose of the receivership announced by the District Court was to pay unlped alleged fee claims of former counsel. SR. v2 p238-239. However, in order to prevent a 'moving target' on appeal, a trial court may not offer new grounds or hear new evidence to support its orders post-appeal *See Coastal Corp. v. Texas Eastern*

Corp., 869 F.2d 817, 820 (5th Cir. 1989). Notably, the post-appeal findings of the District Court cited by Vogel do not relate to the grounds raised in any motion before the District Court and thus fail the test of Due Process. As this Honorable Court has ruled, "The right of defendants to present controverting factual data is illusory unless there is adequate notice of plaintiffs' claims." *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, 356 (5th Cir. 1971). Notably, the findings were made in denying a FRAP 8(a) motion and were not subject to interlocutory review.[3]

Vogel has Constructed a Fictitious Conception of 'Vexatious Litigation'

Vexatious litigation as a legal principle means the filing and processing frivolous and vexatious lawsuits. *E.g.*, *Gordon v. US Department of Justice*, 558 F.2d 618, 618 (1st Cir. 1977). The controlling standard of this Honorable Court is that "[W]here monetary sanctions are ineffective in deterring vexatious filings, enjoining such filings would be considered". *Farguson v. MBank Houston, NA*, 808

[3] The motion, filed by Baron "pursuant to the Federal Rule of Appellate Procedure 8(a)(1)", was taken up by the District Court as being the "same issue" raised in seeking stay before the Fifth Circuit. SR v2 p 359; R. 1702 , 3557.

F.2d 358, 360 (5th Cir. 1986). However, Baron is a defendant in the lawsuit below and there has been no finding that he has ever filed a frivolous lawsuit. Novo Point LLC, Quantec LLC and the two-dozen other companies also in Vogel's receivership are non-parties who have not been accused of any wrongdoing, vexatious or otherwise. Accordingly, the law regarding 'vexatious litigation', as an established legal principle, has no application in these proceedings. Moreover, the authorized remedy for "vexatious litigation" (i.e., filing frivolous lawsuits to harass people) is a pre-filing injunction. *E.g., Gordon v. US Department of Justice*, 558 F.2d at 618.

Receivership is not Injunction

Vogel's argument erroneously posits that the special and limited remedy of receivership is an interchangeable remedy with injunction. However, in a democratic society a court is empowered to control behavior not by striping individuals of their property, but by injunctions. Unlike receivership authority, the authority to impose injunctions is broad and the traditional bases to issue injunctive relief are merely (1) irreparable injury and (2) inadequacy of legal remedies.

E.g., *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542 (1987). The federal court's broad power to impose injunctions reflects a "practice with a background of several hundred years of history". *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Notably, the broad power of a court to impose an injunction is balanced by the fact that the remedy is the "least intrusive form of equitable relief". *See Los Angeles v. Lyons*, 461 U.S. 95, 133 (1983). By contrast, receivership is much more intrusive and a federal court's receivership authority is accordingly much more strictly circumscribed, as discussed below.

Firm Judiciary Act Limitations on Receivership

As a matter of controlling precedent, a federal court's inherent and 'all writs' powers are bounded by the same constraints as a federal court's exercise of its equitable power. That limit is the limits of the powers exercised by the Court of Chancery at the time of the enactment of the Judiciary Act of 1789. *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978) (inherent power and all writs act power); *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1409 (5th Cir. 1993) (inherent power); *and see Grupo*

Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc., 527 U.S. 308, 326 fn. 8 (1999) (all writs act power).

The limit of the Court of Chancery's exercise of receivership power over private property with respect to receivership has been clearly delineated by the Supreme Court in *Gordon v. Washington*, 295 U.S. 30 (1935). Receivership authority derived from the Court of Chancery is strictly limited to aid in enforcement of a judgment or to conserve property pending resolution of competing claims in the property pled before the Court. *Gordon*, 295 U.S. at 37. Accordingly, when acting from inherent, all writs, or equitable power, a federal court has authority to impose a receivership over private property, only to conserve that property pending resolution of a claim pled in or to that property. *Id*. at 36-38; and *see e.g.*, *Forgay*, 47 U.S. at 204-205.

