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

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

BRIEF FOR APPELLANT JEFFREY BARON IN REPLY TO SHERMAN BRIEFING ON APPEALS NOS. 11-10289, 11-10390, 11-10501

Cons. w/ No. 11-10289
NETSPHERE, INC., ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant- Appellant
v.
DANIEL J SHERMAN, Appellee

Cons. w/ No. 11-10290
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, ET AL, Defendants
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Non-Party Appellants
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10390
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
v.
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants
v.
ONDOVA LIMITED COMPANY, Defendant – Appellee
v.
PETER S. VOGEL, Appellee

Cons. w/ No. 11-10501
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants

CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant
v.
PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

Interlocutory Appeals of
Orders in Receivership on Appeal

From the United States District Court
Northern District of Texas, Dallas Division
Civil Action No. 3-09CV0988-F
Hon. Judge William R. Furgeson Presiding

Respectfully submitted,

/s/ Gary N. Schepps

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FOR JEFFREY BARON

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ABBREVIATIONS

"SBRE." refers to Sherman's combined Appellee's Brief filed in appeals 11-10289, 11-10390 and 11-10501.

"VBRE." refers to Vogel's combined Appellee's Brief filed in appeals 11-10290, 11-10390 and 11-10501.

ADOPTION BY REFERENCE

This brief adopts and incorporates by reference the reply brief filed in this appeal for Novo Point LLC and Quantec LLC, and the reply brief filed in response to Vogel's Appellee's brief. To the greatest extent possible, duplicative briefing has been avoided in light of the instant appeals' consolidation into appeal no. 10-11202.

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FEDERAL STATUTES

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Reply Issue 2: The Supreme Court in *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), held that federal courts lack the authority to act against assets that are not themselves subject to a claim before the court, except to enforce a final judgment.

Reply Issue 3: This Honorable Court has held that a federal court's inherent power derives from and is limited by the power exercised by "the common law equity tools of a Chancery Court". *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978).

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Reply Issue 6: *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988)

Reply Issue 7: An equitable remedy "procured by material misrepresentation may not be sustained." *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 818 (5th Cir. 1989)

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REPLY STATEMENT OF FACTS

I. Sherman's Argument that Baron advances "half truths and outright lies" is Not Supported by Sherman's Own Argument or the Record. (SBRE. 5-6).

Sherman points to a single record citation in a footnote of one of the four briefs which Sherman responds to. Sherman's argument correctly points out the weakness of the citation in that the citation cites to a factual summary and not to the direct record evidence. (SBRE. 5). However, Sherman's argument then concedes the very substantive averment for which the challenged citation was cited– Gardere's prior involvement with Baron and Ondova. Moreover, to the extent it attempts to minimize Gardere's prior involvement, the record does not support Sherman's argument. Contrary to the erroneous factual averments made by Sherman's argument, Gardere also represented Emke in the second Northern District "servers.com" lawsuit (3-05-cv-00285-L). SR. v11 p87-88. Moreover, contrary to Sherman's erroneous averments, Gardere was also involved in yet more lawsuits, and its involvement continued after 2006. For example, contrary to Sherman's

argument's averments, in 2007 Barry Golden[1] represented FabJob, Inc. in yet another case Gardere was involved with against Ondova (f/k/a Compana LLC). SR. v10 p4099. Notably, Sherman's argument concedes that well before Vogel was appointed special master in the case below, Baron had formally complained about Gardere's representation of Baron's adversaries– alleging a conflict of interest because Vogel acquired confidential information from Baron with respect Vogel's prospective representation of Ondova. The record does not support Sherman's argument that Baron lied when objecting to Gardere representing his adversaries in prior lawsuits. Similarly, the record does not support Sherman's arguments that Baron's briefing contains "half truths" or "lies".

Sherman's argument, moreover, has failed to offer any record citation to rebut any of the substantive factual averments of Appellants' briefings in the consolidated appeals.

[1] Golden is personally involved in this case as well, and filed Vogel's reply brief in this appeal.

II. A Number of Factual Allegations Made in Sherman's Briefing are Not Supported by the Record, as Follows:

1. That Novo Point LLC and Quantec LLC agreed to be placed into receivership. (SBRE. 2). Instead, the companies objected, and after the District Court ruled that they would be placed into the receivership, (and, after being instructed to do so by the District Court), agreed to the form of a written order conforming with the District Court's oral ruling. See the Reply Briefing of Novo Point LLC and Quantec LLC in appeal no. 11-10113 at pp18-19.

2. That Novo Point LLC and Quantec LLC were controlled by Baron. (SBRE. 2). No motion made this allegation, no finding of the District Court supports this allegation, and there is no evidence in the record to support the allegation.

3. That the District Court declared certain business entities were owned or controlled by Baron. Instead, the District Court's orders adding 28 entities into receivership (including Novo Point LLC and Quantec LLC) did not make any findings regarding Baron's ownership or control over the entities. R. 1717, 3934, 3952; SR. v2 p365. Similarly, the District Court did not order any party to turn

over assets and no party was ordered to turn over their stocks, etc. Rather the companies themselves were ordered into receivership.[2] Accordingly, a receivership was purportedly imposed upon the companies. (SBRE. 15).

