No. 10-11202

In the United States Court of Appeals for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs
v.
JEFFREY BARON,
Defendant-Appellant
v.
ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Order Appointing Receiver in Settled Lawsuit

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

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

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

REPLY BRIEF FOR THE APPELLANTS NOVO POINT, LLC AND QUANTEC, LLC

Respectfully submitted,

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REPLY ISSUES PRESENTED FOR CONSIDERATION

Reply Issue 1: The District Court's ruling to include Novo Point, LLC., and Quantec, LLC., as receivership parties was not agreed to by the companies

Reply Issue 2: The District Court lacked subject matter jurisdiction with respect to Novo Point and Quantec

Reply Issue 3: Novo Point & Quantec were not found to be vexatious (they were not even parties to the lawsuit)

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Reply Issue 6: The underlying post-appeal purpose of the receivership is legally impermissible and in direct contradiction of the Bankruptcy Code

ABBREVIATIONS

"Vogel's Brief" refers to Vogel's Principal Briefing submitted by Vogel by adoption of the Sherman Amicus briefing

"Novo Point" and "Quantec", refer to Novo Point, LLC., and Quantec, LLC., the Appellants

REPLY STATEMENT OF JURISDICTION

As briefed further at page 21, diversity jurisdiction under §1332(a)(1) requires that the pleadings support a claim or controversy between diverse parties. Merely having "citizens of different states", as argued by Vogel (Vogel's Brief, page 1), is not sufficient. Without any claim pled before the court involving Novo Point and Quantec, there is no subject matter jurisdiction granted by §1332(a)(1).

Without a claim asserted against the companies or their assets, there is also no supplemental jurisdiction involving the companies. Title 28 U.S.C. § 1367 authorizes supplemental jurisdiction only over claims arising out of the same Article III case or controversy to which the jurisdiction is supplemental. *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 566 (2005).

REPLY STATEMENT OF FACTS

As briefed in detail below at page 17, the District Court's ruling to include Novo Point, LLC., and Quantec, LLC., as receivership parties was **not** agreed to by the companies. (Vogel's Brief, page 4).

Neither Novo Point, LLC. nor Quantec, LLC. has ever been accused of being vexatious, and neither company was allowed to intervene in the lawsuit below and thus neither company was a party to the lawsuit. R. 1134. As in the lawsuit below, Ondova or Baron were the defendants in almost all of the suits listed by Vogel. Almost all of the suits were brought by the same group of plaintiffs in the case now on appeal. E.g., R. 65-66. The suits were filed in multiple jurisdictions stretching from the US Virgin Islands to California. Id. It is notable that the wrongful nature of those suits was repeatedly established and case after case was dismissed in favor of Ondova and Baron. *E.g.*, *Ondova Limited Company v. Manila Industries, Inc.*, 513 F. Supp. 2d 762, 772 (ND Tex. 2007) (Fitzwater, J.); *Manila Industries, Inc., et al. v. Ondova Limited Co., et al.*, No. 07-55232 (9th Cir. 2007); *HCB, LLC v. Baron, et. al.*, No. 2006-207, (D.V.I. 2007).

Ondova is now controlled by Sherman as the chapter 11 trustee. Now Ondova is on the offensive. On Sherman's motion, a dozen companies were placed into receivership *ex parte*. R. 1619. Those companies did not include Novo Point, LLC., nor Quantec, LLC. Notably, the companies listed under the definition of "Receivership Parties" in the original receivership order are included as 'receivership parties' pursuant to the their being listed in the receivership order and regardless of whether Jeffrey Baron controls them. Id.