Vogel's argument recasts for use against private persons, the super 'constitutional power' a minority of circuits have recognized to control co-branches of government. However, the 'constitutional authority' superpower recognized by those circuits applies only to actions against co-branches of government, and only for 'constitutional

purposes'. *E.g., Morgan v. McDonough*, 540 F.2d 527, 533, 535 (1st Cir. 1976). Moreover, the Supreme Court appears to have rejected the 'anything reasonable' constitutional superpower. *See Milliken v. Bradley*, 433 U.S. 267, 288 (1977) (court's power against co-branches is limited to the traditional attributes of equity power).

Bankruptcy 'Claims' against Baron Exist only in Fictional Law

As a matter of controlling precedent, the attempt to recast *in personam* claims as justification for interference with a litigant's property has been clearly rejected as exceeding the limits of a court's inherent power. *See ITT Community Development Corp.,* 569 F.2d at 1361. Baron's facing potential liability *in personam* for claims by the bankruptcy estate, does not authorize a federal court to interfere with his property (nor the property of non-litigants Novo Point LLC and Quantec LLC). Yet, that is exactly what the District Court below announced that it had done, stating "[T]he Court has a direct interest in maintaining its jurisdiction over Baron's assets for the purpose of being able to afford complete relieve [sic] on any substantial contribution claims by the Chapter 11 Trustee for indemnity against Baron." SR v2

p358. The supposed right of the Ondova Bankruptcy estate to have Baron indemnity it for substantial contribution claims of his attorneys is, however, a **fictional** legal right. The law is clear, well established, and *opposite*, as follows:

Baron is not in bankruptcy, he is a creditor of the bankrupt company, Ondova. R. 890-892. Pursuant to the Bankruptcy Code, when there is a qualifying substantial contribution to the bankruptcy case by a creditor, the party ultimately responsible to pay for the reasonable cost for that contribution (including attorney's fees) is the bankruptcy estate. 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). Thus, if a creditor has paid a professional who made a qualifying contribution, the creditor is entitled to reimbursement **from** the bankruptcy estate. *Id.* Or, if the creditor did not pay the professional, the professional is entitled to be paid directly from the bankruptcy estate. 11 U.S.C. 503(b)(4); *e.g., IN RE Consolidated Bancshares, Inc.*, 785 F.2d 1249,1253 (5th Cir. 1986).

The payment by the bankruptcy estate is the same in either case – by law the party ultimately responsible for paying the cost of qualifying

substantial contributions is **the bankruptcy estate**. By law, **it is the bankruptcy estate that must 'indemnify' the creditor** for the costs of making a qualifying substantial contribution and not the other way around.

Accordingly, the pretext for imposing the receivership over Baron to protect against his allegedly not paying lawyers that then would make substantial contribution claims against the Ondova estate is a **fictional pretext**. The 'claim' for indemnity against Baron for his substantial contributions is absolutely and completely legally groundless. It is a **sham** used to absolutely quash Baron's liberty and misappropriate his, and other's property. Whether or not Baron paid the attorneys' fees has **zero** net impact on the bankruptcy estate and is of no interest to the bankruptcy court. Moreover, Congress has expressly prohibited a court from imposing receivership as an extension of a bankruptcy proceeding. 11 U.S.C. §105(b).

Bollore

Contrary to Vogel's erroneous argument, *Bollore SA v. Import Warehouse*, Inc., 448 F.3d 317, 321 (5th Cir. 2006) did involve an order

appointing a receiver in addition to the turnover order. For the reasons discussed in Appellants' principal briefing, the order in *Bollore* appointing the receiver was vacated by this Honorable Court. Id. at 326.

REPLY ISSUE 5: 28 U.S.C. §144

Contrary to Vogel's erroneous arguments, the District Court's striking and sealing of the affidavits does not prevent appellate review. The original §144 affidavit is in the record and so is the supplement. See SR. v10 p72 (Doc. 651), showing inclusion in record of Doc. 497 (the original §144 affidavit); SR. v5 p1511 (supplemental §144 affidavit).

The District Court is authorized by statute to determine if the facts and reasons stated are "sufficient to show personal bias and prejudice" such that a reasonable man would infer that the Judge's impartiality "might reasonably be questioned". *E.g.*, *Berger v. United States*, 255 U.S. 22, 38 (1921); *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 103 (5th Cir. 1975). However, as a matter of controlling precedent, "Once the motion is filed under § 144, the judge... may not pass on the truth of the matters alleged". *Davis v. Board of School Com'rs of Mobile County*, 517 F.2d 1044, 1051 (5th Cir. 1975).