4. That claims by many of those lawyers against the Ondova bankruptcy estate threatened its ability to pay other creditors and increased its administrative costs. (SBRE. 3). There is no evidence in the record to support this allegation.

5. That Baron hired a total of 19 different firms in matters related to the case below. (SBRE. 3). The record does not reflect which, if any, attorneys were hired by Baron, with respect to the multiple defendants in the multiple duplicative lawsuits filed against them– which notably, they prevailed in– in multiple jurisdictions.

6. That Peter Barrett represented Baron in the receivership proceedings and performed $50,000.00 in work. (SBRE. 37). Barrett expressly appeared only for appellate purposes and in the exclusive role that he was asked by Schepps to assist at Baron's FRAP 8(a)

[2] Without service of process, notice to the companies or shareholders, pleadings to support the relief, etc. R. 1717, 3934, 3952; SR. v2 p365.

hearing on two days. R. 4395-4397.

7. That the District Court appointed Martin Thomas to represent Baron and his interests in the pending Ondova bankruptcy. (SBRE. 37). Instead, Thomas was Baron's bankruptcy counsel, representing Baron in his role as a creditor in the Ondova Bankruptcy before the receivership was imposed. Then, when the receivership was imposed it was ordered that neither Jeff Baron nor Thomas had the authority to object or to consent to any action in the bankruptcy and Thomas was thereby completely neutralized in his role. SR. v11 p89. Moreover, Thomas did not get involved in the District Court, and left that "the purvue [sic] of Mr. Schepps". Id. Accordingly, not only did Thomas not represent Baron's interests in the Bankruptcy Court, but he refused even to comment on proposed orders. Id. Further:

(A) Thomas knew that Sherman had <u>falsely</u> misrepresented to the District Court that Baron had not paid Thomas' fees, filed an ethics complaint against him, and caused him to withdrawn as Baron's bankruptcy counsel; and

(B) Thomas admitted that he could have "rebutted much of the testimony" offered at the FRAP 8(a) hearing for relief pending appeal, SR. v10 p4097;

Yet, Thomas kept his silence, did not inform the District Court of the truth, and allowed to receivership to proceed against Baron.[3]

8. Sherman's representations regarding Novo Point and Quantec's being represented in the District Court by counsel are not supported by the record, and are substantially misleading.

[3] To Thomas' credit, he initially rejected Vogel's repeated requests for him to submit a declaration that he was owed money and present a 'claim' to be paid by Vogel. SR. v10 p4097-4098.

ARGUMENT & AUTHORITY

REPLY ISSUE 1: THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION CONCERNING THE PROPERTY SEIZED IN RECEIVERSHIP, AND AS A MATTER OF ESTABLISHED LAW, THE PROPERTY MUST BE RETURNED.

For a Federal Court to have Subject Matter Jurisdiction Over any Matter, There Must First be a Controversy Concerning that Matter Pled before the Court.

Federal courts are courts of limited jurisdiction, and that jurisdiction cannot to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). It is to be presumed that a matter lies outside a court's subject matter jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.*; *McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178, 182-183 (1936). As a matter of well established law, this Honorable Court has held that [T]he 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). As a fundamental and primary matter– the constitution requires that for a federal court to have subject matter jurisdiction over any matter there must first be a case or controversy concerning that matter pled before

the court. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 fn3 (1964) ("the exercise of judicial power depends upon the existence of a case or controversy.").

A claim or controversy is not created by a request to impose a receivership nor the appeal from that order as argued by Sherman. (SBRE. 31). Rather, the district court must have subject matter jurisdiction over a controversy concerning the property before a receivership may be imposed over that property. Thus, in order for a court to have subject matter jurisdiction pursuant to which a receivership (otherwise authorized) can be ordered, there must first be a controversy concerning that property properly pled before the court. This exact issue was squarely addressed by this Honorable Court in *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026 (5th Cir. 1931).

Cochrane v. WF Potts Son & Co.

In *Cochrane*, the plaintiff prayed "[T]hat the court appoint a receiver to take charge of the securities of, and act as successor trustee in, all the issues [of stock]". *Id.* at 1027. The *Cochrane*'s plaintiff's prayer was granted and– as requested by the plaintiff– the district

court placed the all the stock issues (series A-F) into receivership. *Id.* at 1028. However, outside of series E, no claim had been pled in the property. *Id*. at 1027. This Honorable court found that "[S]ince [the district court] had no jurisdiction over these [other] properties, its order appointing a receiver to take charge of them was void." *Id.* at 1028. In *Cochrane*, this Honorable Court announced four clear principles of law, as follows:

> (1) Nothing was alleged in the plaintiff's pleadings to set up any claim against securities series A-D, or series F, and therefore **"[T]he plaintiffs' pleadings [did not] put their subject-matter at issue"**.
>
> (2) **The district court therefore had no subject matter jurisdiction over the property**, and because "[I]t had no jurisdiction over these properties, its order appointing a receiver to take charge of them was void".
>
> (3) **"[S]eizing the securities did not, unless the subject-matter was by proper pleadings already before the court, aid its jurisdiction."**

> and (4) "Where judicial tribunals have no jurisdiction of the subject matters on which they assume to act, their proceedings are **absolutely void in the strictest sense of the term."**
>
> *Id*. at 1028-1029

The application of this Honorable Court's holding in *Cochrane* to the case at bar is clear. No claim or controversy was pled against Novo Point, LLC, Quantec, LLC, or their property. Similarly, no claim was pled against the property of Jeff Baron. Since the pleadings did not put the subject matter of Novo Point LLC's property, Quantec LLC's property, or Baron's property at issue, the district court "had no jurisdiction over these properties, and its order appointing a receiver to take charge of them was void." *See Cochrane* at 1028-1029.