Vogel was a special master in the proceedings below. R. 394. Vogel was acting in that role (special master) when he consulted with Mr. Sherman (*ex parte*) with respect to filing the motion to appoint Vogel as a private receiver over Mr. Baron. SR. v5 p238. The motion was filed, Vogel was appointed receiver, and Baron appealed. R. 1575, 1619, 1699. Post-appeal Vogel filed a series of motions requesting that he be made receiver over a multitude of additional companies. R. 1717, 3952; SR. v1 p40, and sealed record Doc 609. Those companies include:

1. Novo Point, LLC.
2. Quantec, LLC.
3. Iguana Consulting, LLC.
4. Diamond Key, LLC.
5. Quasar Services, LLC

6. Javelina, LLC.
7. HCB, LLC, a Delaware limited liability company.
8. HCB, LLC, a USVI company.
9. Realty Investment Management, LLC.- Deleware.
10. Realty Investment Management, LLC – USVI.
11. Blue Horizon, LLC.
12. Simple Solutions, LLC.
13. Asiatrust Limited.
14. Southpac Trust Limited.
15. Stowe Protectors, Ltd.
16. Royal Gable 3129 Trust.
17. CDM Services, LLC
18. URDMC, LLC.

The motions to add the companies to the receivership were clearly made by Vogel, a non-party, and were not joined by any party to the lawsuit. Id. Notably, no motion was ever filed seeking a determination of whether Novo Point or Quantec were controlled by Jeffrey Baron. SR. v8 p17-70. No hearing was ever held on the issue, and no finding of the District Court was entered on the issue. Id. Similarly, the order challenged in this appeal does not find that Novo Point or Quantec are under the control of Jeffrey Baron. R. 3934-3941. No claims of any sort have been pled against Novo Point or Quantec in the lawsuit below.

ARGUMENT SUMMARY

Vogel Errs in his Assertion that Novo Point and Quantec agreed to be made receivership parties

Vogel has quoted portions of the record out of context to arrive at an erroneous conclusion.

Vogel has Conceded the Essential Legal Issues on Appeal

Vogel does not contest that:

1. The law does not authorize using receivership as a vehicle to make companies liable as reverse alter egos of a party; and
2. The law does not authorize placing a company into receivership to secure the claims of unsecured creditors;

Vogel is left to argue that neither of these was the purpose or use of the receivership.

Vogel Offers no Basis in Law for Placing Novo Point, LLC., and Quantec, LLC., into Receivership

Vogel offers no lawful purpose or grounds for seizing the assets of Novo Point and Quantec, nor does Vogel offer any controversy pending before the District Court upon which to base the District Court's subject

matter jurisdiction with respect to the assets of Novo Point & Quantec. Novo Point and Quantec were never accused of being vexatious litigants, and they were not parties to the lawsuit below.

Adoption of Baron Reply Briefing

The authority raised in the Reply Briefing of Jeff Baron is adopted by this briefing.[1]

[1] Novo Point & Quantec's Principal briefing was filed prior to the consolidation with Jeff Baron's appeal and, as a result, there was some overlap of argument. To the best extent possible that has been avoided in this briefing.

ARGUMENT & AUTHORITY

REPLY ISSUE 1: THE DISTRICT COURT'S RULING TO INCLUDE NOVO POINT, LLC., AND QUANTEC, LLC., AS RECEIVERSHIP PARTIES WAS NOT AGREED TO BY THE COMPANIES

Vogel's Responsive Argument Is Predicated On the Erroneous Factual Assertion That Novo Point And Quantec Agreed To Be Added as Receivership Parties

Vogel's responsive argument is predicated on the erroneous factual assertion that the District Court's ruling to include Novo Point and Quantec as receivership parties was agreed to by the companies. Other than the argument that 'they agreed to it', Vogel offers no basis in law for including Novo Point & Quantec into the receivership. Vogel does not challenge that Novo Point or Quantec are not the alter-egos of Baron, nor does Vogel challenge that Novo Point or Quantec did not do anything improper or vexatious.

Vogel's Factual Argument is Erroneous

Vogel's argument erroneously concludes that the ruling to include the parties was agreed because Vogel selectively omits the relevant portions of the record from his factual recitation. (Vogel's Brief, page 6).

As explained below, by omitting the relevant facts, Vogel's argument erroneously concludes that Novo Point and Quantec agreed to be included as receivership parties.