The District Court below did not rule as to whether the facts alleged in the affidavit showed personal bias or prejudice. Instead, the district judge refused to accept an affidavit with factual allegations made by Baron and directed that "Mr. Baron's stuff" be taken out. SR. v8 p214.[4]

The District Court clearly lacks authority to reject a §144 affidavit because it contains a party's sworn factual allegations. That is the entire point of the affidavit. A ruling that the facts alleged in the affidavit do not show bias or prejudice takes the affidavit outside of the requirements of §144 and permits the judge to proceed on the case. *E.g.*, *Parrish* at 100. However, a judge is neither authorized to strike the affidavit because it contains the party's sworn allegations of fact, nor does striking the affidavit on that ground constitute a finding which takes the affidavit outside of §144. Otherwise, the statute would have no meaning or effect.

[4] Counsel was not about to argue with the Judge and confirmed the material quoted from the record was quoted accurately. *Id*.

REPLY ISSUE 6: A FEDERAL COURT MAY NOT REACH OUT TO ASSETS UNRELATED TO THE UNDERLYING LITIGATION: *FREDEMAN & FIRST NAT. CITY BANK*

Vogel's argument, (BRE. 18), fundamentally errs in its interpretation of *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988). Like the proceedings below, the *Fredeman* plaintiffs contended that the defendants were scoundrels who would try to escape judgment, thus depriving the Court of 'jurisdiction'. *Id.* at 826. This Honorable Court established in *Fredeman* that the property of even a scoundrel who would try to escape judgment is beyond the inherent power of the federal court where that property is not itself the subject of claims in the pending lawsuit. *Id.* at 824, 827.

Vogel's argument similarly errs in reliance on *United States v. First Nat. City Bank*, 379 U.S. 378, 85 S.Ct. 528 (1965). In *First Nat. City*, the Supreme Court noted that review of a statutory grant of authority must be in light of the public interest involved. *Id.* at 383. The Court held that unlike *De Beers*, the property in *First Nat. City* ***was*** "the subject of the provisions of any final decree in the cause." Id. at 385.

The case at bar is like *De Beers* and unlike *First Nat. City*. The property subject to the challenged order in this appeal was not subject to any claim in the underlying suit and therefore not subject of the provision of any final decree in the cause. Notably, in relying upon *First Nat. City,* Vogel's argument acknowledges that the taking of the property of Novo Point LLC and Quantec LLC was for a public purpose. Vogel's argument, however, fails to address the requirement of the U.S. Constitution–the Court's taking of private property for a public purpose must be paid for and the owner justly compensated. U.S. Const. amend. V ; *e.g.*, *Brown v. Legal Foundation of Wash.*, 538 U.S. 216 (2003).

REPLY ISSUE 7: VOGEL'S FEES

Vogel's Reliance on *Palmer* to Justify Fee Awards is Misplaced

As a matter of binding precedent, where "the lower federal courts lacked jurisdiction, they are necessarily without power to make any charge upon, or disposition of, the assets". *Lion Bonding*, 262 U.S. at 642. In *Lion Bonding,* the Supreme Court established that *Palmer* did not apply where the court lacked jurisdiction to impose a receivership over the seized property. *Id.* ("The case at bar is unlike *Palmer v. Texas*, 212 U.S. 118, 132, upon which the receivers rely. In that case the … Court had jurisdiction") (emphasis). Thus, if the receivership is reversed for lack of subject matter jurisdiction, no fees may be awarded Vogel or his "professionals". *Lion Bonding* at 642.

Moreover, as a matter of controlling precedent, where a receivership is reversed on grounds other than jurisdiction, expenses and costs may be charged against the receivership *res* only **"to the extent that they have inured to its benefit"**. *Speakman v. Bryan*, 61 F.2d 430, 431 (5th Cir. 1932). Vogel has made no showing of **any** benefit to any receivership res. Rather, Vogel seeks for Novo Point and

Quantec to pay the fees for defending Vogel's personal interests and fee applications. Under the American Rule, Vogel is entitled to paid counsel, but he must pay from his own pocket, not the pockets of Novo Point and Quantec. *E.g.*, *Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994); *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534-535 (3rd Cir. 1970) ("the law imposes on a party the duty to pay his own fees and expenses in vindicating his personal interests" and thus "the receivers' expenses and costs in defending their allowances on appeal are not proper charges against the receivership estate"). Similarly, by working against the interests of Novo Point LLC and Quantec LLC, and serving conflicting interests, Vogel forfeited his right to reimbursement. *Woods v. City Nat. Bank & Trust Co. of Chicago*, 312 U.S. 262, 268 (1941).