As a matter of well established law, the Supreme Court has held that where a district court lacks subject matter jurisdiction over assets placed into receivership, the court is without power to make any charge upon, or disposition of, the property seized. *E.g., Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642(1923). As explained by the Supreme

Court, "**If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."** *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896).

REPLY ISSUE 2: THE SUPREME COURT IN *GRUPO MEXICANO DE DESARROLLO, SA V. ALLIANCE BOND FUND, INC.*, 527 U.S. 308 (1999), HELD THAT FEDERAL COURTS LACK THE AUTHORITY TO ACT AGAINST ASSETS THAT ARE NOT THEMSELVES SUBJECT TO A CLAIM BEFORE THE COURT, EXCEPT TO ENFORCE A FINAL JUDGMENT.

The Supreme Court's holding in *Grupo Mexicano* is explicit:

> "[A]n unsecured creditor has no rights at law or in equity in the property of his debtor. ... [T]o discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants. The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law — rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim. The requirement that the creditor obtain a prior judgment is a fundamental protection in debtor-creditor law — rendered all the more important in our federal system by the debtor's right to a jury trial on the legal claim."

Id. at 330.

Further the Supreme Court explained why this is so:

> "[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law like the one advocated here."

Id. at 332.

Vogel's argument concedes that "One of the goals in issuing the Receivership Order and creating the Receivership was for the Receiver to collect evidence regarding the claims of numerous lawyers who Baron engaged, accepted services from, but failed to pay, leading to multiple claims against Baron and his related entities for unpaid services (the 'Former Attorney Claims'). With the district court's guidance, instructions, and orders, the Receiver was to disburse assets to resolve the Former Attorney Claims." (VBRE. 4.) Similarly, Sherman, has admitted that the alleged "need to create" the Receivership was "Baron's [alleged] failure to pay his attorneys". SR. v5 p238.

However, such an alternative system of justice is precisely what the Supreme Court forbid in *Grupo Mexicano.* Moreover, the Supreme Court explained why the action taken by the District Court below is outlawed, as follows:

> "It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni judicis*, and it may be, *ex aequo et bono,* according to his own notions and

conscience; but still acting with a despotic and sovereign authority"
Id. at 332.

REPLY ISSUE 3: THIS HONORABLE COURT HAS HELD THAT A FEDERAL COURT'S INHERENT POWER DERIVES FROM AND IS LIMITED BY THE POWER EXERCISED BY "THE COMMON LAW EQUITY TOOLS OF A CHANCERY COURT". *ITT COMMUNITY DEVELOPMENT CORP. V. BARTON*, 569 F.2D 1351, 1359 (5TH CIR. 1978).

The Chancery Court's Exercise of Power was Strictly Limited with Respect to Imposition of Receiverships

The Chancery Court's exercise of power was strictly limited with respect to imposition of receiverships, and accordingly, the Supreme Court has strictly limited the authority of the federal courts to impose receiverships. *Gordon v. Washington*, 295 U.S. 30, 37-38 (1935). The Supreme Court held in *Gordon* that "[T]here is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition", and that a federal court may not "appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give." *Id.* Thus, a district court lacks authority to use receivership as a remedy where no claim was pled for disposition of the property seized, and further a district court lacks authority to use receivership to provide a primary and independent remedy.

Other Circuit's Governmental Receivership Cases do Not Apply

Sherman's argument erroneously offers other circuit's governmental receivership cases[4] as authority that a federal court's power has no limit but 'reasonableness'. (SBRE. 21). Those cases apply only against co-branches of government and the legal reasoning of expansive judicial power has never been approved by this Honorable Court or the Supreme Court. Sherman's argument of expansive judicial power restrained only by 'reasonableness' is not supported by the established holdings of this Honorable Court or the Supreme Court.

[4] Finding a source of federal judicial power, 'constitutional power', that is limited only by reasonableness– but which can be directed only against other branches of government. *E.g., Morgan v. McDonough*, 540 F.2d 527, 535 (1st Cir. 1976).

REPLY ISSUE 4: THE SUPREME COURT HAS HELD THAT AN ORDER ISSUED IN VIOLATION OF DUE PROCESS OF LAW IS VOID IN THE RENDERING. *WORLD-WIDE VOLKSWAGEN CORP. V. WOODSON*, 444 US 286, 291 (1980). THE SUPREME COURT HAS FURTHER HELD THAT SUCH AN ORDER, VOID WHEN RENDERED, "WILL ALWAYS REMAIN VOID", AND CANNOT BECOME VALID BY SUBSEQUENT DEVELOPMENTS. *PENNOYER V. NEFF*, 95 US 714, 728 (1878).

