Case No. 10-11202

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Netsphere, Inc. et. al.,

Plaintiffs

v.

Jeffrey Baron,

Defendant / Appellant

Daniel J. Sherman
(Ondova Limited Company)

Defendant / Appellee

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

MOTION TO STAY EX-PARTE ORDER APPOINTING RECEIVER OVER THE PERSON AND PROPERTY OF JEFFREY BARON PENDING APPEAL

Respectfully submitted,

/s/ Gary N. Schepps

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FOR 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. Appellant/Defendant: JEFFREY BARON

b. Appellee/Defendant: DANIEL J. SHERMAN, Trustee
for ONDOVA LIMITED COMPANY

c. Intervenor: Rasansky, Jeffrey H. and Charla G. Aldous

d. Intervenor: VeriSign, Inc.

e. Plaintiffs: (1) Netsphere Inc
(2) Manila Industries Inc
(3) Munish Krishan

2. ATTORNEYS

a. For Appellant: Gary N. Schepps
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Dallas, Texas 75240

b. For Appellee: Munsch Hardt Kopf & Harr, P.C.

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c. For Intervenor VeriSign: DORSEY & WHITNEY (DELAWARE) LLP
(1) Eric Lopez Schnabel, Esq.
(2) Robert W. Mallard, Esq.

d. For Intervenor Rasansky and Aldous:

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

3. OTHER

a. Companies and trusts purportedly seized by the ex-parte 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: Peter Vogel

c. Counsel for Receiver: Gardere Wynne Sewell LLP

(1) Peter Vogel
(2) Barry Golden
(3) Peter L. Loh

c. **Non-parties asking the receiver to give them some of Jeff Baron's money in the 'alternative court system' set up below:**

1. **Garrey, Robert (Robert J. Garrey, P.C.)**
2. **Pronske, Gerrit (Pronske & Patel)**
3. **Rasansky, Jeffrey H. and Charla G. Aldous**
4. **Taylor, Mark (Powers Taylor)**
5. **Coale, David (Carrington Coleman)**
6. **Bickel, John**
7. **Friedman, Larry (Friedman & Feiger)**
8. **Nelson, Michael**
9. **Broome, Stanley (Broome Law Firm)**
10. **Randy Schaffer**

11. Vitullo, Anthony "Louie"
12. Ferguson, Dean
13. Pacione, David L.
14. Motley, Christy (Nace & Motley)
15. Shaver, Steven R. (Shaver & Ash)
16. Hall, Jeffrey
17. Jones, Steven
18. Lyon, Gary

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

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TO THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT COURT OF APPEALS:

COMES NOW JEFF BARON, Appellant, and pursuant to Federal Rule of Appellate Procedure 8(a)(2) moves this Court to stay the district court's Order Appointing Receiver signed November 24, 2010 [Doc#s124, 130], pending Jeff Baron's interlocutory appeal from that order.

II. SUMMARY

There has been a breakdown of due process in the district court, and because the actors are cloaked with the mantle of immunity there is no one for Jeff Baron to recover from if his appeal is successful. In the meantime, his life's savings including his exempt assets are being liquidated and rapidly dissipated.

Without notice or hearing, upon an unverified motion not supported by affidavit, the district court entered a harsh pre-trial receivership order over the person and property of Jeff Baron. **No findings were entered to support the order**, and no bond was posted by the movant. (Ex. A and B). The stated necessity for the emergency order was to keep Jeff Baron from hiring any lawyers. (Ex. C, paragraph 13). Jeff was warned that if he attempted to hire an attorney to defend himself he would be held in contempt. (Ex. F).

Jeff Baron was ordered stripped of all his property, his cell phones, his house keys, all of his private documents, and all his assets (including exempt retirement accounts). His bank accounts, credit cards, etc, were seized. He was (and still is) enjoined from transacting any business, or taking any property (including any cash, clothing, etc.) outside of the Northern District of Texas. (Ex. A).

The district court has since stated that the purpose of the receivership is to take Jeff Baron's money to pay former attorneys. (Ex. D, M). Many of the attorneys did not represent Jeff, and most them had nothing to do with the district court below. (Ex. H). Only one claim of any attorney was pled before the district court. All claims for relief in the district court (a 'business divorce') settled well prior to the receivership order. (Ex. D, E).

