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 Ex Parte Receivership imposed
to Investigate and Prosecute Unpleaded Claims against Jeff Baron
and to Prevent Baron from Hiring Paid Counsel to Defend Himself

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

BRIEF FOR THE APPELLANTS

Respectfully submitted,

/s/ Gary N. Schepps

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FOR APPELLANTS

NOVO POINT LLC,
QUANTEC LLC, and
JEFFREY BARON

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. Intervenors: 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, L.L.C.
(2) QUANTEC, L.L.C.
(3) JEFFREY BARON
(4) GARY N. SCHEPPS

G. APPELLEES: (1) PETER S. VOGEL

2. ATTORNEYS

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d. For Intervenor VeriSign: Dorsey & Whitney (Delaware)

(1) Eric Lopez Schnabel, Esq.
(2) Robert W. Mallard, Esq.

d. For Intervenor Aldous and Rasansky:

Aldous Law Firm
Charla G Aldous

f. 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 seeking money from the receivership res:

1. Garrey, Robert (Robert J. Garrey, P.C.)
2. Pronske and Patel
3. Carrington, Coleman, Sloman & Blumenthal, LLP
4. Aldous Law Firm (Charla G. Aldous)
5. Rasansky Law Firm (Rasansky, Jeffrey H.)
6. Schurig Jetel Beckett Tackett
7. Powers and Taylor (Taylor, Mark)
8. Gary G. Lyon
9. Dean Ferguson
10. Bickel & Brewer
11. Robert J. Garrey
12. Hohmann, Taube & Summers, LLP
13. Michael B. Nelson, Inc.
14. Mateer & Shaffer, LLP (Randy Schaffer)
15. Broome Law Firm, PLLC
16. Fee, Smith, Sharp & Vitullo, LLP (Vitullo, Anthony "Louie")
17. Jones, Otjen & Davis (Jones, Steven)
18. Hitchcock Evert, LLP
19. David L. Pacione
20. Shaver Law Firm
21. James M. Eckels

22. Joshua E. Cox
23. Friedman, Larry (Friedman & Feiger)
24. Pacione, David L.
25. Motley, Christy (Nace & Motley)
26. Shaver, Steven R. (Shaver & Ash)
27. Jeffrey Hall
28. Martin Thomas
29. Sidney B. Chesnin
30. Tom Jackson

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

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument would not be helpful in determining the issues involved in this appeal. Dispositive issues raise questions of law involving established legal principles that have been authoritatively decided, *e.g., Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (a district court lacks jurisdiction to impose receivership over property for which no claim of interest in, or right to, has been pled); *Gordon v. Washington*, 295 U.S. 30, 37 (1935) (receivership may be imposed upon private property only "[w]here a final decree involving the disposition of property is appropriately asked" in order to "preserve and protect the property pending its final disposition."); *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908) (where a court lacks jurisdiction or authority to impose a receivership over property, it lacks discretion to award any part of that property to pay the costs of the receivership); *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923) (where a district court lacks jurisdiction, it is without power to make any disposition of the assets ordered into receivership); etc.

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STATEMENT OF THE JURISDICTION

The Fifth Circuit Court of Appeals has jurisdiction to hear this interlocutory appeal from the orders of the District Court of the Northern District of Texas, taking steps to accomplish the purposes of a receivership, including directing the sale of receivership assets and ordering the disposal and disbursement of receivership property pursuant to 28 U.S.C. §§1292(a)(1) and (2). The District Court lacks subject matter jurisdiction to enter the orders challenged on appeal,[1] and additionally lacks territorial jurisdiction over the assets ordered sold[2]. Further, the District Court lacks personal jurisdiction over the mass of non-parties ordered into receivership by the District Court without notice, pleadings, or service of process.

[1] See Issue 1.

[2] See Issue 9.

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does the District Court lack subject matter jurisdiction over the property seized from Novo Point LLC and Quantec LLC ?

ISSUE 2: Does the District Court lack the legal authority to impose a receivership over the assets of Novo Point LLC and Quantec LLC ?

ISSUE 3: Can a receivership be used as a vehicle to make third parties liable as 'reverse alter-egos' of a party ?

ISSUE 4: Do the Fourth and Fifth Amendments of the U.S. Constitution prohibit the District Court from liquidating and distributing the property of Novo Point LLC and Quantec LLC ?

ISSUE 5: Did the District Court Violate the Due Process rights of Jeffrey Baron in denying him the right to paid counsel ?

ISSUE 6: Do secret proceedings violate federal law and the U.S. Constitution ?

ISSUE 7: Did the District Court abuse its discretion in awarding professional fees: (1) Without an evidentiary hearing on contested fact issues or findings as to the reasonableness or necessity of the fees; (2) Without regard to which of multiple receivership estates the fees were allegedly incurred on behalf of; and (3) Where the receiver requesting payment of the fees was prohibited by law from being appointed as receiver ?

ISSUE 8: Did the District Court err in allowing the Court's receiver to embark upon a fishing expedition and seize the bank records of Appellate Counsel ?

ISSUE 9: Does the U.S. District Court in the Northern District of Texas have jurisdictional authority over assets registered in Australia owned by companies chartered in the Cook Islands and exempt from execution by Cook Islands law ?

ISSUE 10: Once an affidavit is filed pursuant to 28 U.S.C. §144, is the authority of the Judge circumscribed to making a determination as to the legal sufficiency of the facts stated in the affidavit ?

STATEMENT OF THE CASE

The Lawsuit Below Fully Settled

In August, 2010, all claims pled in the lawsuit below fully and finally settled and all parties entered a stipulated order of dismissal with prejudice as to all claims. R. 2109, *et.seq.*, 2346-2356. There were two sets of claims asserted in the suit, as follows:

(1) A diverse breach of contract claim brought by the plaintiffs against the defendants Jeff Baron and his company Ondova. R. 38-51. And,

(2) A non-diverse breach of contract claim brought as an intervention against the same defendants by a law partner of the District Judge's brother-in-law, Charla Aldous, and attorney J. Rasansky.[3] R. 385, *et. seq*.

[3] Two days after the District Judge's brother-in-law's partner filed for intervention, the District Judge appointed a partner at the District Judge's sister-in-law's former law firm to act as special master in the case. R. 394-396. The appointment was ordered in violation of the mandatory requirements of Fed.R.Civ.P. 53(b)(3). The District Judge later appointed that same partner, Vogel, as mediator and receiver. R. 1574,1604. As receiver, Vogel moved for Novo Point LLC and Quantec LLC to be included into his own receivership. Vogel then arranged the secret asset sales complained of in this appeal in order to pay himself, his firm and 'professionals'. The million dollars in fees challenged on appeal were awarded by the District Court in addition to previous fee awards totaling a million dollars taken by Vogel from Baron's savings accounts, and emptying them. R. 1717, sealed Doc. Nos. 424/425,480; SR. v8 p1007, pp990-992.

Both the plaintiffs' claim and the Aldous/Rasansky claim fully and finally settled in August 2010. R. 2346-2356.

District Judge's Action to Take Matters into his Own Hands and Seize Property *Ex Parte* to Forcibly Pay on Unpleaded Allegations Baron Owed Money to Former Lawyers

Several months later, the District Judge was apparently concerned with grievances he had against Jeff Baron, primarily the allegation that Baron owed money to a series of former attorneys.[4] The allegations were not pled in the lawsuit before the District Court.[5] However, on November 24, 2010, the District Judge decided to take matters into his own hands 'in the interest of justice'.[6] In off-the-record *ex parte* proceedings and without any supporting pleadings, affidavits, service of process, findings, etc., the District Court signed an order placing Jeff Baron and a long series of non-party entities into

[4] While no findings were entered in support of the *ex parte* receivership order signed November 24, 2010, In February 2011 the District Court entered findings in denying Baron's Fed.R.App.P. 8(a) motion for relief pending appeal. SR. v2 p339, *et. seq*.