The District Court Made its Ruling on The Motion To 'Clarify' the Companies into the Receivership Prior to the Quotations Cited By Vogel

Vogel omits from his factual discussion the pivotal fact that the District Court made an oral ruling on the motion to 'clarify' the companies into the receivership prior to the verbal exchange quoted by Vogel. SR. v2 p245. Vogel similarly omits from his factual discussion the fact that, after making its ruling, the District Court ordered the parties to provide it with a conforming order. SR. v2 p246. The out-of-context text cited by Vogel makes it erroneously appear that Novo Point and Quantec had agreed to be included as receivership parties and were presenting that agreement to the District Court. (Vogel's Brief, page 7).

Instead, the parties were announcing that they had reached agreement on the form of the written order conforming to the Court's oral ruling. The sequence of the proceedings was:

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. SR. v2 p294.**

Vogel's argument ignores all of the proceedings prior to the submission of the conforming order. Vogel's argument similarly ignores the 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, as is a common practice in the Northern District of Texas. *E.g.*, *Carrabba v. Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 781 (N.D. Tex. 2000)(parties ordered to submit agreed order

conforming with court's ruling); *Commercial Union Ins. Co. of New York v. Daniels*, 343 F.Supp. 674, 678 (S.D.Tex.1972)(same).[2]

[2] As a matter of judicial policy, agreement as to the form of orders conforming to a court's oral ruling facilitates efficiency of the process, and should be encouraged. If a party was threatened with waiver by agreeing to the entry of an order in conformity with the oral ruling of the court, no prudent attorney would so agree. The courts' ability to rely upon the parties to present conforming orders would thereafter be substantially impeded.

REPLY ISSUE 2: THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION WITH RESPECT TO NOVO POINT AND QUANTEC

Lack of Jurisdiction to Order a Receivership is Presumed

Lack of jurisdiction is presumed, and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Subject matter jurisdiction is necessary to issue an order under Fed.R.Civ.P. 66, as the rules of procedure do not grant or expand a court's jurisdiction. Fed.R.Civ.P. 82; *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978).

Lack of Jurisdiction is not Waivable and can be Raised at Any Time

Parties cannot confer subject matter jurisdiction by agreement, waiver, or consent. *Mitchell v. Maurer*, 293 U.S. 237 (1934); *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928); *and e.g.*, *Matter of Edwards*, 962 F.2d 641, 644 (7th Cir. 1992); *First State Bank v. Sand Springs State Bank*, 528 F.2d 350, 354 (10th Cir. 1976). Similarly, when the district court lacks jurisdiction, the court of appeals has jurisdiction on

appeal for the purpose of addressing the lower court's jurisdiction. *Griffin v. Lee*, 621 F.3d 380, 384 (5th Cir. 2010). This rule is so fundamental that the court of appeals has an affirmative obligation to investigate the jurisdiction of the district court even if the parties concede it. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). The Supreme Court explained in *Bender*:

> "[I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.*

The District Court Lacked Subject Matter Jurisdiction with respect to Novo Point and Quantec

The District Court lacked subject matter jurisdiction with respect the companies and their assets because no claim or controversy involving the companies or their assets was pled before the court. It is a well settled principle that the exercise of judicial power depends upon the existence of a case or controversy. *Locke v. Board Of Public Instruction of Palm Beach Cty.*, 499 F.2d 359, 364 (5th Cir. 1974). Since

no controversy was pled before the district court with respect to Novo Point or Quantec, the District Court lacked subject matter jurisdiction over any matter with respect to them. *E.g.*, *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986) (no subject matter jurisdiction where there is no actual case between the parties within the meaning of Article III of the Constitution); *Infant Form. Anti. Lit. MDL 878 v. Abbott Laborat.,* 72 F.3d 842, 843 (11th Cir. 1995) (there is no subject matter jurisdiction over matter involving a non-party); *and see Steel Co. v. Citizens for Better Environmen*t, 523 U.S. 83, 89 (1998) (subject matter jurisdiction tested by "the right of the petitioners to recover under their complaint").