III. STATEMENT OF THE CASE AND FACTS

On the evening of Friday, November 19, 2010, Jeff Baron objected to the fee application of Raymond Urbanik in the Ondova, Ltd. bankruptcy case.[1]

Three business days later, Mr. Urbanik[2] filed the unverified motion to appoint a receiver over Jeff Baron in the district court below. **The motion sought** to appoint an emergency receiver over Jeff Baron **"in order to remove Baron from control of his assets and end his ability to further hire and fire a growing army of attorneys."** (Ex. C, paragraph 13).

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[1] Mr. Urbanik is the attorney for a Chapter 11 trustee (Mr. Sherman) in the bankruptcy case of Ondova, Ltd. Jeff Baron is the beneficial owner of Ondova. Jeff Baron and Ondova are co-defendants in the 'business divorce' lawsuit that settled in the district court below.

Jeff Baron became concerned that Mr. Urbanik was charging grossly excessive fees in the Ondova bankruptcy. Cloaked with authority and legitimacy as the attorney for the bankruptcy trustee, Mr. Urbanik had effectively drained all the assets of Ondova through massive attorney fee billings. With his latest fee application, Mr. Urbanik's bills reached around one million dollars, a sum greater than all of the combined creditors' claims recognized as legitimate. In other words, it would have been cheaper just to pay all the claims than Mr. Urbanik's bill. Notably, Mr. Urbanik's million dollar fees did not remove most of the claims. (Ex. Z).

There are no claims between Ondova and Jeff Baron in the district court, and all claims between plaintiffs and the co-defendants in the district court have settled. The lawsuit below was not dismissed only because Mr. Urbanik breached his obligation to file the executed dismissal papers he is holding in escrow. (Ex. K).

[2] In the name of the Ondova Chapter 11 trustee, Sherman.

The ground offered by Mr. Urbanik in support of the emergency receivership was that if Jeff Baron hired lawyers, they might make a substantial contribution to the benefit of the Ondova bankruptcy estate.[3] The attorneys, Mr. Urbanik averred, would then be entitled to fees for any substantial contribution they might make to the benefit of the bankruptcy case. Mr. Urbanik argued that the hearing of such claims for contribution could delay the bankruptcy proceedings.[4] (Ex. C, paragraphs 4, 12). Therefore, Mr. Urbanik concluded, Jeff Baron must be immediately stopped—not by an injunction, but by receivership over Jeff's person and property—from hiring any lawyers.[5] Without providing notice or hearing, the

[3] For example by showing that Mr. Urbanik's fees were excessive. See Ex. C, paragraph 4.

[4] If a creditor such as Jeff Baron provides a substantial contribution to a bankruptcy case that is "considerable in amount, value or worth" and the creditor's contributions to the case "foster and enhance, rather than retard or interrupt the progress of reorganization" then the creditor is entitled to recover reasonable expenses, including reasonable attorney's fees, for the substantial contribution. 11 U.S.C. §503(b)(3)(D); E.g., *In re DP Partners, Ltd. P'ship*, 106 F.3d 667, 673 (5th Cir.1997). The claim pursuant to 11 U.S.C. §503(b)(3)(D) for the creditor's contribution may be made by the creditor or by the professional directly. 11 U.S.C. 503(b)(4); *e.g. In re Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986).

Notably, there is no right of recovery *against* the creditor who provided the substantial contribution. Quite the opposite—a creditor who provides a substantial contribution to the bankruptcy case is entitled to recovery from the bankruptcy estate for the expenses he incurred in making that contribution. 11 U.S.C. §503(b)(3)(D); E.g., *In re DP Partners,* 106 F.3d at 673.

Accordingly, the hiring and firing of lawyers can have zero net effect on the bankruptcy case under §503(b)(3)(D), unless by hiring or firing the lawyers the creditor provides a substantial benefit to the bankruptcy case, in which case either the creditor or the attorney would be entitled to file a claim for allowance of the fees. Providing a substantial contribution is a good thing, which the bankruptcy code encourages by allowing reimbursement of expenses. Jeff Baron should clearly not be sanctioned for any substantial contribution he makes to the bankruptcy case.

[5] To a judge inexperienced with bankruptcy law, the grounds may sound legitimate—'if lawyers work on the bankruptcy case, they might file more and more claims and the case will never end'.