Due Process was Clearly Violated in the Proceedings Below

Due process is clearly violated by secret[5] off-the-record[6], *ex parte* proceedings to order all of an individual's property seized in his absence:

(1) Without any application showing exigent circumstances;

(2) Without any verified allegations;

(3) Without the Court setting an immediate hearing; and

(4) Without any bond required to protect the defendant should the seizure be wrongful.

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[5] The proceedings in the District Court below held on 11/24/2010 were secret. Neither the District Court nor any of the participants have acknowledged their occurrence. The proceedings were revealed from information provided by third parties and examination of the creation time of key documents. See SR. v11 p82-83, demonstrating that the District Court's order granting receivership was signed an hour *before* the motion to appoint a receiver was filed. Sherman's motion notably certifies that it was emailed and uploaded to PACER, and therefore was either not presented prior to being uploaded, or was presented with a false certification. R. 1716.

[6] R. 3924.

See e.g., Connecticut v. Doehr, 501 U.S. 1, 4 (1991). The receivership order should therefore be declared void for failure of due process, and if the order is void, no subsequent proceedings held in the District Court could make the order valid. *Pennoyer* at 728.

The District Court's Decision Must be Reviewed on Appeal based on the Evidence Relied on by the District Court in Making its Decision

Similarly, this Honorable Court has held that as a basic practice of fairness in Anglo-Saxon jurisprudence, "the deciding authority may not base its decision on evidence which has not been specifically brought before it". *Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964). Accordingly, this Honorable Court has held that in "reaching the validity of the district court's judgment, we must first determine (1) the action which it took (that is, precisely which motion it granted); (2) the factual basis of the decision". *Williamson v. Tucker*, 645 F.2d 404, 411 (5th Cir. 1981). Thus, the order challenged on appeal must stand or fail based on what evidence was before the District Judge when he entered the order. As this Honorable Court has recently held, "[T]he district court necessarily has great authority over ... motions. However, it must

base its decision on evidence". *League of United Latin American Citizens, District 19 v. City of Boerne*, __ F.3d __ (5th Cir. 2011, Nos. 10-50290, 10-50416). A decision must be based upon evidence available and presented at the time the District Judge makes his decision. A decision of the district court cannot be based on evidence introduced at a later date, at other hearings held after the decision has already been made and appealed. *See Id*. Similarly, the Supreme Court has held that as a fundamental principle of due process, a tribunal's decision "must rest solely on the legal rules and evidence adduced at the hearing". *Goldberg v. Kelly*, 397 U.S. 254 (1970).

There was no evidence offered to the District Judge before he entered the receivership order challenged in the primary appeal, and no findings were made in support of the receivership order. The findings Sherman references in his briefing[7] are findings made months after the receivership was imposed in denying Baron's FRAP 8 motion for relief pending appeal. Further, this Honorable Court has held that as a general rule, a district court cannot accept "new evidence or arguments"

[7] E.g., SBRE. 3.

on an order, while the validity of the order is on appeal. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989)

The Retrospective Justifications Offered by Sherman do Not Support the Receivership Imposed

Sherman argues that lawyers were hired as a means of delaying court proceedings. However, as discussed below, the rules of procedure do not provide for any delay when new lawyers are hired, and the District Court did not grant any. Sherman argues that Baron hired lawyers without the intent to pay them. The record establishes those 'claims' are false and groundless. Such claims moreover, have never been pled and are non-diverse state law claims well outside of the subject matter jurisdiction of the district court. *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010). Sherman claims that Baron increased the cost of litigation for all parties. However, no evidence of any additional cost is found in the record, and in any case, all parties– including Sherman– reached a full and final settlement and entered into a stipulated dismissal with prejudice. R. 2346. Accordingly, all litigants' 'costs' were resolved by that settlement. Sherman alleges contempt of orders, but no specific order can be pointed to. Sherman argues that Baron exposed

the Ondova Bankruptcy Estate to expense, a fallacious legal argument that is addressed in Novo Point LLC and Quantec LLC's reply briefing. Finally, Sherman alleges that there was an immediate threat that Baron would transfer assets. No motion raised this 'threat'. No evidence was offered of this 'threat' other than Pronske's post-appeal testimony that several months prior to the receivership proceedings, the trustee of the Village Trust changed from one Cook Islands trustee to another. Moreover, even if Baron was going to 'secrete' all his property, there was no active claim pled against him. Further, as discussed in the LLCs' reply briefing, there was more than a million dollars of Baron's money, in cash, in the Ondova Bankruptcy.

REPLY ISSUE 5: "VEXATIOUS LITIGATION" AS A LEGAL CONCEPT DOES NOT MEAN 'FRUSTRATING AND IRRITATING THE JUDGE'. RATHER, THIS HONORABLE COURT HAS HELD THAT IN DETERMINING WHETHER A PARTY IS A VEXATIOUS LITIGANT "[A] COURT MUST WEIGH .. THE PARTY'S HISTORY OF LITIGATION, IN PARTICULAR WHETHER HE HAS FILED VEXATIOUS, HARASSING, OR DUPLICATIVE LAWSUITS". *BAUM V. BLUE MOON VENTURES, LLC*, 513 F.3D 181, 189 (5TH CIR. 2008).