The District Court's lack of subject matter jurisdiction is highlighted by Vogel's argument, as follows: First, Vogel argues that the clarification order merely declared what the status quo was– that Novo Point and Quantec were included in the original receivership order. (Vogel's Brief, page 19). Second, Vogel argues that Novo Point & Quantec became parties by objecting to the motion to 'clarify' them into

the receivership.[3] (Vogel's Brief, page 18). Accordingly, **Vogel concedes that when Novo Point & Quantec were placed into receivership they were not parties to the lawsuit.** As a fundamental jurisdictional matter, the District Court lacks subject matter jurisdiction over non-parties. *E.g.*, *Middle South Energy,* 800 F.2d at 490; *Infant Form.,* 72 F.3d at 843. There was (and still is) no controversy pled before the court involving Novo Point or Quantec.

The District Court Lacked Jurisdiction to Modify or Tamper in any way with an Order then on Appeal

An appeal "confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal". *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 58 (1982). Accordingly, as explained by the Fifth Circuit in *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990), once Jeffrey Baron appealed the receivership order, the District Court did not have the power to "alter the status of the case as it rests before the Court of Appeals".

[3] Vogel certified Novo Point and Quantec not as parties, but as a companies purportedly seized by the receivership. Vogel's Brief, pages vi-vii.

REPLY ISSUE 3: NOVO POINT & QUANTEC WERE NOT FOUND TO BE VEXATIOUS (THEY WERE NOT EVEN PARTIES TO THE LAWSUIT)

Vexatiousness

To constitute vexatiousness, the litigant's series of conduct in the suit must be "lacking justification and intended to harass." *Overnite Transp. Co. v. Chicago Indus. Tire Co.*, 697 F.2d 789, 795 (7th Cir. 1983); *United States v. Ross*, 535 F.2d 346, 349 (6th Cir. 1976). Novo Point & Quantec have not been accused of any of these things. The companies were not even parties to the lawsuit below. Vogel has offered no legal authority to place the companies into receivership based on the alleged vexatious litigation of another. No allegation was pled and no finding was entered that the companies controlled or were in any way responsible for Mr. Baron. Baron is not alleged to be an employee of the companies.

REPLY ISSUE 4: WHY RECEIVERSHIP IS NOT AUTHORIZED AS A REMEDY FOR VEXATIOUS LITIGATION

The Source of a Court's Power

Vogel argues that if a court can place a city into receivership, why can't it place a person into receivership for the same reason. (Vogel's Brief, page 15). There are many reasons why not, as follows:

Courts find their authority to act from some source. As a matter of statutory authorization granted from Congress, the inherent power of a District Court, as well as its All Writs authority, and its powers in equity, all ultimately spring from the same source— the English court of chancery. *See ITT Community Development Corp. v. Barton*, 569 F.2d 1351 (5th Cir. 1978); *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); and *Gordon v. Washington*, 295 U.S. 30 (1935).

The English Court of Chancery

Accordingly, when a Court seeks to exercise inherent, equitable, or All Writs power, its authority is limited and bounded by the powers and jurisdiction exercised by the English court of chancery. *E.g., Gordon* at 36-37. *Gordon* not only explains this *general* principle but also defines

the bounds and limits of exercising authority specifically with respect to the remedy of receivership. *Gordon* holds:

> "[Receivership] is not an end in itself. Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition. … [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. [Because] The English chancery court from the beginning declined to exercise its jurisdiction for that purpose". Id. at 37.

The holding of the Supreme Court in *Gordon* is clear: Receivership is not authorized as a remedy to provide final relief; It is an ancillary remedy to conserve property for further disposition by some other remedy. These strict limitations on the authority to impose a receivership are a matter of longstanding law. As the Supreme Court held in *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923):

> "[T]he appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief.

> The appointment determines no substantive right; nor is it a step in the determination of such a right. It is a means of preserving property"

The Specific Limitations of the Remedy of Equity Receivership

As discussed above, the inherent and equitable power of the District Court extend only so far as the power exercised by the English court of chancery. With respect to the specific remedy of receivership the extent of that authority is **only** to conserve property "Where a final decree involving the disposition of property is appropriately asked". *E.g., Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954). Because the English chancery court did not do so, there is no occasion for a district court to use receivership as a final remedy. *Gordon* at 37. In noting the very limited use for which receivership is authorized, the Fifth Circuit in *Tucker* warned:

> "[R]eceiverships for conservation have a legitimate function but they are to be watched with jealous eyes lest their function be perverted".
>
> *Id.*

Accordingly, receivership exercised through the inherent, All Writs, and equitable authority of a District Court is not authorized to be used as a 'creative' remedy, or, as Sherman argues was the case in the District Court below, as a remedy to control a vexatious litigant. The English chancery court did not exercise such power and therefore, without a specific statutory grant of authority from Congress, a District Court cannot either. Which leads to the governmental receivership cases.