Mr. Urbanik bolstered his motion by representing that the bankruptcy court had recommended that a receiver be appointed over Mr. Baron if he decided to represent himself *pro se*. (Ex. C, paragraph 2). That representation is clearly inconsistent with the record. The bankruptcy court threatened that if Mr. Baron choose to proceed *pro se* **and** did not cooperate in connection with the final consummation of the Global Settlement Agreement then she would recommend a receiver be appointed to "perform the obligations of Jeffrey Baron under the Global Settlement Agreement."

district judge signed the receivership order.

After repeated unsuccessful attempts to have a hearing set in the district court to stay the receivership, Jeff Baron filed for emergency relief in the Court of Appeals. When Jeff Baron's motion for stay was filed in this Court, the district court set a hearing date for December 17, 2010. Jeff Baron's motion in this court was accordingly denied without prejudice.

At the hearing on December 17th, the district court took action to expand the receivership and ordered the liquidation of some receivership assets.[6] Jeff Baron then renewed his emergency motion in this Court. The district court had not yet issued a ruling on the motion to stay pending in the district court, and this Court accordingly denied the emergency motion without reaching an opinion on the merits, based on "an inadequate showing at this stage of the proceedings."

On February 3, 2011, 71 days after entering the receivership order, the district court signed an order denying Jeff Baron's motion for stay pending appeal, making the matter ripe for consideration by this Court. Since that date, the circumstances have materially deteriorated.

(Ex. G). Jeff cooperated with the final consummation of the settlement agreement. (Ex. E). The motion presented by Mr. Urbanik does not aver otherwise.

Mr. Urbanik also bolstered his motion by suggesting that the district court had entered an order prohibiting Jeff Baron from hiring attorneys without the court's permission, and that Jeff Baron had violated that order. Although **no such order exists**, the suggestion was effective because the district judge mistakenly believes that he entered such an order on July 1, 2009. (See Ex. I, "the Court notes for the record that Mr. Lyons is not counsel of record in this case. Moreover, the Court previously entered an Order on July 1, 2009, requiring Court approval before Defendant can employ new or additional counsel (See Docket No. 38).") However, no motion for such relief was filed, no hearing for such relief was held, and no such order was entered. (Ex. J, K).

[6] Declining to grant the emergency relief requested, without ruling on the motion to stay.

Relief by this court is urgently requested and desperately required.[7] Jeff Baron has been literally trapped in an apartment with no heating when the temperatures in Dallas fell below freezing, while **the receiver began actively liquidating and disposing of Jeff's assets and life savings**, already **taking $276,434.00 in 'receivers fees' for 37 days of receivership**.[8]

Instead of being used as vehicle to preserve assets pending resolution of claims in the district court, the district court is using the pre-trial receivership to bypass a trial and to liquidate and dispose of Jeff Baron's life savings—all of them. (Ex. L). The district court is disposing of the receivership assets as awards (without trial) of state court causes of action. The district court is now poised to authorize the receiver to immediately liquidate and dispose of Jeff's exempt[9] Roth IRAs for direct 'execution' of the untried claims, most of them un-filed. (Ex. M).

Alternative System of Justice

The district judge has decided that Jeff Baron has abused former attorneys by not paying their demanded fees in full. (Ex. O, M). That a party would dispute attorneys' fees is not acceptable to the district judge. Similarly it is not acceptable to

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[7] As of today, Jeff Baron is restrained from hiring attorneys to assist him, has had his health insurance cancelled, is suffering serious (requiring medical treatment) physical distress from the receivership, is restrained from "transacting any business", has had most all (exempt and non-exempt) assets and legal rights (such as the right to contract, prosecute and defend lawsuits, etc.) taken from him. Notably, the receiver's first official action was to withdraw Jeff Baron's objection to Mr. Urbanik's fees. Jeff has not been permitted to leave the Northern District and is having his reputation materially tarnished by the receivership— Most of his former colleagues will no longer speak to him or return his calls. Jeff has been effectively socially and professionally isolated by the receivership.

[8] **There is no judgment against Jeff Baron**, nor active claims against him in the district court. The district court lawsuit below fully and finally settled well prior to the entry of the receivership order.

[9] Tex.Prop.Code §42.0021; *E.g.*, *In re Youngblood,* 29 F.3d 225 (5th Cir. 1994).

the district judge that attorneys would need to file lawsuits in state court and prove their claims to a jury before being afforded relief. (Ex. D, M).