Baron is not alleged to have filed a single lawsuit. Notably, Baron is a defendant below, and was (directly or though Ondova) a defendant in a series of duplicative suits filed by the same plaintiffs. That Baron was required to retain a large number of attorneys to defend the multiple duplicative suits filed by the plaintiff's below does not qualify under the legal concept as a 'vexatious litigant'. E.g., R. 65-66. [8]

The concept of 'vexatious litigation' comes about because party can, in the normal course, file a lawsuit without the approval of any court. Thus, the power to file a lawsuit can be abused because the court normally has no control over what lawsuits are filed. The remedy recognized to control vexatious litigation is 'pre-filing injunction' to make a party's right to file a lawsuit subject to prior court approval.

[8] See also the Novo Point LLC and Quantec LLC's reply briefing in appeal 11-10113, at page 12.

See Baum at 187. Pre-filing injunction is notably not authorized as a punitive measure or as sanction for contempt. *Id.* at 193.

A party's vexatious filing of lawsuits implicates the subject matter of the court's control over its own docket. *Id.* at 187. By stark contrast, the subject matter of a litigant's property is clearly not implicated in relation to judicial supervision of a party's procedural right to file lawsuits. Notably, a pre-filing injunction merely imposes an additional procedural rule that allows a court to exert control over its own docket. Without such an injunction the rules of procedure allow a vexatious party to impose his presence upon the court by filing new lawsuits. Further, a pre-filing injunction does not interfere with any rights granted a litigant pursuant to state law. *Cf. Id.* at 192 (pre-filing injunction not authorized to extend to state court proceedings). By contrast, seizure of all of a litigant's property and property rights, and prohibiting a litigant from engaging in any business transactions or earning any wages, directly interferes with the litigant's rights under state law to (1) work, (2) earn a living, (3) engage in commerce, and (4) possess and control property, etc. None of those subjects are

implicated in relation to a court's procedural control over its own docket.

Changing Lawyers Cannot Constitute Vexatious Litigation

Baron is 'accused' of changing lawyers multiple times in the lawsuit below. But even if Baron changed lawyers a thousand times – as a matter of law– that cannot be 'vexatious litigation'. This is because Baron's change of counsel was always done with the express approval and authorization of the trial court. The trial court already has full control over what attorneys will appear at the bar before it, and the trial court already has the power to approve a motion to withdraw or substitute counsel. Because the power to control what attorney– if any– appear at bar before it, already rests in the hands of the trial court, changing counsel is not a procedural device that a litigant can use to be 'vexatious'.[9] Clearly, a litigant might 'vex' a court in the sense of 'frustrate and irritate' a trial judge who does not want a litigant to change counsel but for whom the court never-the-less permits multiple counsel to appear before it. In such a case, the fault and responsibility

[9] Accordingly, the trial court does not need to seize all of a party's assets to control what attorney appears before it.

does not rest with the litigant– it is the trial judge who controls whether substitution or withdrawal of counsel will be allowed.

Moreover, the changing of counsel does not extend or alter any deadline, time period, or other obligation of a litigant pursuant to the Federal Rules of Civil Procedure. Accordingly, a party in a civil lawsuit cannot unilaterally impact the advancement of a proceeding by changing counsel. Any delay involved in such a circumstance results from the court's willing accommodation. Notably, no such accommodation and no such delay occurred below. The District Court below allowed withdrawal of counsel but maintained– without allowing even one day additional for the new counsel– the same discovery schedule, and even the same deposition setting for Baron. R. 146-147.

Sherman argues that Baron changed counsel too often, and therefore the District Court had authority to seize all of his assets– from his house keys to his retirement IRAs, and to prohibit Baron from engaging in any business transactions. R. 1629, 1612. As authority for this proposition, Sherman's argument relied on an erroneous view of the holding of *In re Fredeman. (SBRE. 20).*

REPLY ISSUE 6: *IN RE FREDEMAN LITIGATION*, 843 F.2D 821 (5TH CIR. 1988)

Sherman's argument grossly and fundamentally errs in its interpretation of *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988). In *Fredeman,* like the proceedings below, the plaintiff's "contend primarily that the defendants are scoundrels who will try to escape judgment". *Id.* at 826. This Honorable Court held in *Fredeman* that the allegation, even if true, "would not justify the preliminary injunction". *Id.* Notably, in *Fredeman* a live claim was pled and pending against the defendant, whereas, in the instant case all claims against Baron had fully settled, and no claims were asserted against Novo Point LLC or Quantec LLC. This Honorable Court held in *Fredeman,* that "The general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." *Id.* at 824. Accordingly, this Honorable Court held that "as the Court stated in *De Beers*, an injunction may issue to protect assets that are the subject of the dispute". *Id.* at 827. Similarly, this Honorable Court has held in *Fredeman* that an order "limited to the

property in dispute or its direct, traceable proceeds, is far different from the all-inclusive order entered here." *Id.*

In the case at bar, no claim was made as to any property– no assets were subject to any pending disputes what-so-ever. This Honorable Court was clear in its *Fredeman* holding, that it has upheld "injunctions to preserve the particular assets in dispute in actions that were essentially in rem" and not to secure awards for damages. *Id.* at 827. The District Court below did exactly what this Honorable Court declared in *Fredeman,* was prohibited, "The district court here, by contrast, froze essentially all of the defendants' assets, effectively putting the defendants into involuntary receivership, based on unproven claims for unliquidated damages." *Id.* at 828.