[5] Other than of the partner of the Judge's brother-in-law and Rasansky,

[6] *Id.*

receivership.[7] No affidavits, evidence, or sworn showing was made to establish the cause for seizing the property subject of the receivership. No bond was ordered to protect any party should the receivership order be found wrongful. No claim of exigent circumstances was made. The property ordered seized by the receiver was not subject to any claim pled, and no party was served with process in relationship to the receivership proceedings.[8]

Then, a Motion to Support the District Court's Order was Filed

Later in the day after the receivership order was signed, a motion seeking the order was filed. R. 1716; SR. v11 p82-83. The sole grounds stated in the motion for the need for a receivership was to prevent Jeff Baron from hiring legal counsel to defend himself. R. 1578, ¶13. The District Judge instructed the receiver, Peter Vogel, to investigate and prosecute the allegations against Baron, but (according to the receiver's

[7] R. 1619-1632. The order was signed at 1:15pm. SR. v11 p83. No findings were entered in support of the receivership order. It is unclear who drafted the order. Information about the *ex parte*, off-the-record proceedings came to light from information provided by third parties and examination of the creation time of key documents. See SR. v11 p82-84.

[8] No claims of any type were pled in the District Court below against Novo Point LLC or Quantec LLC, or their assets.

position) to ignore all exculpatory evidence. SR. v7 p202.

This appeal is an interlocutory appeal from three actions taken by District Court while the underlying receivership has been on appeal to this Honorable Court. The orders complained of in this appeal are as follows:

(1) An order liquidating millions of dollars of assets of two non-party foreign LLCs, in secret, private, non-auction sales at some fractional amount of the assets' value;[9]

(2) Orders to pay well over a million dollars in 'fees' to the receiver and his 'professionals';[10] and

(3) An order allowing the receiver to investigate the private bank records of counsel for the Appellants to investigate whether Jeff Baron was in contempt of the District Court's orders by paying for an attorney to represent him.[11]

[9] SR. v14 p178.
[10] SR. v12 p333 and SR. v14 p178.
[11] SR. v12 p136.

STATEMENT OF FACTS

The *Ex Parte* Receivership

After the receivership was imposed *ex parte*, Baron was then warned that he was "prohibited from retaining any legal counsel" and that if he did "the Receiver may move the Court to find you in contempt".[12] Baron's trial counsel was fired by the receiver.[13] Baron's motions to be allowed to retain trial counsel were denied.[14] When the receivership was imposed, Baron immediately turned over his personal documents and files requested by the receiver.[15] Baron's estate consists essentially of some savings accounts and some Roth IRAs.[16] Baron appealed the receivership order on Dec. 2, 2010.[17] The receiver, Peter Vogel, the Appellee in this appeal, then moved to add a multitude of companies into his receivership (without lawsuits, service, evidence, or the normally expected due process of law).[18]

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[12] SR. v8 p1213.
[13] R. 3890-3892.
[14] E.g., R. 2720, 4580-4581; SR. v2 p384-390; SR. v4 p119.
[15] R. 3891.
[16] SR. v8 p1007.
[17] R. 1699-1700.
[18] R. 1717, 3952; SR. v1 p40, and sealed record Doc 609; SR. v2 pp365,405.

Those companies include the following:

1. NovoPoint, 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 *Ex Parte* Asset Liquidations

The motions to liquidate millions of dollars of assets of Novo Point LLC and Quantec LLC, granted by the order challenged on appeal, were filed *ex parte* and under seal.[19] A substantially redacted version of the motions was served on Appellant's counsel hiding the following: (1) the identity of the assets, (2) the appraisal values, (3) the proposed sales amounts, (4) the identity of the purchasers, etc. SR. v5 p401, *et. seq.*

[19] See sealed Doc. Nos. 424/425,480.

According to an unredacted portion of the motions, no marketing efforts were engaged in to sell the assets. Rather:

> "[The prices] were a result of **unsolicited purchase inquiries**. So, the negotiated sales prices for many of the Domains For Sale are **substantially lower than their appraised values**."[20]

Notably, even the core appraised value of the assets was not based on any known appraiser or known appraisal methodology.[21] Rather, the 'appraisals' were obtained from on-line internet websites, and it is unknown who performed the appraisals, if anyone, or how.[22] At the bottom of the principal 'appraisal' used by Nelson, Vogel's 'expert', "Estibot.com", discloses "The dollar valuation is not to be taken literally …. **Do not make a purchase or sale decisions based on this appraisal.**" SR. v5 p408. Estibot.com and similar on-line 'appraisal' sites do not claim to be reliable. For example Estibot.com appraises "Japan.com" at under $10,000.00 but "Korea.com" at over

[20] See sealed Doc. Nos. 424/425, affidavit of Nelson, page 6.
[21] See sealed Doc. Nos. 424/425, affidavit of Nelson.
[22] *Id.*

$5,000,000.00. *Id*. The assets at issue were registered and located in Australia. SR. v8 p1172.

The 28 U.S.C. §144 Affidavit

Prior to the District Court's entry of the orders challenged in this appeal, Baron filed an affidavit pursuant to 28 U.S.C. §144. However, the District Judge refused to review the legal sufficiency of the facts stated in Baron's §144 affidavit. Instead, the District Court ruled that Baron could not submit an affidavit that made factual allegations, but rather must instead submit an affidavit that cited specific portions of the court record. SR. v5 p1470. The District Court sealed Baron's affidavit so that it was hidden from the public. *Id*. Baron then filed a supplemental affidavit that added quotations from the record, including the quoted text and the hearing date. Doc. 521 (ordered under seal). The District Judge then struck and also placed that affidavit under seal on the grounds that the affidavit "failed to give citation to the record as to every statement by the Court". SR. v6 p122. The District Judge ordered that any supplemental affidavit could not contain any off-the-record statements made by the District Judge, and must be confined to

statements the Judge made on the record. *Id.* Some of the factual assertions made in the §144 affidavit include, for example, the following:

1. The District Judge announced that even if Baron were to testify, he had already decided not to believe him, no matter what he said.

2. After three former attorneys testified they were owed money, the District Judge announced that he had already determined the matter and was not going to believe Baron if he testified that he had paid the attorneys. This is despite the fact the attorneys produced no contracts, no bills, no statements, and no list of payments.

3. Before hearing any evidence on the subject, the District Judge stated he "would not give credence to assertions of lawyers acting poorly".

4. Before a hearing on the matter was held or evidence submitted, the District Judge announced that he had decided

that the attorneys who had represented Baron did a good job and acted in good faith.

5. The District Judge stated that he did not ever find lawyers acted improperly and impose sanctions against them (except for one single time). By contrast, the District Judge told Baron, a non-lawyer, that if he failed to comply with his orders it was "**punishable by** possible jail, **death**."

ARGUMENT SUMMARY

The District Court appears to have been convinced that Jeff Baron owed money to former attorneys, and the Judge was clearly determined to do something about it. In trying to bring about 'equitable justice', the District Judge was led to take ad hoc action and use a sort of procedural 'sham'– an unauthorized, unconstitutional substantive remedy clothed in the guise of an ancillary procedural tool– i.e., a receivership.

To the view of the District Court, receivership can be used independently as a 'magic wand', allowing the Court to act as a sovereign and free from Constitutional constraints.[23] As viewed by the District Court, receivership authority endues the Court with power to seize a person's property in order to force payment of:

(1) the alleged debts of that person or another;

(2) the costs of investigation and prosecution of claims; and

(3) the costs of advocating in defense of the District Court's actions.

[23] To the District Court's view, receivership can be used as a means to 'waive' a person's constitutional rights. E.g., SR. v7 p357.

Moreover, to the District Court's view, receivership is an independent substantive remedy that allows a Judge to 'cut through' all the 'red tape' involved in the traditional system of American Justice such as pleading claims, the requirements of Congressionally granted subject matter jurisdiction, the right to representation by paid counsel, discovery, jury trials, the right to post a bond to suspend a judgment pending appeal, etc. As explained by the District Judge, "[Y]ou want to screw with me, have at it … I can take every penny you've got if I think you are doing stuff that's unlawful, illegal, fraudulent and whatever." R. 226.