The district judge has effectively ceased to be an impartial judge of matters placed before him for adjudication (all claims in the case have settled) and has become an advocate– prosecuting to correct what he perceives as injustice. At the district court hearing where Jeff Baron sought relief pursuant to Rule 8(a)(1), the district judge explained his purpose for the receivership:

> "[M]y goal is to get control of the money to a certain level so that I can pay the lawyers who have tried their best to help Mr. Baron. There may be other things hanging out there that I don't know about yet. Once I do that, I'm glad to end this receivership" "I want to sit down and get everybody paid" (Ex. N, page 14)

The receiver is now seeking to liquidate Jeff Baron's exempt property such as his Roth IRAs, and distribute it, without trial, to the 'claimant' attorneys. (Ex. L, M).

Breakdown of Due Process

At this point in time, basic due process has been abandoned by a district court. For example, just four days after they were filed the district judge granted motions for the disbursement of an additional $235,209.00 from Jeff Baron's property to the receiver and his law firm.[10] (Ex. V). The motions were granted without hearing, without ordering Jeff Baron's response period be shortened, and without allowing the 21 day period prescribed by the local rules for Jeff Baron to respond. The district court

[10] At the same time, the district court has forbidden Jeff Baron from retaining counsel, and has seized all Jeff's money so he cannot do so.

has similarly entered multiple orders disposing of Jeff's assets without allowing any response, objection, or hearing.[11]

The District Court's Order on Appellant's FRAP 8(a)(1) Motion

The filing of a notice of appeal is an event of jurisdictional significance— it confers jurisdiction on the court of appeals and divests the district court of its jurisdiction. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

A district court cannot "accept new evidence or arguments" to support the order after it has been appealed. *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). Similarly, a district court is without jurisdiction to alter the status of the appeal as it sits before the court of appeals. *Dayton Indep. School Dist. v. US Mineral Prods*. Co., 906 F.2d 1059, 1063 (5th Cir. 1990).

Accordingly, the district court's post-appeal findings in its order denying Rule 8(a)(1) relief should have no relevance to determining the validity of the order appealed from. In an abundance of caution, brief points in relation to the district court's Rule 8(a)(1) findings[12] are discussed in Appendix A to this motion.

IV. STANDARD IN GRANTING STAY PENDING APPEAL

The Fifth Circuit has adopted four factors to determine whether stay pending appeal should be granted: (1) substantial showing of probable success on the merits; (2) irreparable injury if not granted; (3) whether a stay would substantially harm the

[11] The district court is liquidating and disposing of Jeff Baron's assets—but there is no judgment against Jeff Baron, and no active claims against Jeff Baron pending before the district court.

[12] Notably, no hearing was held on the grounds for receivership. The issues heard at the Rule 8(a)(1) hearing on Jeff Baron's motion expressly filed "pursuant to Federal Rule of Appellate Procedure 8(a)(1)" were whether Jeff Baron was likely to be successful in this appeal, whether there was irreparable injury, and any harm to other parties and the public if the stay was granted.

other parties; and (4) whether the granting would serve the public interest. *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968).

V. ARGUMENT & AUTHORITY

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON APPEAL

Receivership is Prohibited to be Ordered for its Own Sake

Receivership is a special remedy that is allowed **only** as a step to achieve a further, final disposition of property**.** This fundamental rule was established by the Supreme Court's ruling in *Gordon v. Washington*, 295 U.S. 30, 37 (1935):

> "**[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.**" *(emphasis).*

Receivership is strictly prohibited where it is not ancillary to claim for primary relief—**the appointment of a receiver may not be used as a means to provide substantive relief.** *Kelleam v. Maryland Casualty Co. of Baltimore,* 312 U.S. 377, 381 (1941); *Tucker v. Baker*, 214 F.2d 627, 631-2 (5th Cir. 1954)(**receivership for the sake of a receivership is prohibited**).[13]

Because Mr. Urbanik's motion for receivership did not seek the appointment

[13] In *Tucker* the Fifth Circuit clearly delineated the distinction between the permitted and forbidden use of a receivership. The permitted use is in a "confused situation as to the ownership of interests in the properties, to assert and maintain the jurisdiction of the district court and through a conservator take possession of the properties for the purpose of determining these ownerships and preventing the dissipation of the properties or their being made off with or otherwise disposed of by adverse claimants, during the period necessary for making these determinations". *Id.* at 631. The forbidden use is "**a receivership for the sake of a receivership** with the consequent heavy burdens and expenses which will tend to dissipate in court costs and allowances the properties of the true owners, while unduly and without warrant keeping them out of the possession and use of their own." *Id.*

of a receiver as a step to achieve any further, final disposition of Jeff Baron's property, the district court abused its discretion in granting the motion. *Id*.