Vogel's Argument on Fee Segregation is Erroneous

About 90% of the fees awarded by the orders challenged in this appeal have been awarded to Vogel and his partners at Gardere, ($1,100,000.00, with $824,000.00 paid immediately). Vogel concedes there is no segregation for those fees. Additionally Eckels ($18,775.00)

was to be paid to "the extent that the Receiver controls available cash fund" without reference to any source. Cox ($26,328.88) was paid for work purportedly on behalf of Quantec LLC from funds of Novo Point LLC, etc.. SR. v12 p333, et. seq.

Vogel erroneously argues that *In Franceski v. Plaquemines Parish School Road*, 772 F.2d 197 (5th Cir 1985) requires a line by line analysis of his fee applications on appeal. Contrary to Vogel's argument, *Franceski* merely holds that "Contentions not briefed may be considered waived".

Special Masters Hold an Office

When appointed receiver, Vogel was holding the office of special master by virtue of his employment as special master by the District Judge. Federal courts have explicitly recognized that a special master occupies an office of the Court. *E.g.*, *Gary W. v. State of La., DHHR*, 861 F.2d 1366, 1367 (5th Cir. 1988) ("office of special master terminated ").

No Finding of Necessity or Reasonableness

While a court, as an expert, could determine if the rate of a fee is reasonable, there is no way for the court to determine factually if the

work billed for was necessary. Vogel offered no evidence as to necessity or reasonableness of the 'services' rendered. Notably, the District Court did not find that the fees, or the rate, were reasonable.

REPLY ISSUE 8: THE NON-AUCTION SALES

Vogel oddly references 28 U.S.C. §754 as authority for non-auction sales. However, §754 applies to property situated in districts where the property is located. Vogel failed to file in the district where the property was registered and located-- Australia. Accordingly, pursuant to §754, Vogel was divested of jurisdiction over the property 10 days after entry of his order of appointment. 28 U.S.C. § 754 .

Similarly, the authority offered in Vogel's argument does not support his positions. For example, *United States v. Branch Coal Corp.*, 390 F.2d 7 (3d Cir. 1968) is authority for allowing the district court to set the terms by which the property will be auctioned at public sale, not as authority for private, non-auction sales.

Similarly, the record does not support Vogel's argument of waiver. Objection was made to the secret sales, based on the same issues raised in this appeal. SR. v5 p401, et. seq.

Finally, contrary to Vogel's argument that the valuation of Domains lacked methodology, the document cited by Vogel (Document No. 511754199 at p. 2) discloses the basis for valuation, for example, that "coupons.com provides a good baseline for the domain name rewards.com. Coupons.com sold for $2,200,000.00". Notably, Vogel 'sold' rewards.com plus forty-nine similar names for half the value of rewards.com alone.

REPLY ISSUE 9: AUTHORITY

Vogel's footnote argument regarding authority errs. (BRE. 4). With respect to the issue of authority of counsel, "an attorney is presumed authorized to represent the party he claims to represent". *In re Armored Car Antitrust Litigation*, 645 F.2d 488, 492-493 (5th Cir. 1981). Moreover, "Where a party seeks to challenge the authority of an attorney to represent his purported client, the burden is on that party to raise and prove the contention." *Id.* Notably, the Bankruptcy Court proceedings Vogel references are beyond the record. Vogel's argument presupposes the validity of the receivership order. However, the Order is void for want of subject matter jurisdiction and is therefore is

incapable of binding persons or property in any other tribunal, *Pennoyer v. Neff*, 95 US 714, 722-723 (1878). Similarly, the order is void for lack of fundamental due process. *See Bass v. Hoagland*, 172 F.2d 205, 209 (5th Cir. 1949). The Cook Islands' LLCs also fall outside of the District Court's territorial jurisdiction. *E.g.*, *Booth v. Clark*, 58 U.S. 322, 333, 17 How. 322, 15 L.Ed. 164 (1854). R. 850, 2110. [5]

REPLY ISSUE 10: DUE PROCESS

The Post-Appeal FRAP 8(a) Hearing

Vogel's argument looks to a post-appeal FRAP 8(a) hearing to cure the failure of Due Process in entering the receivership order. However, this Honorable Court has held that a post-deprivation hearing does not repair the district court's prior violation of a litigant's rights to due process. *Dailey v. Vought Aircraft Co.*, 141 F. 3d 224, 230-231 (5th Cir. 1998). In the context of seizure of property and specifically of wages, the Supreme Court has held the same. *Fuentes v. Shevin*, 407 U.S. 67, 82-85 (1972).