Governmental Receivership

In the era of desegregation, the courts were faced with very difficult tasks in enforcing what were found to be constitutionally mandated protections due from public institutions— ie., from the executive branch of government. The First Circuit's solution was to find a new source of power from which a court was authorized to act—direct constitutional power. That power, as found by the First Circuit, arises directly out of the constitution and allows a court to enforce the constitution against a co-branch of government by any means that is 'reasonable under the circumstances'. *Morgan v. McDonough*, 540 F.2d

527, 533, 535 (1st Cir. 1976). Thus, to the view of the First Circuit, the power of a court with respect to "substitution of a court's authority for that of elected and appointed officials" springs directly from the constitution and the only limitation on a court's power to act against a co-branch of government is "reasonableness under the circumstances". *Id.* Accordingly, to the view of the First Circuit, receivership, or *any* imaginable exercise of power is authorized against a co-branch of government, so long as it is 'reasonable' and for 'constitutional purposes'. The Supreme Court in *Milliken v. Bradley*, 433 U.S. 267, 288 (1977) seemed to disapprove of the 'unlimited power' against co-branches of government principle and held that a court's power is limited to the "traditional attributes of equity power". *Id.* The trial court opinions relied upon by Vogel (*Dixon*, *Bracco, Shaw,* and *City of Detroit*) all rely upon the First Circuit's holding in *Morgan*. The Fifth Circuit has not adopted the reasoning of the First Circuit on this issue, nor have the majority of the Circuits.

No Application Outside of Actions Against the Executive Branch of Government

Most significantly, the 'all things reasonable' power derived directly from the constitution that is recognized by the First Circuit, applies **only** to enforcing the constitution against co-branches of government. *Morgan*, 540 F.2d at 535. Accordingly, the 'a court can do *anything* that is reasonable, including receiverships' authority cited by Vogel has no application outside of actions against the executive branch of government. *Id.* When a court exercises power with respect to private persons, even in the First Circuit, a court's authority is bound by the limits of English chancery court powers and not by 'all things reasonable'. The distinction is fundamental.

Accordingly, the District Court should be found to be unauthorized to use receivership to remedy alleged vexatious litigation. Such an exercise of power exceeds that exercised by the Court of Chancery, and has been prohibited by well established precedent. *E.g.*, *Gordon*, 295 U.S. at 37-38.

REPLY ISSUE 5: THE RECEIVERSHIP IS BEING USED AS A COLLECTION DEVICE UNAUTHORIZED IN LAW

Vogel argues that the District Court heard the Receiver's Motion to Pay Attorney Fee Claimants, but fails to acknowledge that he, as receiver, intends to pay the alleged claimants against Baron by liquidating the assets of Novo Point and Quantec. (Vogel's Brief, page 2).

Recent Procedural History Below

The receiver's report is informative as to the recent procedural events in the District Court. SR. v8 p977. The key events are as follows:

1. The receiver seized about a million dollars. SR. v8 p989.
2. Those funds mostly came from Jeff Baron's bank accounts. SR. v8 p1007.
3. The receiver paid himself and his law partners about a million dollars in fees. SR. v8 p990-992.
4. The receiver would like to be paid another half million dollars in fees, but has no cash to do so right now. SR. v8 p992.
5. There are $870,000 in former attorney 'claims' by former 'Baron attorneys'. SR. v8 p993.

6. The receiver wants to sell Novo Point & Quantec's domain name assets to raise the money to pay Baron's former attorney 'claims' and to pay the receiver more of his fees. SR. v8 p995.

7. The receiver does not want to disclose which of Novo Point and Quantec's assets he wants to liquidate in secret, private, sales. SR. v8 p997.