The receivership imposed by the district court below is in place solely so that the district court could use the ancillary power of the receivership to do what a district court is prohibited from doing—adjudicating state law, non-diverse claims without trial, while seizing the defendant's assets so he can not retain counsel. The district court abused its discretion in imposing a receivership for the sake of a receivership. *Id.*

Abuse of discretion

It is well established law that receivership is a remedy which **can be requested only by a party with an interest in the receivership property**. *E.g.*, *Williams Holding Co. v. Pennell*, 86 F.2d 230 (5th Cir. 1936). Mr. Urbanik, Mr. Sherman, and Ondova, Ltd. had no property interest in any of Jeff Baron's property. Therefore, they lacked standing to seek a receivership, and it was an abuse of discretion for the district court to grant them one.

Moreover, receivership is an "extraordinary" remedy to be "granted only in cases of clear necessity." *See e.g., Solis v. Matheson,* 563 F.3d 425, 437 (9th Cir. 2009); *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997); *Aviation Supply Corp. v. R.S.B.I. Aerospace, Inc.*, 999 F.2d 314, 316 (8th Cir. 1993); *Consolidated Rail Corp. v. Fore River Ry. Co.*, 861 F.2d 322, 326-27 (1st Cir. 1988). Accordingly, in those cases where a receiver can be properly appointed, a district court has discretion to appoint a receiver "only **after** evidence has been presented and findings made" *E.g., Solis*, 563 F.3d at 438 (emphasis). The district

court abused its discretion in granting an unverified motion for receivership, without notice and hearing, and without making any findings in support. *Id*.

The "Nuclear Weapon" of Pre-Trial Seizure of Assets, is Outside a District Court's Inherent Authority

A case similar in many respects to the case at bar is *In re Fredeman Litigation*, 843 F.2d 821 (5th Cir. 1988). In *Fredeman* the district court entered a preliminary injunction prohibiting the defendants from transferring or removing virtually any of their assets without the court's express approval and the plaintiffs' knowledge.[14]

Just like the district court below,[15] the *Fredeman* district court premised its authority to interfere with a party's control over their assets based on "its inherent power". The Fifth Circuit ruled that "the district court lacked power" to do so. *Id.*

The Fifth Circuit has held that inherent authority "is not a broad reservoir of power, ready at an imperial hand". *Natural Gas Pipeline Co. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993). Similarly, the Supreme Court has ruled that inherent powers are limited "to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn, 6 Wheat.* 204, 227 (1821); *see also Ex parte Robinson*, 19 Wall. 505, 510 (1874)." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 43 (1991). None of these permitted uses of inherent power apply to Jeff Baron.

The Fifth Circuit, moreover, has ruled that the inherent powers doctrine is rooted in the notion that a federal court, sitting in equity, possesses all of "the common

[14] The district court below acted without notice or hearing and has gone much further than the *Fredeman* trial court. The district court below did not just freeze the assets but seized them, as well as Jeff Baron's rights (to contract, to travel outside the northern district, to engage in any business transaction, etc.).

[15] As explained in the court's post-appeal explanation for denying relief pending appeal. (Ex. P).

law equity tools of a Chancery Court". *ITT Community Development Corp. v. Barton*, 569 F.2d 1351,1359 (5th Cir. 1978). It is well established that **to appoint a receiver of property of which it is asked to make no further disposition is <u>not</u> a common law tool of a Chancery Court.** *Gordon*, 295 U.S. at 37.[16]

Receivership is Excessive

In overruling Jeff Baron's motion for stay pending appeal, the sole grounds upon which the district court found this appeal would not be successful was that the district court has inherent authority to issue the receivership order. (Ex. P at 20). If pre-trial receivership were within the district court's inherent power (it is not, see above), the ultimate touchstone of inherent powers is sill ***necessity***. *Natural Gas Pipeline*, 2 F.3d at 1412. A court must "employ the least possible power adequate to the end proposed." *Scaife*, 100 F.3d at 411; *Spallone v. United States*, 493 U.S. 265, 272 (1990).