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[5] As a matter of substantive law, the LLCs are exempt from seizure by the District Court. Art. 26 and Art. 45, Cook Islands Limited Liability Companies Act 2008. Honoring the Cook Islands' territorial sovereignty is a binding U.S. treaty obligation. *See Cook Islands Treaty on Friendship and Delimitation (1980).*

No Hired Counsel, No Trial Counsel

The record does not support Vogel's argument that Baron was represented in the trial court.

Barrett was unpaid and expressly appeared only for appellate purposes and in the exclusive role of assisting at Baron's FRAP 8(a) hearing. R. 4395-4397. Moreover, Barrett clearly lacked the functional qualification for that assignment. For example, he did not know the most basic requirements of federal trial practice such as how to lay a predicate for an expert opinion. R. 4479-4481.

Thomas was stripped of the authority to object to any action in the bankruptcy and was so completely neutralized in his role that he refused *even to comment* on proposed orders. SR. v11 p89. Moreover, Thomas left the District Court to "the purvue [sic]" of Baron's appellate counsel. *Id.*

While motions were made in the District Court by Baron's unpaid appellate counsel, those motions related to matters on appeal such as motions for stay pending appeal, briefings thereon, and motions to preserve the receivership *res* pending appeal. R. 1702, 4167, 4374, 4377. There is no support in the record for Vogel's assertions that Baron was

paying his lawyer, or that Schepps' accounts were receivership assets.

Vogel's Argument: No Constitutional Right to Counsel in Civil Cases, and Right to Counsel can be Suspended upon Allegations of Unpaid Fees

Vogel argues that the right to representation by counsel can be suspended by a judge who suspects a party has defrauded his counsel and not paid his attorneys fees. However, the legal relations between a litigant and his non-diverse counsel fall **outside the subject matter jurisdiction of the federal courts**. *Griffin*, 621 F.3d at 388.

Moreover, contrary to Vogel's erroneous argument, there is a Constitutional right to retain hired counsel in civil matters that "includes the right to choose the lawyer who will provide that representation." *E.g., Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178, 1180-1181 (5th Cir. 1992). That right may not be impinged without "compelling" reasons. *Id.* at 1181. Notably, there is a fundamental distinction between denial of **any** hired counsel, as was ordered by the District Court below, and denial of one particular hired counsel in a particular case. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255, 1265 (5th Cir. 1983).

Finally, Vogel erroneously argues that the District Court's denials of Due Process were harmless. Because "the right to a hearing has always included the right to the aid of counsel", the denial of the right to retain hired counsel is "a denial of a hearing, and, therefore, of due process in the constitutional sense." *See e.g.*, *Texas Catastrophe Property* at 1181; *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980). As a matter of controlling precedent, when a party is denied the opportunity to be heard and present evidence to support their contentions, the resulting error is not harmless. *E.g. Powell v. US*, 849 F.2d 1576,1582 (5th Cir. 1988). Moreover, this Honorable Court has ruled that basic constitutional rights to a fair trial can never be treated as harmless error. *Vaccaro v. United States*, 461 F.2d 626, 635 (5th Cir. 1972). These rights include, for example, the right to counsel, and an impartial judge. *Id.* at fn. 47.

CONCLUSION

To allow a court to seize all of a person's assets and property rights by retrospectively declaring that person, or some other person as 'vexatious', would tear down the fundamental protection of individual liberty provided by Article III. The Constitutional limitations of a federal court's jurisdiction to the cases and controversies pled before it is a non-trivial Constitutional guardian of liberty. Accordingly, allowing a court's declaration of 'vexation' to remove that Constitutional limit upon the exercise of court power, would unleash the district courts unrestrained upon the community.

This Honorable Court has therefore established a vital bulwark for the protection of liberty, as follows: Before a trial court is granted jurisdiction to place private property into receivership, the pleadings before that court must "put their subject-matter at issue". *Cochrane,* 47 F.2d at 1028-1029 (5th Cir. 1931). **Where the trial court places property into receivership for which no claim has been pled, the court exceeds its subject matter jurisdiction and its order is absolutely void.** *Id.*

Respectfully submitted,

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DATED: May 14, 2012.

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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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