Finally, it is notable that all parties to the suit below had entered a stipulated dismissal order. R. 2346. The only thing that the District Court needed to do to process the litigation to a complete resolution was to sign the stipulated dismissal order.

REPLY ISSUE 7: AN EQUITABLE REMEDY "PROCURED BY MATERIAL MISREPRESENTATION MAY NOT BE SUSTAINED." *COASTAL CORP. V. TEXAS EASTERN CORP.*, 869 F.2D 817, 818 (5TH CIR. 1989)

Sherman and Vogel succeeded in persuading the District Court to grant the receivership by convincing the District Court of two key misrepresented facts, as follows:

1. Falsely Misrepresenting that Thomas was Unpaid and Withdrew

First, Sherman misrepresented that "Mr. Thomas[10] was terminating his legal representation of Baron because he had not been paid and Baron had filed a grievance against him". SR v2 p353. This point was a central pillar of Sherman's motion. Sherman falsely alleged that the Bankruptcy Court had ordered that Baron could either retain Martin Thomas or proceed *pro se* in which case it would recommend a receiver be appointed over Baron.[11] R. 1576. Sherman then fabricated a story that Baron had not paid Thomas' fees, had filed a grievance against Thomas, and caused Thomas to withdraw. Sherman's story was a fabrication. SR. v10 p4097.

[10] Baron's counsel representing him as a creditor in the Ondova Bankruptcy.

[11] Such an order would clearly violate federal law. 28 U.S.C. §1654.

2. Falsely Misrepresenting that Baron Caused the Mediation Process to Fail

Second, Sherman and Vogel misrepresented that "that Baron is not cooperating in the process outlined by this Court in its Order of October 13, 2010 regarding the mediation process." R. 1577. This representation was clearly false. Vogel, the mediator, had said he would not even know the costs or scheduling until after November 22, 2010. SR. v10 p4096. If the most preliminary aspects of the mediation– initial scheduling and setting of the costs for mediation– were not even scheduled to be determined until after Nov. 22, it is not possible for Baron to have failed to cooperate with the mediation and cause the mediation to fail. However, the District Judge believed Sherman and Vogel, and believed that Baron had caused the mediation to fail. SR v2 p343. Notably, the District Judge, in retrospectively explaining his reasons for entering the receivership order, expressly relied on "Baron's failure to cooperate in the process outlined in the Court's October 13, 2010 Order to mediate the claims against Baron for legal fees" as a reason "why the emergency appointment of a receiver was necessary." Id. Accordingly, **the District Court would not have issued the**

receivership order if Sherman or Vogel would have told him the truth– that the mediation hadn't even started and Vogel was not even ready with preliminary scheduling or figuring out how much he was going to charge, until after Nov. 22, 2010. SR. v10 p4096.

Conclusion

The District Judge erred on the law in many fundamental ways. But he was clearly trying to do what he felt, in his perspective, was the right thing to do. He had ordered Baron to mediation to resolve claims attorneys had asserted (not in the district court). If Baron was both not going to pay his lawyers, and was going to thumb his nose at the Judge by refusing to mediate the fees, then the Judge felt a receivership order was justified. As a legal matter, the District Court lacks subject matter jurisdiction over the non-diverse claims of a litigant's counsel. *Griffin*, 621 F.3d at 388. Receivership is also not a remedy authorized to secure or resolve the claims of unsecured creditors. *E.g., Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923). However, Vogel and Sherman– in off-the-record, *ex parte* proceedings, convinced the District Judge to take that drastic step, by misrepresenting that the mediation the District

Judge had ordered to help resolve (what the District Judge believed to be Baron's failure to pay multiple attorneys), had been caused to fail by more of Baron's misdeeds. Vogel was employed as a Special Master in the case. Vogel was also the mediator. R. 1574. Vogel thus had personal knowledge that the mediation– for which he was the mediator– had not started. Yet, **sitting as a judicial officer in his role as special master, Vogel misled the District Court** into believing that Baron had caused the mediation to fail– in order to induce the District Judge into appointing him as receiver. Accordingly, Sherman (and Vogel adopting Sherman's appellate argument), argue erroneously that it would be inequitable not to allow Vogel and his law partners their **million dollar receivership fees**, approved by the District Court.