The very unusual context of the "Receiver's Motion to Pay Attorney Fee Claimants" should be noted. According to the receiver, **"The Receiver did <u>not</u> collect or offer evidence to controvert the Former Attorney Claims".** SR. v7 p202. The receiver apparently understood the Court's order for the receiver to "prepare a full report, assessment report" (SR. v4 p1224) as meaning to prepare a one-sided report ignoring <u>all</u> the evidence that controverted the Attorney's claims. Notably, the receiver *solicited* the claims against Mr. Baron. E.g., SR. v8 p1242-43.

Accordingly, the receivership is being used as a vehicle by which millions of dollars in assets of Novo Point & Quantec are to be sold to pay 'claims' asserted against Baron. The 'claims' asserted against Baron were, moreover, approved by the District Court based on a one-sided report of the claims that <u>ignores all of the evidence controverting those</u>

claims. SR. v7 p202. If the 'claims' themselves are examined, they appear to be absolutely groundless. SR. v8 p1197-1201, 1212-1243.

Not Authorized by Law

As a matter of established Fifth Circuit precedent, the District Court clearly does not have subject matter jurisdiction over non-diverse attorney fee claims. *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010). Similarly, as a matter of long established law, receivership is clearly not authorized as a means to collect or secure the claims of simple creditors. *Pusey & Jones Co.,* 261 U.S. at 497. Finally, as Vogel appears to concede, as a matter of established Fifth Circuit precedent, receivership cannot be used to impose alter-ego liability. *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317, 323 (5th Cir. 2006). Accordingly, the law does not authorize the receivership challenged in this appeal, which contrary to the law, attempts to do all of these things.

REPLY ISSUE 6: THE UNDERLYING POST-APPEAL PURPOSE OF THE RECEIVERSHIP IS LEGALLY IMPERMISSIBLE AND IN DIRECT CONTRADICTION OF THE BANKRUPTCY CODE

The Post-Appeal Purpose of the Receivership, as Stated by the District Court

Vogel looks to the post-appeal findings of the District Court in denying Baron's FRAP 8(a) motion for relief pending appeal to find justification for the receivership order. Nothing in the findings supports the order with respect to Novo Point or Quantec. Moreover, the statements of the District Court at the FRAP 8(a) hearing make clear that the underlying purpose behind the receivership is legally impermissible. At the Jan. 4 hearing, the District Judge stated the purpose of the receivership at that point:

> "There are substantial contribution claims by lawyers in that bankruptcy. I am trying to get the -- The [Ondova] bankruptcy is under my supervision, and it's trying to be closed. …. I just want to get this matter closed. This receivership is not going on forever. It's not going on for very long. But everybody wants to fight about everything in this case. This receivership could be over tomorrow if we could just get sufficient funds to make sure that the

> bankruptcy court is appropriately funded in such a way that it could be closed." R. 4587.

Legally Impermissible Purpose

In other words, the receivership is being used as an extension of the bankruptcy proceedings to "make sure that the bankruptcy court is appropriately funded." Id. That purpose is explicitly forbidden by the bankruptcy code. 11 U.S.C. §105(b) ("[A] court may not appoint a receiver in a case under this title.").

Legally Fallacious Grounds

The District Judge was explicit as to why the bankruptcy court needed to be funded by the receivership, explaining:

> "[L]awyers in this Court who have worked for Mr. Baron in good faith, who have done everything they could to facilitate the bankruptcy in this case and who have made substantial contributions to the bankruptcy -- those good lawyers have gone unpaid and to the detriment of the bankruptcy estate, and that is a deep problem."

In other words, Mr. Baron's failure to pay lawyers for their substantial

contribution claims was seen by the District Court as a "deep problem" because it works as a detriment to the bankruptcy estate that is faced with paying those substantial contribution claims. However, that reasoning is a legal fallacy, as follows:

Mr. Baron is not in bankruptcy, he is a creditor of the bankrupt company, Ondova. R. 890-892. When there is a qualifying substantial contribution to the bankruptcy case, pursuant to the Bankruptcy Code, the responsible party to pay for the reasonable cost (including attorney's fees) for that contribution 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). If the creditor has paid the professional who made the contribution, the creditor is entitled to reimbursement from the bankruptcy estate. *Id.* If the professional has not been paid by the creditor, 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). In either case, **by law the party responsible for paying the cost of any qualifying substantial contribution is the bankruptcy estate**

and not the creditor who makes the contribution.