Imposition of a receivership is clearly not necessary to enjoin a party from hiring attorneys. Accordingly, the district court abused its discretion in failing to exercise restraint in exercising its powers. *Toon v. Wackenhut Corrections Corp.*, 250 F. 3d 950, 952 (5th Cir. 2001).

As the Fifth Circuit explained in *Natural Gas Pipeline,* "Traditional sanctions– perhaps a monetary penalty that increased each day for Fox's noncompliance … would

[16] The Supreme Court has explained "[W]e have no authority to craft a 'nuclear weapon' of the law" allowing prejudgment interference with a defendant's property. *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Such a power, the Supreme Court ruled, "[W]ould 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." *Id.* at 330 (emphasis).

have accomplished the court's purpose more properly". *Id*. at 1412; s*ee also Dailey v. Vought Aircraft Co.*, 141 F. 3d 224, 233 (5th Cir. 1998). (A court **must** try the less restrictive measure first.).[17]

The District Court Moreover Lacks Subject Matter Jurisdiction to impose a Receivership over Jeff Baron's Property

The primary question of subject matter jurisdiction is "did the plaintiffs' pleadings put their subject-matter at issue". *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931). No pleading before the court places Jeff Baron's properties in dispute. Accordingly, **the court acquired no jurisdiction over his properties**. *Id.* at 1028. The Fifth Circuit has ruled:

> **"[S]ince it had no jurisdiction over these properties, its order appointing a receiver to take charge of them was void."** *Id.*

and,

> **"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 1029.

Even under the "inherent power" doctrine, the district court has no power to act where lacks subject matter jurisdiction for its action. *Kokkonen v. Guardian Life*

[17] If restraining a litigant from hiring attorneys were shown necessary after notice and hearing, an injunction could be imposed, requiring court approval before hiring new counsel. Similarly, the Fifth circuit has ruled that where there is vexatious litigation, the remedy authorized by the district court is a pre-filing injunction that preserves the legitimate rights of the litigant. *Baum v. Blue Moon Ventures, LLC,* 513 F. 3d 181, 187 (5th Cir. 2008). Receivership is not the authorized remedy.

Moreover, even for a 'vexatious litigant', due process— including notice and a hearing before entry of any order— are required. E.*g., Matter of Hartford Textile Corp.*, 681 F.2d 895 (2nd Cir. 1982)("reversed a *sua sponte* order of the district court, which enjoined further litigation by appellant and her attorney, only because the order was entered without notice")

Ins. Co. of America, 511 U.S. 375, 380 (1994). A post-appeal justification for the receivership offered by the district court was protecting the settlement agreement . (Ex. P at 2,6). However, there was no pleading before the court putting the subject matter of the settlement agreement at issue. Accordingly, **the district court lacks subject matter jurisdiction to enforce the settlement agreement**.[18] *See Id.* at 382 ("enforcement of the settlement agreement is for state courts").

Like the district court below, the district court in *Kokkonen* entered an order, asserting the "inherent power" to do so. The Supreme Court ruled that the district court lacked subject matter jurisdiction for its action and the inherent power doctrine does not support the assertion of jurisdiction that is otherwise lacking. *Id.* at 380.[19]

Similarly, beyond the attorney's claim which settled, there was no pleading before the district court putting the subject matter of attorneys' fees at issue or bringing them within the ambit of the court's jurisdiction.[20] The Fifth Circuit has recently ruled directly on the issue: "Unless a dispute falls within the confines of the jurisdiction conferred by Congress, such courts do not have authority to issue orders regarding its resolution." *Griffin,* 621 F.3d at 388. **The district court lacks subject matter jurisdiction to resolve the fee disputes of non-diverse attorneys.** *Id.*

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[18] A post-appeal justification for the receivership offered by the district court. (Ex. P at 2,6).

[19] The Supreme Court ruled in *Kokkonen* that "**the power asked for here is quite remote from what courts require in order to perform their functions** ... The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order ... The suit involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute." *Kokkonen* at 380.

[20] Had former attorney's claims been pled, the district court still would have lacked jurisdiction to adjudicate the state law causes of action asserted by non-diverse attorneys. *Griffin v. Lee*, 621 F.3d 380 (5th Cir. 2010).