Further, to the view of the District Court an appeal from the orders of a federal district court is ineffective as a practical matter. The District Judge explained as follows:

> "**Say you win and there is no receiver. It doesn't make any difference. This is going on and on and on until Mr. Baron has nothing. I mean actually everything is depleted. I gather that Mr. Baron is worth lots of money. But it may be that we sell all the domain names. We may sell all of his stock. We may cash in all of his CD's**"
>
> SR. v4 p1042.

The District Court erred. Receivership is not an independent remedy. Rather, receivership may be imposed only to enforce a judgment or to conserve property where a claim to a legally protected interest in that property has been pled. Further, a District Court cannot cause an appeal to not make any difference by depleting the receivership estate while the appeal is pending. Rather, as a matter of binding precedent, where the District Court lacks authority or jurisdiction to impose a receivership then the District Court also lacks the power to distribute receivership assets. Accordingly, this appeal presents dispositive issues that have been authoritatively decided, as follows:

(1) A federal district court lacks Subject Matter Jurisdiction to impose a receivership over private property that is not itself the subject of an active claim pled before the Court. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931).

[24] E.g., SR. v7 p357.

(2) A federal district court lacks authority to exert receivership power over private property for any purpose other than as a means of preserving the property so that it may ultimately be applied toward the satisfaction of substantive rights claimed in and to that property. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). As a matter of binding precedent, "[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". *Gordon v. Washington*, 295 U.S. 30, 37 (1935).

(3) As a matter of binding precedent, where a court lacks jurisdiction or authority to impose a receivership, it does not have discretion to use that property to pay the costs of the receivership. *E.g.*, *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908). Similarly, as a matter of binding precedent, where a district court lacks jurisdiction to impose a receivership, it is without power to make any disposition of the assets ordered into receivership. *E.g.*, *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923). Moreover, where there is no jurisdiction over the matter, the orders

of the District Court are "as much *coram non judice* as anything else… [and] consequently void." *E.g.*, *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896).

(4) The Fourth and Fifth Amendments of the U.S. Constitution prohibit a court both from (a) issuing an order to seize property without a sworn showing of probable cause, and (b) taking property without just compensation. *E.g.*, *Severance v. Patterson*, 566 F.3d 490, 511 (5th Cir. 2009).

ARGUMENT & AUTHORITY

ISSUE 1: DOES THE DISTRICT COURT LACK SUBJECT MATTER JURISDICTION OVER THE PROPERTY SEIZED FROM NOVO POINT LLC AND QUANTEC LLC ?

Standard of Review

Issues of authority, jurisdiction, and constitutionality are based on questions of law and are subject to independent review, *de novo.* See e.g., *Castillo v. Cameron County, Texas*, 238 F.3d 339, 347 (5th Cir. 2001).

Argument

The federal district court is a passive vessel that is empowered only to resolve qualifying disputes that are pled before it.[25] The federal court is not an executive of the sovereign empowered to proactively seek out controversies, exert its power over them, and resolve them.[26] Thus, the district court must wait for qualifying claims to be pled before it in order to endue the court with jurisdiction.[27] Accordingly, this

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[25] *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); 28 U.S.C. §§ 1330-1339.

[26] *E.g.*, *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010) ("Unless a dispute falls within the confines of the jurisdiction conferred by Congress, such courts do not have authority to issue orders").

[27] *E.g.*, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 fn 3 (1964); *Locke v. Board Of Public Instruction of Palm Beach Cty.*, 499 F.2d 359, 366 (5th Cir. 1974) (when a court

Honorable Court has established the precedent that **a district court lacks jurisdiction to impose a receivership over property that is not itself the subject of an active claim pled before the district court.** *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (property for which no claim of interest in, or right to has been pled). This lack of subject matter jurisdiction cannot be waived nor overcome by an agreement of the parties.[28] Further, this lack of subject matter jurisdiction is entitled to a presumption by this Honorable Court, and it is the burden of the proponent of jurisdiction to establish how the District Court has subject matter jurisdiction.[29] Because there is a failure of jurisdiction, fees may not be awarded from the receivership estates' property and the District Court is without power to make any disposition of the assets ordered into receivership.[30]

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cannot render a decree responsible to the complaint there is "no longer a subject matter").

[28] *E.g., Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

[29] *E.g., Lehigh Mining & Mfg. Co. v. Kelly,* 160 U.S. 327, 337 (1895); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

[30] *E.g.*, *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923).

The Standing Corollary: No Legally Protected Interest Claimed in the Seized Property

The component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry "requires careful judicial examination of a complaint's allegations". *Allen v. Wright*, 468 U.S. 737, 752 (1984). Critically, the pleadings in the case at bar contain no allegations of any legal or equitable interest in the property seized in receivership. Therefore, there is no standing in the case at bar to support subject matter jurisdiction to impose a receivership. *See e.g., Williams Holding Co. v. Pennell*, 86 F.2d 230, 230 (5th Cir. 1936) ("[A] simple contract creditor, has no standing to apply for a receiver.").

The Supreme Court has held that in order to have standing, a party "must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized". *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992). However, **in the case at bar, no legally protected interest was claimed in the property seized by the receivership.** Without such a claim, there is

no right in or to the property. *See Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 330 (1999). Accordingly, because there is no pleading claiming any legally protected interest in the property seized, there is no subject matter jurisdiction to support a receivership over that property. *See E.g.*, *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931). The receivership order is therefore "absolutely void". *Id.*

Conclusion

As discussed above, the established precedent of this Honorable Court holds that where **property is <u>not subject to a claim pled</u>** before the court, the **court lacks jurisdiction to appoint a receiver** over that property and any **attempt to do so is <u>absolutely void</u>** for lack of subject matter jurisdiction. *Cochrane v. WF Potts Son & Co.*, 47 F.2d at 1029. As a matter of binding precedent, where a court lacks jurisdiction or authority to impose a receivership over property, it does not have discretion to use that property to pay the costs of the receivership. *E.g.*, *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908); *and see Lion Bonding & Surety Co.*, 262 U.S. at 642 (where a

district court lacks jurisdiction, it is without power to make any disposition of the assets ordered into receivership). Therefore, the District Court below was without jurisdiction to enter the orders challenged on appeal both purporting to authorize the sale of the seized assets, and purporting to distribute receivership assets to pay 'fees'. The challenged orders should accordingly be reversed.

ISSUE 2: DOES THE DISTRICT COURT LACK THE LEGAL AUTHORITY TO IMPOSE A RECEIVERSHIP OVER THE ASSETS OF NOVO POINT LLC AND QUANTEC LLC ?

Standard of Review

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

Argument

The District Court has discretion to exert authority over private property through a receivership only in order to conserve property that is subject to competing parties' claims pending before the Court, or in supplementary proceedings in aid of execution of a judgment.[31] The Supreme Court has explained this limitation on the court's power as follows: "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." *Gordon v. Washington*, 295 U.S. 30, 37 (1935). As a matter of binding precedent, the Supreme Court has held that the District Court lacks authority to exert receivership power over private property for any

[31] *E.g.*, *Pusey & Jones Co.*, 261 U.S. at 497; *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997).

other purpose. *Id.* Accordingly, a court may not appoint a receiver to act as an investigational and prosecutorial branch of the court.[32] Similarly, as a matter of established law, a court lacks the legal authority and discretion to use receivership to liquidate private property to pay the costs of a court ordered investigations and prosecutions. *See e.g.*, *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954).