REPLY ISSUE 8: APPEAL DIVESTS THE DISTRICT COURT OF JURISDICTION OVER THE MATTER APPEALED

Griggs

Sherman argues erroneously that "There is no absolute rule that the filing of a notice of appeal divests the district court of jurisdiction with respect to the order appealed from." (SBRE. 21). Contrary to Sherman's argument, that is precisely what an appeal does. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Sherman's argument is that the District Court and the Court of Appeals share jurisdiction, so long as the District Court does not act to divest the Court of Appeals. However, the law is just the opposite. *Id.* This Honorable Court has held that a "federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Dayton Indep. School Dist. v. US Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990). The District Court maintains jurisdiction only to enforce the order, and to maintain the status quo during the pendency of the appeal. *E.g., Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989) (power of the district court during appeal "should be limited to maintaining the status quo"). As

this Honorable Court held in *Dayton*, "**the district court loses jurisdiction over all matters which are validly on appeal.** " *Id.* at 1064.

Palmer v. Texas

Sherman's erroneous argument that a District Court may empty a receivership res while it is on appeal is not supported by any authority. The Supreme Court in *Palmer v. Texas*, 212 U.S. 118, 29 S.Ct. 230 (1909) clearly held that on appeal, the receivership res becomes the possession of the appellate court, as follows:

> "the effect of the appeal was simply ... that the appellate court still had jurisdiction over the res the same as the trial court had".

Lion Bonding

The Supreme Court's holding in *Lion Bonding & Surety Co., v. Karantz*, 262 U.S. 640, 642 (1923) is also clear:

> "Even where the court which appoints a receiver had jurisdiction at the time, but loses it ... the first court cannot thereafter make an allowance for his expenses and compensation".

In *Lion Bonding*, the example offered in the court's reasoning was loss of jurisdiction of the matter because of an intervening bankruptcy. In the instant case, the District Court was divested of jurisdiction over the matter by an appeal. The legal principle is the same– when the District Court lost jurisdiction over the matter, it was also divested of authority to make charges against the receivership res. As the Supreme Court held in *Palmer*, the receivership res became the possession of the court of appeals when the receivership order was appealed.

Wabash

Similarly, the Supreme Court made clear in *Wabash R. Co. v. Adelbert College of Western Reserve Univ.*, 208 U.S. 38, 46 (1908) that:

> "[The] possession [of the receivership res] carried with it the exclusive jurisdiction to determine all judicial questions concerning the property".

Accordingly, pursuant to the Supreme Court's holding in *Wabash,* when the jurisdiction over the res passed to the court of appeals, the district court was without power to determine any questions concerning the property held in the receivership estate. Similarly, after an appeal is filed, the District Court is required to maintain the status quo. *Coastal*

Corp. at 820. The only way a court of appeals can ensure effective redress to property wrongfully seized in a receivership, is if the property is preserved and can be returned to its owner if the receivership is found wrongful. Accordingly, conservation of the receivership res is fundamental to maintaining jurisdiction over the appeal.

Jeff Baron's Life Savings

The authority cited in support of Sherman's argument that attorneys fees can be awarded while a case is on appeal, *Procter & Gamble*, relates to a right to attorneys fees that accrued outside of the matter being appealed.[12] Secondly, *Procter & Gamble* involves the authority of a district court to adjudicate fees in personam and does not involve distribution of assets out of the receivership estate. In the case at bar, Jeff Baron had **a million dollars** saved up in his savings accounts. That money was placed into receivership and constituted receivership res. On appeal, Baron seeks the return of his life's savings. When Baron's notice of appeal was filed, this Honorable Court obtained jurisdiction over the matter on appeal, and the District Court was

[12] *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 525 (5th Cir. 2002).

divested of power to change the status of the matter as it rested before this Honorable Court. *Dayton* at 1063. If a district court were allowed power to distribute Baron's million dollars as 'receivership fees' while the case is on appeal, the Court of Appeals would be divested of jurisdiction over the receivership by the District Court.

The Law of Invalid Receiverships

Sherman erroneously argues that *Palmer* holds fees can be awarded by a trial court where a receivership was found to be invalid, as discussed below. First, the *Palmer* fees were allowed by the Supreme Court, the court which was the appellate court in possession of the receivership res on appeal. Secondly, the fees were awarded at the resolution of the appeal– not while the appeal was still being decided. Thirdly, the *Palmer* receivership was <u>not</u> found to be outside the authority nor the subject matter jurisdiction of the trial court, nor was the *Palmer* receivership found to be based on a defective claim. Rather, the *Palmer* receivership order was reversed out of principles of comity, to respect the state court receivership. In the circumstance where the state court receivership was affirmed by the state supreme court, the

allowance of costs for a receiver while the federal court retained jurisdiction over the matter was found just. That circumstance does not apply in the case at bar– the receivership at bar is not based on a valid claim, and the District Court lacked both subject matter jurisdiction and authority to impose the receivership. Moreover, the law with respect to disallowing receivership costs and fees when the receivership order is reversed because the receivership itself was defective is clear and well-established, as discussed below.

The Three Distinct Types of Defective Receiverships Cases

There are three distinct types of cases involving the question of authority to pay the costs of the receiver's professionals out of receivership assets when the receivership is ultimately reversed, as follows:

The first type of case is where court has authority to impose a receivership, but the receivership was instituted upon an unfounded claim. This Honorable Court has held that in that type of case, based on equitable principles the party who's property was seized is entitled to have the costs of the receivership charged against those who

provoked the receivership. *Tucker v. Baker*, 214 F.2d 627, 631, 632 (5th Cir. 1954); *Porter v. Cooke*, 127 F.2d 853, 859 (5th Cir. 1942).