As the text of the All Writs Act (28 U.S.C. §1651) recognizes, a court's power to issue any form of relief—extraordinary or otherwise— is contingent on that court's subject-matter jurisdiction over the controversy for which the relief is granted. *US v. Denedo*, 129 S.Ct. 2213, 2221 (2009).

The District Court's Order is also Void for Lack of Due Process

The Fifth Circuit has ruled that an order purporting to control a party's behavior over an extended period of time is a preliminarily injunction— no other description is possible. *Parker v. Ryan*, 960 F.2d 543, 545 (5th Cir. 1992).

The receivership order below is directed squarely at enjoining Jeff Baron.[21]

Rule 65(a)(1) mandatorily requires that a preliminary injunction may be issued "only on notice to the adverse party." Compliance with rule 65(a)(1) is mandatory. *Parker,* 960 F.2d at 544. Notice under rule 65(a)(1) must comply with rule 6(c)(1), which requires two weeks notice before a hearing on a motion. *See Id.* The requirements of Federal Rule of Procedure 65 are clear. The district court below abused its discretion and disregarded nearly every requirement of the rule.[22]

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[21] A "Receivership Party", **Jeff Baron is enjoined and restrained:** from transferring, selling, spending, or disposing of any asset, from opening any safe deposit box without notice to the Receiver, from cashing any checks or depositing any customer payments, and from incurring charges on any credit card. Jeff was ordered to repatriate all his assets to the Northern District of Texas, to provide accountings to the receiver, to cooperate with the receiver, to assist the receiver, to provide whatever information the receiver requests from him. Further Jeff was ordered to turn over all his cell phones to the receiver, and **restrained from transacting any of his business, deleting any files from his computer, throwing away any papers, selling any of his possessions, or even filing for bankruptcy.** Jeff was ordered to turn over all the keys to his home to the receiver. (Ex. A).

[22] Only a *temporary* restraining order may be issued without notice— and for at most 28 days— and only if an affidavit or verified complaint clearly show immediate and irreparable injury will be caused before a hearing can be held, and written explanation for lack of notice is provided. Fed.R.Civ.P. 65(b)(1). The order must sate the injury and why it is irreparable, explain why it

"For more than a century the central meaning of procedural due process has been clear: '**Parties whose rights are to be affected are entitled to be heard**; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991).

Moreover, the receivership order, entered without notice, without hearing, and without supporting affidavits, clearly violates the fundamental principles of due process because it was preceded by no hearing or presentation of evidence. *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 (1969). Even the temporary[23] taking of property that is not in execution of a final judgment is a "deprivation" as contemplated by the constitution and must be "**preceded** by a fair hearing". *Fuentes v. Shevin*, 407 U.S. 67 (1972) ("Both *Sniadach* and *Bell* involved takings of property pending a final judgment in an underlying dispute. In both cases .. the Court firmly held that these were deprivations of property that had to be **preceded** by a fair hearing.") (emphasis).[24]

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was issued without notice, state the hour it was issued, and state that it expires after 14 days at most. A court may issue a preliminary or temporary injunction only if the movant gives security in an amount proper to pay the damages sustained by any party found to have been wrongfully restrained. Fed.R.Civ.P. 65(c). A restraining order or injunction must state the reasons why it issued. Fed.R.Civ.P. 65(d)(1)(A).

The district court below abused its discretion in failing to comply with the rules of procedure. The order appointing a receiver over Jeff Baron's person and property was granted without a hearing, and without any opportunity to respond. The motion was unverified and granted without any supporting affidavits. The order does not expire after 14 days and does not state why it issued. No security was provided by the movant to compensate Jeff if he is found to have been wrongfully restrained.

[23] The taking by the district court below is not temporary. Hundreds of thousands of dollars taken from Jeff Baron have already been disbursed as receiver's fees— without any hearing or the opportunity for Jeff to object or be heard. (Eg., Ex. V).

[24] Due process requires presentation of evidence prior to the deprivation of property rights even if a hearing is provided thereafter. *Mathews v. Eldridge*, 424 U.S. 319, 333. No hearing post-deprivation hearing was set or held on the receivership order. The only post seizure hearing held was Jeff Baron's Rule 8(a)(1) motion, held after the trial court was divested of jurisdiction over the

Accordingly, the receivership order is void *ab initio* because it was entered without due process. *See Pennoyer v. Neff*, 95 U.S. 714, 737 (1878) ("such proceeding is void as not being by due process of law"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("rendered in violation of due process is void in the rendering").