As discussed in the preceding issue, as a matter of binding precedent where a court lacks jurisdiction or authority to impose a receivership over property, it does not have discretion to use that property to pay the costs of the receivership. *E.g.*, *Atlantic Trust Co.* 208 U.S. at 373; *and see Lion Bonding & Surety Co.*, 262 U.S. at 642. In the case at bar there was no asserted or pleaded claim of interest or right to the property of Novo Point LLC and Quantec LLC. Therefore, the District Court lacked both the authority and the jurisdiction to impose a receivership over the property. Accordingly, the District Court does not have discretion to take the property placed in receivership to pay the receivership's alleged costs. *Atlantic Trust Co.*, 208 U.S. at 373.

[32] See e.g., SR. v2 p264, lines 18-21.

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

This Honorable Court has held that a district court's decision to grant appoint a receiver is subject to "close scrutiny" on appeal. *Tucker*, 214 F.2d at 631. Equity receivership has been recognized as an "extraordinary" remedy to be "employed with the utmost caution". *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). Issues based on questions of law underlying a court's decision are subject to independent review, *de novo. In re Fredeman*, 843 F.2d at 824.

Receivership May Not be Used to Determine an Alter Ego Claim

As discussed below, as a matter of established precedent of this Honorable Court, receivership may not be used to determine (or bypass the determination of) an alter ego claim. Moreover, as a matter of long settled precedent, receivership "determines no substantive right; nor is it

a step in the determination of such a right." *E.g., Pusey,* 261 U.S. at 497 (1923).

Bollore SA v. Import Warehouse, Inc.

In *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006) the district court entered an order appointing a receiver over an alleged 'alter ego' entity, and ordering turnover of property. *Id.* at 321. This Honorable Court 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. This Honorable Court 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 this Honorable Court 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.

As in *Bollore*, no independent trial was held against Novo Point or Quantec to establish an alter ego claim. Similarly, no claim has been pled that Novo Point LLC or Quantec LLC are alter egos of Baron, or any other party. No claim has been pled against either Novo Point LLC or Quantec LLC.

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. Art. 45, Cook Islands Limited Liability Companies Act (2008).[33]

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 anyone but a party; a court of equity is as much so limited as a court of law …. its jurisdiction is limited to those who therefore can have their day in court". *Alemite Mfg. Corporation v. Staff*, 42 F.2d 832 (2nd Cir.1930).

Conclusion

For the reasons discussed above, the District Court's order authorizing liquidation of the assets of the LLC entities for the payment of the fees incurred in administering a receivership against Baron should be reversed.

[33] The same result would be reached in applying Texas corporate law. As explained by this Honorable Court, "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." *Bollore SA,* 448 F.3d at 325. Since Baron owns no stock in either Novo Point, LLC, nor Quantec, LLC, alter-ego liability would not apply.

ISSUE 4: DO THE FOURTH AND FIFTH AMENDMENTS OF THE U.S. CONSTITUTION PROHIBIT THE DISTRICT COURT FROM LIQUIDATING AND DISTRIBUTING THE PROPERTY OF NOVO POINT LLC AND QUANTEC LLC ?

Standard of Review

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

Argument

The Fourth and Fifth Amendments prohibit a court from seizing property without a sworn showing of probable cause, or from taking property without just compensation. *E.g.*, *Severance v. Patterson*, 566 F.3d 490, 511 (5th Cir. 2009). The prohibition of taking property without just compensation applies to the courts. *Id.* In the case at bar, no sworn showing of probable cause was made with respect to the assets seized by the District Court. Further, property may not be taken by the court without just compensation being paid to the property's owner. U.S. CONST. amend. V.

In a normal receivership case, a receiver's allowances would be allowed only to the extent the fees benefited the receivership res. *E.g.,*

Bank of Commerce & Trust Co. v. Hood, 65 F.2d 281, 283-284 (5th Cir. 1933). Thus, the owner of the property would automatically be receiving just compensation, i.e., the benefit for which the fees were charged. However, in the case at bar the fees are being sought for work assisting the 'receiver' in acting as a private prosecutor and investigator. SR. v13 p365, *et. seq*. Accordingly, with respect to those fees there is no equivalent benefit provided to the receivership estate against which the fees are sought to be charged. *See e.g.*, *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534 (3rd Cir. 1970); *Speakman v. Bryan*, 61 F.2d 430, 431, 432 (5th Cir. 1932). Accordingly, seizure and liquidation of the receivership res to be used to pay such fees directly violates the Fifth Amendment and should be reversed.

Procedural 'Sham': An Unauthorized, Unconstitutional Substantive "Remedy" Dressed up in the Clothes of an Ancillary Procedural Tool

The receivership imposed upon Novo Point LLC and Quantec LLC can be viewed as a procedural sham designed to redistribute assets in direct violation of the U.S. Constitution. This Honorable Court has recognized that receiverships should be "watched with jealous eyes lest

their function be perverted." *Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954). As this Honorable Court has held:

> "A receivership is only a means to reach some legitimate end sought through the exercise of the power of the court of equity; it 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. For that purpose the court may appoint a receiver of mortgaged property to protect and conserve it pending foreclosure, or of property which a judgment creditor seeks to have applied to the satisfaction of his judgment. 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."
> *Id.*

The property of Novo Point LLC and Quantec LLC was not seized to conserve it pending resolution of any claim made for a final decree involving disposition of the LLCs' property. Novo Point LLC and Quantec LLC are not parties to the lawsuit in the District Court and no claim was ever pled against them. Moreover, all parties to the lawsuit have fully and finally settled all of the claims that were pled. Instead, the only purpose of the receivership is simply to take the property of

Novo Point LLC and Quantec LLC, and redistribute it at the discretion of the District Court.

By contrast, legitimate receivership is an ancillary proceeding "to preserve property pending final determination of its distribution in supplementary proceedings in aid of execution." E.g., *Santibanez*, 105 F.3d at 241. As a matter of binding precedent, "[A] federal court of equity should not appoint a receiver where the appointment is not a remedy auxiliary to some primary relief". *Kelleam v. Maryland Casualty Co. of Baltimore*, 312 U.S. 377, 381 (1941). The receivership in the case at bar, however, is not auxiliary to any form of primary relief. There is no claim pending before the District Court for which the receivership preserves the disputed property pending resolution of that claim. Instead, there is only the receivership.

The private property of Novo Point LLC and Quantec LLC has not been seized so that the property can be conserved while competing claims pled in and to that property can be adjudicated. Rather, the property was seized so that the District Judge could exercise control over the property and could distribute the property as he found

'equitable'. SR. v7 p354. In that context, the District Court's orders to liquidate and distribute the private property of Novo Point LLC and Quantec LLC directly violate the Fifth Amendment and should be reversed.

ISSUE 5: DID THE DISTRICT COURT VIOLATE THE DUE PROCESS RIGHTS OF JEFFREY BARON IN DENYING HIM THE RIGHT TO PAID COUNSEL ?

Standard of Review

Questions of law are reviewed *de novo*. *In Re Fredeman*, 843 F.2d at 824.

Argument

As a fundamental cornerstone of Due Process, the Constitution guarantees every citizen the right to a meaningful opportunity to be heard in a meaningful manner. *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). As a matter of established precedent, this means the right to be represented by paid legal counsel. *E.g.*, *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 942, 946 (5th Cir. 1981); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). **In the District Court proceedings, Jeffrey Baron was denied this fundamental right.** The District Court seized all of Baron's assets and denied Baron's motions to access his own money to hire counsel, and moreover ordered that the undersigned appellate

counsel could not be paid during the pendency of the receivership. E.g., R. 2720, 4580-4581; SR. v2 p384-390 (Doc 264); SR. v4 p119 (Doc 316). Accordingly, the proceedings against Baron and his legal and beneficial interests while denying Baron his Constitutional right to work, earn money, and employ counsel to represent him is directly violative of the Constitution and should be reversed.

Notably, Baron repeatedly moved to be allowed access to his own money in order to hire attorneys to represent him. E.g., R. 2720; SR. v2 p384-390; SR. v5 p139. However, the District Court did not allow Baron to hire counsel. E.g., SR. v4 p119. The District Court went so far as to order that Baron's appellate counsel could not be paid during the pendency of the receivership and sealed Baron's motion to hire counsel so that it would not be viewed by the public. R. 4580-4581; SR. v7 p379.