Accordingly, if the creditor has made a substantial contribution[4] then by law the bankruptcy estate is responsible for paying the reasonable costs of that contribution. It is not a 'deep problem' as the District Court misunderstood it, and it is not vexatious litigation. It is the law. Moreover, if Mr. Baron paid the attorneys (which it appears he did, SR. v8 p 1197-1201, 1212- 1243), then the bankruptcy estate is still responsible for paying their bill and reimbursing Mr. Baron. *E.g., IN RE DP Partners Ltd.*, 106 F. 3d at 671-673. It should be noted that to qualify as a substantial contribution the benefit to provide the estate must be greater than the expense of the claim. *E.g.*, *IN RE DP Partners*, 106 F. 3d at 673.

In short, the imposition of a receivership in order to force a creditor to pay the costs of substantial contributions to the bankruptcy estate—an obligation imposed by law upon the estate— involves the use of a prohibited means,[5] to controvert the clear statutory framework of the Bankruptcy Code. The use of receivership to seize, without any

[4] Which is the only way a creditor's lawyers are entitled to a claim against the bankruptcy estate. 11 U.S.C. §503(b)(4).

[5] 11 U.S.C. §105(b).

legal grounds, the assets from third parties such as Novo Point & Quantec, in order to fund an unrelated bankruptcy, has no basis in law and rests well outside of the authority of the District Court.

Notably, Sherman filed his motion for receivership over Baron almost immediately (within 3 business days) after Baron objected to Sherman's attorney's fee application in the Ondova bankruptcy case. R. 1576-1578. The Ondova bankruptcy estate was funded with sufficient cash to pay every creditor in full. SR. v5 p239-10; R. 2109-2185. However, instead of paying the creditors and ending the bankruptcy, Sherman went on a billing spree in a <u>legally groundless pursuit</u> in clear contravention of the Bankruptcy Code— to stop Baron's 'vexatious' conduct of making substantial contributions to the bankruptcy case for which the estate would be 'burdened' with paying the reasonable costs. In doing so, Sherman generated nearly four hundred thousand dollars of additional attorney's fees on his behalf, substantially draining the Ondova estate. SR. v5 p255.

Finally, creditors in a bankruptcy have no right to be paid in full, or at all. Pursuant to the Bankruptcy Code, creditors share in the net

assets of the bankruptcy estate. Accordingly, the District Court's conception that the bankruptcy estate needed to be 'fully funded' in order to 'close' the bankruptcy is another legal fallacy. Even if the immediate effect of substantial contribution claims were to 'prevent' creditors from receiving 100% of the their claims, that is not a "deep problem" but the normal working of the bankruptcy system. The creditors receive a net benefit because the substantial contribution must be greater than the administrative claim for making that contribution. *E.g.*, *IN RE DP Partners*, 106 F. 3d at 673. In short, grabbing someone and forcing them to fund a bankruptcy is clearly well outside the law. The reasoning offered is that Baron was vexatious. As discussed above, that reasoning is based on legal fallacy. In any case, Vogel's offered justification that 'Baron is vexatious' does not authorize the seizure and liquidation of third parties such as Novo Point and Quantec.

CONCLUSION

The order placing Novo Point, LLC., and Quantec, LLC., into receivership should be vacated.

Respectfully submitted,

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FOR NOVO POINT, LLC., and, QUANTEC, LLC.

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DATED: July 15, 2011.

CERTIFIED BY: /s/ Gary N. Schepps
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and QUANTEC, LLC.

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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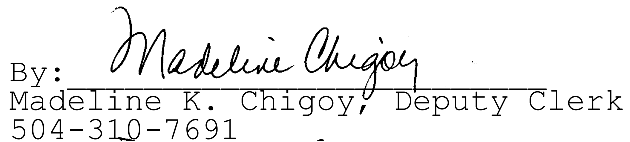
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