The second type of case involves a situation where a receiver has taken property under an irregular or unauthorized appointment. The Supreme Court has held that in those types of cases the receiver must look for his compensation to the parties at whose instance he was appointed. *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908). The same rule applies if the property of which the receiver takes possession is determined to belong to persons who are not parties to the action. *Id.*

The third type of case involves a situation where the district court lacks subject matter jurisdiction over the party or assets placed into receivership. The Supreme Court has held that in such a situation the courts are without power to make any charge upon, or disposition of, the assets. *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923); *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896) (If there were no jurisdiction, there was no power to do anything).

The receivership imposed below is challenged on appeal based on the receivership:

(1) being brought on an improper claim;

(2) the District Court's lacking subject matter jurisdiction to impose a receivership over the property seized; and

(3) the District Court's lack of authority to impose receivership as a primary, independent remedy and absent an ancillary claim in equity to an interest in the receivership res.

Accordingly, if the receivership is reversed on appeal based on any of these grounds, taking from the receivership estate to pay costs is neither authorized by law nor equitable. Sherman's argument, by contrast, relies upon *Palmer*– a case involving a receivership that was rejected based on comity, not on underlying invalidity. *Palmer* involved an underlying state court receivership that was found by the state supreme court to be authorized and properly instituted. *Id.* at 129. The Federal court in *Palmer* had both the subject matter jurisdiction, and the authority in law to impose a receivership. However, the state receivership was imposed first and as a principle of comity was

respected by the federal courts. *Id.* In *Palmer*, upon resolution of the federal appeal, costs were allowed out of the receivership funds that were turned over to the state receivership. Since the federal court in *Palmer* had (1) subject matter jurisdiction and (2) legal authority to impose the receivership, and since (3) absent the federal receivership the costs would have been borne out of receivership res in the state receivership, costs were allowed from the receivership res upon dismissal of the case. Notably, these elements are not present in the case at bar.

Conclusion

Sherman argues that "Justice requires that the costs and fees of the receivership be recovered even though they were incurred while the receivership order was on appeal." However, Sherman's argument ignores well-established law, as discussed above. As a matter of established law, if the district court lacks subject matter jurisdiction, it has no power to charge the receivership estate. *Lion Bonding* at 642. Similarly, if the receivership is found to have been wrongly imposed, as a matter of established law, 'Justice requires that the costs and fees of

the receivership be recovered' from the party provoking the receivership and not from the assets taken into receivership. *E.g., Atlantic Trust Co.* at 373.

REPLY ISSUE 9: 28 U.S.C. § 958

28 U.S.C. §958 applies to any person "holding any ... office or employment under the United States or employed by any justice or judge". Vogel was clearly employed by district judge as special master, and was holding the office of special master by virtue of his appointment, as discussed below.

The office of master has a long history in law. The office of master in chancery, is of French origin and was imported into England with the Norman Conquest. See 1 Holdsworth, A History of English Law 416, 441-444 (1956); 1 Pollock and Maitland, History of English Law 193 (1959); Bryant, The Office of Master in Chancery: Early English Development, A.B.A.Jour. 498 (1954); Kaufman, Masters in the Federal Courts: Rule 53, 58 Col.L.Rev. 452 (1958). As explained by Professor Bryant, "In the colonial development of America just as chancery relief had been required and had become a part of the judicial system of colonial America, so had the office of master been recognized as an integral part of the administration of that relief and had become soundly rooted in the legal thinking and custom. It was from this basis

that after the Revolution the office of master in chancery or its equivalent made its way into many of the state and federal systems of procedure." Bryant, The Office of Master in Chancery: Colonial Development, 40 A.B.A.Jour. 595 (1954).

Similarly, federal courts have recognized that the special master occupies an office. E.g., *Cochrane v. Commissioner of Internal Revenue*, 26 BTA 1167, 1168 (1932) ("auditor appointed by a judge ... was an officer or employee of that state within the meaning of section 1211 of the Revenue Act of 1926, and that such office was analogous to the office of master in chancery"); *N.L.R.B. v. Baldwin Locomotive Works*, 128 F.2d 39 (3d Cir.1942)("[A]ncient office of Master in Chancery"); *Gary W. v. State of La., DHHR*, 861 F.2d 1366, 1367 (5th Cir. 1988) ("Dr. Brenda Lyles was appointed special master on January 1, 1987 ... The following week the office of special master terminated and Dr. Lyles was appointed director of an independent monitoring unit").

As a matter of long-standing and historical law, the office of special master is a judicial office. Vogel was clearly employed by the District Court as special master and held that office at the time he was

appointed as receiver over Baron. Because Vogel then held an "office or employment" as special master, he was prohibited from being appointed receiver by 28 U.S.C. § 958.

CONCLUSION

For the foregoing reasons, the receivership order imposed by the District Court should be reversed and declared void, and the receivership res should be returned to its original and proper owners. Jointly and in the alternative, the orders complained on appeal should be reversed.

Respectfully submitted,

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DATED: November 21, 2011.

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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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