This Honorable Court has held that a civil litigant has a constitutional right to retain hired counsel. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). Moreover, this Honorable Court has held that "the right to counsel is one of constitutional dimensions and should thus be freely exercised without

impingement." Id. at 1118; *Mosley*, 634 F.2d at 946. Further, the Supreme Court has held that a party must be afforded a fair opportunity to secure counsel "of his own choice" and that applies "in any case, civil or criminal" as a due process right "in the constitutional sense". *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932). That basic right was denied Baron by the District Court below and the orders of the District Court granted while Baron was denied his right to hire and be represented by paid legal counsel should be reversed.

ISSUE 6: DO SECRET PROCEEDINGS VIOLATE FEDERAL LAW AND THE U.S. CONSTITUTION ?

Standard of Review

Questions of law are reviewed *de novo*. *In Re Fredeman*, 843 F.2d at 824

Argument

The Supreme Court has described secret judicial proceedings as "a menace to liberty". *Gannett Co. v. DePasquale*, 443 U.S. 368, 412 (1979). The most basic principle of Due Process is notice and the opportunity to be heard. *E.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *and see Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Phillips v. Vandygriff*, 711 F.2d 1217, 1227 (5th Cir. 1983); *Registration Control Systems v. Compusystems, Inc.*, 922 F.2d 805, 807 (Federal Cir. 1990). However, the motions to liquidate the assets of Novo Point LLC and Quantec LLC were filed *ex parte* and under seal.

28 U.S.C. § 2004 Requires Personalty Sold Under Order of the Federal Court to be Sold at Public Auction

Absent "extraordinary circumstances" the liquidation of assets by a federal receiver requires open, public auctions. 28 U.S.C. § 2004;

Tanzer v. Huffines, 412 F.2d 221, 222 (3rd Cir. 1969). In the case at bar, there is no exigent or extraordinary circumstance present, nor has the District Court made any finding of any such circumstance. Accordingly, because the District Court's order bypassed the most basic statutory procedural protections to ensure that assets are liquidated at reasonable prices, the District Court abused its discretion and the liquidation orders should be reversed.

The *ex parte,* secret nature of the motions to liquidate prevented the ability of the Court to hear evidence as to the value of the assets involved and consider the reasonableness of private sales. Due Process requires more. As discussed above, Due Process requires, as a constitutionally mandated requirement, that the Appellants be provided notice of the motion in a way that allows a full response. *E.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("[F]undamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"). The opportunity to be heard in opposition to a motion to sell assets requires that the Appellants be allowed the opportunity to argue, for example, the value

of the asset to be sold, that the method of sale[34] is patently unreasonable because the sales price is unreasonably low in relation to the asset's value, that the purchasers are insiders, etc. However, none of those arguments can be made without notice disclosing the identity of the assets sought to be sold, the proposed sales price, the alleged appraisal value of the assets, and or the identity of the purchasers[35]. Accordingly, the *ex parte* motions below to liquidate secret receivership assets bypassed the Constitutional requirement of Due Process by failing to allow the meaningful opportunity to be heard in opposition, and the order granting the motions should accordingly be reversed.

The Outcome of the Secret Sale Proceedings is Manifestly Unjust

It appears that the District Court may have ordered the liquidation of $60,000,000.00 in assets (possibly to friends and colleagues of the receiver), for less than 1/60th of the assets' value. Fifty

[34] The sales method used by Vogel has been vaguely described as "unsolicited purchase inquires ... [resulting in] negotiated sales prices .. substantially lower than their appraised values". See sealed Doc. Nos. 424/425, affidavit of Nelson, page 6.

[35] In order to object to insider transactions, etc.

domain name assets were ordered liquidated.[36] A market value of one million Dollars *per domain,* has been admitted of record, to wit: "These names have both high revenue potential and can be sold individually - sometimes for in excess of $1 million a piece." R. 2687 (lines 10-11). Moreover, it is uncontroverted before this Honorable Court that just three example domain names believed by Appellants to be included in the sale order ("Slice.com", "Rewards.com", and "iCandy.com") are themselves worth between $6,500,000.00 to $13,000,000.00.[37] It is unknown to Appellants what other names were ordered liquidated, but 50 such domains were ordered liquidated by the District Court.[38] Further, it appears that bona fide purchasers contacted the receiver, Vogel, to bid on the domain names and were told that Vogel had already personally selected a buyer and higher bids would not be accepted.[39] In such a circumstance, both the sales method, and the result is manifestly unjust.

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[36] 24 domain names under Sealed Doc. No. 424/425, plus 26 domain names under Sealed Doc. No. 480.

[37] See page 2 of Document 511754199 filed on 2/10/2012 in case 12-10003.

[38] 2 Sealed Doc. Nos. 424/425, 480.

[39] *Id.* at page 5.

ISSUE 7: DID THE DISTRICT COURT ABUSE ITS DISCRETION IN AWARDING PROFESSIONAL FEES: (1) WITHOUT AN EVIDENTIARY HEARING ON CONTESTED FACT ISSUES OR FINDINGS AS TO THE REASONABLENESS OR NECESSITY OF THE FEES; (2) WITHOUT REGARD TO WHICH OF MULTIPLE RECEIVERSHIP ESTATES THE FEES WERE ALLEGEDLY INCURRED ON BEHALF OF; AND (3) WHERE THE RECEIVER REQUESTING PAYMENT OF THE FEES WAS PROHIBITED BY LAW FROM BEING APPOINTED AS RECEIVER ?

Standard of Review

Issues based on questions of law are subject to independent review, *de novo*. *In Re Fredeman*, 843 F.2d at 824. The discretionary aspects of receivership fee allowances are reviewed for abuse of discretion. *Commodity Credit Corporation v. Bell*, 107 F.2d 1001 (5th Cir. 1939).

The District Court Lacks Discretion to Award Receivership Fees Without Clearly Distinguishing Between Different Receivership Funds

The established precedent of this Honorable Court requires that an award of fees involving multiple receivership funds be distinguished clearly between the different receivership funds held by the receiver. *E.g., Bank of Commerce & Trust Co.*, 65 F.2d at 283. In the District Court proceedings below, multiple estates were placed into Vogel's

hands as receiver. However, the fee awards granted by the District Court failed to segregate fees by receivership estate. Therefore the District Court lacked discretion to charge the fees against the receivership estate of Novo Point LLC and Quantec LLC. *Id.*

Established Limitations on Receivership Fees

In an abundance of caution the following discussion is included relating to a district court's discretion in setting fee awards. Because, as discussed in preceding issues, the District Court lacked both subject matter jurisdiction and authority to impose a receivership, the District Court was without power to exercise the discretion to award fees. The following argument addresses why, if the District Court would have had jurisdiction and authority to exercise discretion to award fees, it abused that discretion. While a District Court enjoys great discretion in determining the compensation of a receiver, that discretion has clear bounds. As a preliminary matter, when a receiver looks for compensation to the receivership estate, which may belong, in equity, largely to others than those who have requested the receiver's services, the receiver should have in mind the fact that the total aggregate of fees

must bear some reasonable relation to the estate's value. *Cf. In re Imperial "400" National, Inc.*, 432 F.2d 232, 237 (3rd Cir. 1970); *Finn v. Childs Co.*, 181 F.2d 431, 436 (2nd Cir. 1950). Critically, as a matter of established precedent, compensation paid to a receiver from a receivership estate must be for services provided to that estate. *E.g.*, *Bank of Commerce & Trust Co.*, 65 F.2d at 283-284. Further, where the same receiver is appointed over multiple receivership estates, the charge to each estate must be based on the work performed by the receiver for that particular estate. *Id.*; *and see e.g., Butterwick v. Fitzpatrick*, 2008 Cal. App. LEXIS 1293 (4th Appellate Dist., 1st Div., February 15, 2008). The District Court considered none of the above discussed mandated factors, and therefore abused its discretion in granting the receivership fees.

No Evidence or Finding of Necessity or Reasonableness, and No Segregation of Fees across Multiple Receivership Estates

Two of the orders challenged in this appeal awarded fees to the receiver, his law partners, and 'professionals' employed by the

receiver.[40] With respect to the basis referenced for awarding such fees, there was no argument or evidence offered that the fees were reasonable or necessary. The fees moreover were billed for work on multiple receivership estates, for work involving multiple receivership parties and multiple receivership *res*; however, the fees were not segregated in any way and were charged apparently arbitrarily against any particular receivership party or estate.[41] The District Court entered no findings of fact or law in support of its granting the motions for payment of the fees. However, the established precedent of this Honorable Court requires that orders awarding professional fees be supported by findings explaining the basis of the award. *E.g.*, *Longden v. Sunderman*, 979 F. 2d 1095, 1100 (5th Cir.1992) ("the district court must explain how each of the Johnson factors affects its award"); *Matter of US Golf Corp.*, 639 F.2d 1197, 1202 (5th Cir. 1981)("[T]he judge must explain the basis of his award. In particular, he must briefly describe his findings of fact and explain how an analysis of the appropriate factors has led to his decision"); *Matter of First Colonial Corp. of*

[40] Doc. Nos. 734, 807.

[41] E.g., SR. v13 p365, *et. seq.*, SR. v10 p1454, *et. seq.*, SR. v9 p427, *et. seq.*, SR. v8 p779, *et. seq.*, SR. v8 p934, *et. seq.*, etc.

America, 544 F.2d 1291, 1298 (5th Cir. 1977)(findings are mandatory "In order to establish an objective basis for determining the amount of compensation that is reasonable for an attorney's services, and to make meaningful review of that determination possible on appeal"). Accordingly, the District Court abused its discretion in granting the fee awards without making the required findings as to the reasonableness of the fees upon which the trial court's discretion can be reviewed on appeal.

No Hearing as to Contested Matters or Findings as to Multiple Uncontested Defenses to the Fee Requests

The District Court erred in failing to hold an evidentiary hearing and to enter findings as to the disputed factual issues. As a matter of established precedent this Honorable Court has held that "[T]he judge must determine the nature and extent of services supplied … and the judge must hold an evidentiary hearing if there are any disputed factual issues." *Matter of US Golf Corp.,* 639 F.2d 1197 at 1202. As held by the Supreme Court, "[T]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services

rendered." *Perkins v. Standard Oil Co. of Cal.*, 399 U.S. 222 (1970). Accordingly, the District Court erred in failing to hear and address the multiple uncontested defenses raised to the fee motions,[42] including for example the following matters:

1. Vogel's Unclean Hands

Where a District Court has subject matter jurisdiction and authority to impose a receivership the right to expenses chargeable is an equitable right limited to expenses incurred to the extent they have inured to the benefit of the receivership estate that is sought to be charged. *E.g. Speakman,* 61 F.2d 430 at 431, 432.[43] Because the right is one of equity, were otherwise applicable, the right to payment for expenses is barred by the equitable maxim that "he who comes into equity must come with clean hands". The doctrine of unclean hands requires that the Court refuse "any relief whatsoever [and] not to

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[42] E.g., Document 00511734073 filed on 1/23/2012 in case 10-11202; Document 511712615 filed on 1/03/2012 in case 10-11202; Document 00511647389 filed on 10/27/2011 in case 10-11202; Document 00511779644 filed on 3/06/2012 in case 10-11202; Document 511650815 filed on 10/31/2011 in case 10-11202; and Document 511600278 filed on 9/12/2011 in case 10-11202.

[43] Notably, the fees awarded to Vogel for himself, his partners, and his "professionals" are not for expenses that benefited the receivership estates of either Novo Point LLC or Quantec LLC. E.g., SR. v13 p365, *et. seq*.

compromise with it .. by allowing a part of what was claimed" *E.g., Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 451 (1935). It is uncontested that Vogel comes with unclean hands, as follows: While holding the quasi-judicial office of special master in the case, Vogel led the District Court to wrongfully believe that Jeff Baron had caused a mediation, for which Vogel was the mediator, to fail. SR v2 p343. In truth, Vogel had not even scheduled the mediation yet. SR. v10 p4096. The matter was fundamental and material. The District Judge, wrongfully or rightfully, was concerned that Jeff Baron had allegedly not paid a series of attorneys. SR v2 p343. The District Judge ordered mediation to resolve the perceived problem that the District Judge found disturbing. *Id.* Since he had ordered mediation to resolve the issue, the District Judge would not have taken the much more drastic step of receivership, without waiting to see what result was produced by the mediation. Accordingly, in order to have himself appointed receiver, Vogel needed the mediation torpedoed. So, as mediator, he failed to schedule the mediation, and led the District Judge to falsely believe that the mediation had failed because of Jeff Baron's misconduct. Thus,

because of his unclean hands, as a matter of equity Vogel and his partners are barred from receiving the allowance of any equitable relief. *E.g., Manufacturers' Finance Co.*, 294 U.S. at 451.

2. Other Issues

Other issues raised in opposition to the fee requests but not heard or addressed in the District Court's findings include the following matters:

(1) Vogel and his partners seek fees for work done in defending their own actions and fees. However, receivers' expenses and costs in defending themselves and their fees are not proper charges against the receivership estate. *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 535 (3rd Cir. 1970).

(2) Vogel was grossly neglectful of his most basic duties as fiduciary and, for example, since December 2010 when he was appointed receiver Vogel has failed to file any tax returns, tax reports, franchise reports, and has failed to pay any income taxes or franchise fees for any of the more than two dozen entities over which he is billing for being 'receiver'. While Vogel has collected for himself

and his partners approximately Two Million Dollars in 'fees', no funds have been set aside to pay what is now two years of past due taxes. Vogel has wholly failed to report and pay both income taxes and payroll and withholding taxes, (for any of the multiple receivership entities), including for taxes and reports due in the United States, Canada, and the Cook Islands.

(3) The District Court has awarded substantial fees for Damon Nelson as a receivership "professional" but Nelson is not an attorney and has no professional experience in the domain name industry. Rather, Nelson's experience is as a con-man, as discussed below. Prior to working with Vogel (and Sherman), Nelson[44] ran the Hilton Head Properties scam in Dallas. The District Court did not allow a hearing on the issue, but a good summary of the Hilton Head scam was aired by CBS news.[45] While judges are familiar with legal fees

[44] It is uncontested that Nelson has also intermittently passed himself off as a multi-millionaire CEO of a venture capital fund. See Document 511695587 filed on 12/14/2011 in case 10-11202 at page 12.

[45] The CBS report is on-line at ***http://tinyurl.com/CBS-HiltonHead*** See Document 511754198 filed on 2/10/2012 at page 13. While 'Chase Fonteno' was Hilton Head's public face, the operations of the Dallas office of Hilton Head were actually run by Damon Nelson. SR. v4 p921. The now infamous scam involved quitclaimed property of the recently deceased. Through a series of subsidiary companies set up by Nelson through Hilton Head's employees, Hilton Head would

and therefore expert testimony is not required to support awarding fees to attorneys, Nelson is not an attorney. *See Matter of US Golf Corp.*, 639 F.2d 1197 at 1202. Accordingly, expert testimony is required to establish the reasonableness of his alleged fees.

(4) Cox contracted in writing to work for Novo Point at the rate of $4,750.00 per month.[46] The fees awarded by the District Court are at a 'bonus' rate of up to five times the rate contracted for by Cox. However, a receivership is not intended to be a generous reward for court-appointed officers. *SEC v. W.L. Moody & Co.*, 374 F.Supp. 465, 483 (S.D. Tex. 1974), aff'd, 519 F.2d 1087 (5th Cir. 1975).

(5) Similarly, Eckels is under contract to work at $60.00/hour, half the rate awarded Eckels by the District Court.[47] Payment at twice an attorneys' agreed upon and contracted for rate, is both patently unreasonable and presumed so as a matter of law. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964).

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fraudulently quitclaim decedent's abandoned property to a subsidiary company and then sell the property on a note, transferring the note back to Hilton Head or another subsidiary. The unsuspecting buyer would move in and make repairs, to be confronted at some point by the heirs of the legitimate, deceased property owner.

[46] See pages 6-9 of Document 511650815 filed on 10/31/2011 in case 10-11202.

[47] See Document 511779644 filed on 3/06/2012 in case 10-11202.

(6) A receiver is entitled to seek legal counsel, but that is different from delegating receiver's duties to high priced attorneys (who share a portion of their fee with the receiver). *E.g.*, S*tuart v. Boulware*, 133 U.S. 78, 81 (1890); *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3rd Cir. 1983)(duty to prevent "wasteful use of highly skilled and highly priced talent for matters easily delegable to nonprofessionals or less experienced associates …. A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn."). Moreover, as a matter of established Texas law, legal fees can be charged only for legal services. *Lee v. Daniels & Daniels,* 264 S.W.3d 273 (Tex.App.–San Antonio 2008, pet. denied).

Vogel Was Prohibited by Law from Being Appointed Receiver

Background

On July 9, 2009, the District Court employed Peter Vogel as a special master in this case. R. 394. While still in his role as special master in this case, Vogel consulted *ex parte* with Sherman (who then controlled the defendant Ondova) with respect to the motion to appoint himself (Vogel) as a private receiver over Mr. Baron's assets. SR. v5

p238. Vogel was also a special master in this case when he moved to add Novo Point, LLC., and Quantec, LLC., under his own receivership. R. 1717. A special master employed by the Court is an officer of the court. *E.g.*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Further, courts which have considered the issue have held that a special master is a judge sitting in the case in which he is employed. *E.g.*, *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998); *Vereen v. Everett, Dist. Court*, (ND Georgia 2009, No. 1:08-CV-1969-RWS).

28 U.S.C. §958 Prohibited Vogel's Appointment as Receiver

Congress mandated in 28 U.S.C. §958 that any person (1) holding any civil office or (2) employed by any judge of the United States, shall not be appointed a receiver in any case. Accordingly, pursuant to Federal law, Peter Vogel could not be appointed a receiver because he was employed by the District Judge as a special master at the time he was appointed receiver. A clear public policy purpose of the statute is to prevent conflicts of interest. The possibility that a special master in a case would privately consult behind closed doors to have himself appointed as a private receiver over a party in the lawsuit where he

presently sat in a judicial role, violates the most fundamental notions of an impartial judiciary. If the motive of personal profit is allowed to enter the side of the bench behind which judges and special masters sit, the very foundation of an independent, impartial judiciary is threatened. For these reasons, regardless of the character and intentions of those involved, the fees awarded to Peter Vogel and his law firm should be reversed. [48]

[48] Vogel's conflicts of interest are not theoretical. For example, after his appointment as receiver Vogel, as receiver, moved (without any explanation as to why payment should come from receivership funds), to pay himself out of the receivership funds for his work as special master. SR. v4 p 541. Notably, Vogel was employed as special master in the case below, even though his law firm, Gardere, had represented a plaintiff against the same defendants in the instant case in multiple disputes including a dispute still in litigation and involving one of the very same assets ("servers.com") involved in the instant case. SR. v8 p424; SR. v11 p87-88; SR. v10 p4099.

ISSUE 8: DID THE DISTRICT COURT ERR IN ALLOWING THE COURT'S RECEIVER TO EMBARK UPON A FISHING EXPEDITION AND SEIZE THE BANK RECORDS OF APPELLATE COUNSEL ?

Standard of Review

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

Overview

The District Court overruled the objection and Motion to Quash Vogel's subpoena of Appellate Counsel's bank account records. SR. v12 p136. The District Court erroneously found that Counsel was a party to the District Court lawsuit, and that the Right to Financial Privacy Act therefore did not apply. SR. v12 p141. Additionally, the District Court erred in failing to address the substantive provisions of the Texas Finance Code, or the First Amendment issues involved.

Texas Law Creates a Qualified Substantive Privilege for Private Bank Records

The substantive aspects of the Texas Finance Code create a qualified substantive privilege that in Texas **banking records are privileged for all purposes other than disclosure to parties in**

proceedings before a tribunal for the exclusive purpose of "resolving disputes before the tribunal". Texas Finance Code § 59.006 (d)(1) and (2). While other parts of the law deal with procedural aspects, this part of the law provides for substantive rights and not procedural rules. Specifically, this part of the law establishes substantive rights of privilege limiting who may view the documents and for what limited purposes. While a federal court may use its own procedural steps regarding ***how*** documents are viewed, the federal court must respect the substantive rights provided for under Texas law as to ***who*** can view the material. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Similar qualified and limited privileges which do not arise out of a general right to privacy are well known in Texas law. *See e.g., Tex.R.Evid. 508(c).*[49]

Additionally, the cost allocation provisions of the Texas Finance code are clearly substantive. The State of Texas has the right to ensure

[49] The Texas Finance statute is limited in the scope of privilege created and expressly does not create a general right to privacy. Accordingly, litigants to a proceedings cannot claim privilege over bank records relevant to resolving the dispute before that proceeding. However, the Texas statute clearly creates a privilege in all other circumstances. Notably, the bank's customer whose records were sought by the receiver was the Appellate Counsel Schepps. Schepps is not a litigant in the lawsuit before the District Court below.

its consumers have low banking costs. Accordingly, Texas has the right to require those desiring access to bank records to pay for them, and not have the cost placed on the backs of the bank's customers. The requirement that the requester pay for the costs of production is more than a procedural rule, it is a substantive rule allocating the cost of banking operations. Accordingly, the substantive rights of privilege created by Texas law should be respected.

Protecting the First Amendment Right to Associate with Others

With respect to providing the details involved in financial transactions, a clear majority of courts have held that bank records relating to the transfer of funds in or out of a lawyer's trust account are not in and of themselves privileged communication. *E.g. SEC v. First Security Bank of Utah, N.A.*, 447 F.2d 166, 167 (l0th Cir. l97l), cert. denied, 92 S.Ct. 710 (1972); *Harris v. United States*, 413 F.2d 316, 319-20 (9th Cir. 1969); *O'Donnell v. Sullivan*, 364 F.2d 43, 44 (1st Cir.), cert. denied, 87 S.Ct. 501 (1966). The reasoning of those decisions is that "[t]he deposit and disbursement of money in a commercial checking account are not confidential communications." *First Security Bank*, 447

F.2d at 167 (citations omitted). Texas courts have addressed that particular issue similarly. *E.g., Neely v. Commission for Lawyer Discipline*, 302 SW 3d 331, 341 (Tex.App.-- Houston [14th Dist.] 2009) ("The attorney-client privilege shields 'confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.' TEX.R.EVID. 503(b)(1). The Trust Account Records do not contain any confidential attorney-client communications."). This issue does not appear to have been addressed by this Honorable Court, and consideration from a new perspective should be considered, as follows:

Fishing though someone's bank records is an expedition through their private and confidential affairs. The effect of allowing such invasion of a litigant's counsel's private bank records chills and thus infringes a litigant's rights of association and representation. The First Amendment, however, has been recognized to afford a privileged zone to allow for the private formation and preservation of certain kinds of highly personal relationships and to provide a substantial measure of sanctuary to these zones from unjustified interference by the State.

E.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). The chilling effect works in two directions. On one hand, allowing a nonlitigant's private and confidential financial relationship with an attorney to be disclosed in proceedings unrelated to that client may reasonably chill individual's exercise of their constitutional right to hire counsel for consultation. Such an infringement is unconstitutional. *See e.g., Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002)(an individual's relationship with his or her attorney "acts as a critical buffer between the individual and the power of the State."). The *Johnson* court held "The freedom of intimate association, which is applicable to plaintiffs' claims here, stems from the necessity of protecting individuals' ability to enter into and maintain certain intimate human relationships [that] must be secured against undue intrusion". *Id.* Allowing a peek into an attorney's bank account unduly intrudes into that relationship. Accordingly, that information should be protected as privileged. Just as other agents work for an attorney in handling confidential client information, a bank is no

different. Pursuant to state statute, a Texas bank must maintain the confidentiality of bank transactions. Accordingly, payments made in confidence to an attorney's trust account are made with an expectation of privacy and confidentiality. This Honorable Court should strongly consider protecting that privilege.

Secondly, if an attorney risks being 'audited' because he is willing to accept representation of any particular client, it is reasonably that the attorney may be less inclined to represent such clients. The attachment of such a risk to an attorney's representation of any individual, chills the willingness of attorneys to represent that client. Every individual should be protected by such intrusion by his or her constitutional right to freely associate with counsel.

The scope of privilege advocated for is not a blanket privilege. Rather, it is a privilege against fishing expeditions into an attorney's bank records arising out of his representation of any client. If the record of some specific transaction is sought, the balancing factors discussed above would likely not apply. That is not the case with the subpoena at issue.

The Right to Financial Privacy Act

The records sought by Vogel are privileged and protected from disclosure by the Right to Financial Privacy Act (12 U.S.C. §3401, et seq., hereinafter the "Act"), and jointly, Vogel has failed to comply with the mandatory provisions and requirements of the Act. As a matter of established law, Vogel (the District Court's receiver) is an "officer of the court that appoints him". *United States v. Pollard*, 115 F.2d 134, 135 (5th Cir. 1940); *Taylor v. Sternberg*, 293 U.S. 470, 472 (1935); *Great Western Mining & Mfg. Co. v. Harris*, 198 U.S. 561, 574 (1905). Accordingly, Vogel qualifies as a "Government authority" as defined by the Act. 12 U.S.C. §3401 (3). The Act provides that "Access to financial records by Government authorities [is] prohibited" except pursuant to the statutory exceptions set up by the Act. 12 U.S.C. §3402. Vogel's subpoena does not meet the requirements of a statutory exception. 12 U.S.C. §§3402, 3407. Disclosure of the records to Vogel is therefore prohibited by law. 12 U.S.C. §3402. [50]

[50] Additionally, the mandatory procedural prerequisites for disclosure (had the material qualified for an exception) were not met as: (1) a copy of the subpoena was not served upon the customer before the date on which the subpoena was served on

ISSUE 9: DOES THE U.S. DISTRICT COURT IN THE NORTHERN DISTRICT OF TEXAS HAVE JURISDICTIONAL AUTHORITY OVER ASSETS REGISTERED IN AUSTRALIA OWNED BY COMPANIES CHARTERED IN THE COOK ISLANDS AND EXEMPT FROM EXECUTION BY COOK ISLANDS LAW ?

Standard of Review

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

Argument

Novo Point, LLC and Quantec, LLC, exist as legal entities pursuant to laws of the sovereign government of the Cook Islands, a member of the British Commonwealth. R. 850, 2110. The two 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). SouthPac, however, is not a party to the lawsuit

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the financial institution; and (2) Vogel failed to provide the customer with the mandatory notice and disclosures required by the Act.

below and has not been served with any process in the proceedings below. Accordingly, the District Court did not acquire personal jurisdiction over SouthPac. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied"); *St. Clair v. Cox*, 106 U.S. 350, 353 (1882) ("The courts … must have acquired jurisdiction over the party … whether the party be a corporation or a natural person.").

While a US district court has jurisdiction to place into receivership the assets of a foreign company that are located within the district in which the Court sits, the Supreme Court has held that a district court does not have power to directly affect property located in foreign jurisdictions. *E.g., Booth v. Clark*, 58 U.S. 322, 333 (1855); *Guaranty Trust Co. of New York v. Fentress*, 61 F. 2d 329, 332 (7th Cir.1932). Similarly, the Supreme Court has held that the sovereign where the company is chartered has "jurisdiction of all questions relating to the internal management of the corporation." *Hartford Life Ins. Co. v. IBS*, 237 U.S. 662, 671 (1915).

Pursuant to the law of the Cook Islands, the sovereign pursuant to whose laws Novo Point, L.L.C., and Quantec, L.L.C. are chartered, the membership rights of the owners of the companies may not be executed upon by judicial process or otherwise controlled by any court other than the courts of the Cook Islands. Art. 45, Cook Islands Limited Liability Companies Act (2008). A treaty between the United States and the Cook Islands obligates the United States to recognize Cook Islands' sovereignty.[51] Accordingly, while the District Court below may have jurisdiction to seize the property of Novo Point, LLC and Quantec, LLC that is located within the Northern District of Texas, the District Court has no authority seize property located outside the borders of the United States, or to change or appoint the Cook Islands' manager of the companies, an act by virtue of Cook Islands' law that can be performed only by the courts of the Cook Islands and the owners of the LLCs. Art. 26, Cook Islands Limited Liability Companies Act (2008).

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

ISSUE 10: ONCE AN AFFIDAVIT IS FILED PURSUANT TO 28 U.S.C. §144, IS THE AUTHORITY OF THE JUDGE CIRCUMSCRIBED TO MAKING A DETERMINATION AS TO THE LEGAL SUFFICIENCY OF THE FACTS STATED IN THE AFFIDAVIT ?

Standard of Review

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

Argument

This Honorable Court has established the precedent that "Once the motion is filed under § 144, the judge must pass on the legal sufficiency of the affidavit, but 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). Further, this Honorable Court has established the precedent that, "**Once the affidavit is filed, further activity of the judge against whom it is filed is circumscribed except as allowed by the statute.**" *Parrish v. Board of Com'rs of Alabama State Bar*, 524 F.2d 98, 100 (5th Cir. 1975) .

Baron filed an affidavit pursuant to 28 U.S.C. §144.[52] Therefore, as this Honorable Court held in *Parrish*:

> "The threshold requirement under the §144 disqualification procedure is that a party file an affidavit demonstrating personal bias or prejudice on the part of the district judge against that party or in favor of an adverse party. Once the affidavit is filed, further activity of the judge against whom it is filed is circumscribed except as allowed by the statute."
>
> *Parrish*, 524 F.2d at 100.

The District Judge, however:

(1) Refused to accept the factual allegations in Baron's §144 affidavit as true; and accordingly,

(2) Refused to pass on the legal sufficiency of the facts alleged in Baron's §144 affidavit; but rather

(3) Struck and sealed the affidavit for making unsupported allegations; and

(4) Continued his activity in the case.[53]

[52] Sealed Doc No. 497.

[53] SR. v5 p1470; SR. v6 p122.

As discussed above, because the District Judge's authority to act was circumscribed by law pending a ruling on the legal sufficiency of the facts alleged in the §144 affidavit, the District Judge lacked authority to issue subsequent orders.[54] Accordingly, the orders challenged in this appeal were issued while the District Judge was not empowered by Congress with authority and jurisdiction to act, and the orders should therefore be reversed.

[54] 28 U.S.C. §144 ("[S]uch judge **shall proceed no further**"); *Parrish*, 524 F.2d at 100 ("[F]urther activity of the judge … is circumscribed except as allowed by the statute").

PRAYER

Appellants jointly and in the alternative request the following relief:

(1) That the challenged orders be reversed.

(2) That the challenged orders disposing of receivership estate assets and/or awarding fees or costs from estate assets be found to be void *ab initio*.

(3) That costs be taxed against the Appellees.

Respectfully submitted,

/s/ Gary N. Schepps

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because: this brief contains 11,639 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using MS Word 2000 in 14 and 15 point century font.

DATED: March 27, 2012.

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.

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