Even if the doctrine of inherent power extended to the imposition of pre-judgment receiverships (it does not, see page 17, et. seq., above), **in invoking inherent power a court must still comply with the mandates of due process**. *E.g.*, *Chambers,* 501 U.S. at 50; *Gonzalez v. Trinity Marine Group, Inc.*, 117 F. 3d 894, 898 (5th Cir. 1997). **Those mandates include an appropriate hearing.** *Chambers,* 501 U.S. at 57. Accordingly, the district court abused its discretion in issuing an order based on inherent power without notice and hearing, and in issuing the order without any supporting findings.[25]

The Receivership Motion's Purpose is Itself Unconstitutional

The purpose of the receivership motion, to bar an individual from freely hiring attorneys to give legal counsel outside of the courtroom,[26] is blatantly unconstitutional. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980) ("[T]he fifth amendment to the United States Constitution establishes that a civil litigant has a constitutional right to retain hired counsel" and "[T]he right to counsel is one of

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order by this appeal, and held 41 days after the order was entered. The issues at that hearing were whether Jeff Baron was likely to be successful in this appeal, whether there was irreparable injury, and any harm to other parties and the public if the stay was granted. The substantive claims made by the receivership motion were not taken up, and the receivership movant, the Ondova trustee, offered no evidence to support the receivership motion at the hearing. (Ex. Q).

[25] In order for a district court to impose sanctions under its inherent power a specific finding of bad faith **must** be made. *Scaife v. Associated Air Center Inc.*, 100 F. 3d 406, 412 (5th Cir. 1996).

[26] The Court clearly has authority to control which attorneys appear at bar before it. *E.g., McCuin v. Tex. Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983). Just as clearly, the Court does not require a receivership imposed upon a litigant in order to exercise this authority.

constitutional dimensions and should thus be freely exercised without impingement"); *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981)(the right to the advice of retained counsel in civil litigation is implicit in the concept of due process); *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002) (attorney acts as a critical buffer between the individual and the power of the State); *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932) (right to hire counsel of one's choice is a due process right in the constitutional sense that applies in any case, civil or criminal).

The Receivership Amounts to an Unconstitutional Taking without Due Process

The seizure clause of the Fourth Amendment prohibits the unreasonable interference with possession of a person's property. *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009). The seizure ordered by the District Court was purely arbitrary—based on no case law or statute, ordered without a trial on the merits of any claim, and entered without a hearing and based on no objective guidelines or guiding principles.

B. IRREPARABLE INJURY

Deprivation of constitutional rights is irreparable injury as a matter of law

It is well settled that the **loss of constitutional freedoms for even minimal periods of time constitutes irreparable injury.** *Deerfield Med. Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). Accordingly, the receivership order—seizing all of Jeff Baron's assets without due process, interfering with Jeff's right to hire legal counsel, and directly impeding Jeff's right to travel freely, seizing his right defend and prosecute lawsuits and to contract, and eliminating his right to privacy— involves irreparable injury as a matter of law. This "mandates a finding of

irreparable injury". *Deerfield* at 338. [27]

Serious and irreparable harm to Jeff Baron personally

Jeff Baron's declaration attached hereto as Exhibit H, and incorporated herein by reference. Since the loss of his freedom,[28] living each day has become a physical and emotional struggle. Being stripped of his assets and having his legal rights controlled by an antagonistic receiver is physically and emotionally trying. Jeff has been depressed to the point of becoming despondent. He is ill and is suffering physically from the stress.[29]

Jeff's life savings is being actively disbursed for receivership 'expenses' at a rate of around $10,000.00 *per day*.[30] Having taking over $300,000.00 of his savings, the district court is poised to authorize the liquidation of Jeff's *exempt* Roth IRAs, to pay absolutely groundless and contrived claims that were actively solicited by the receiver.

Liquidation of Jeff Baron's assets is actively in process. Only this Court can stop it.

Jeff Baron's privacy, and sense of self control have been taken from him, no less

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[27] When a persons' very right to control assets and to transact business is stripped from them, a cascade of constitutional rights are impaired. For example, it directly acts to impair their First Amendment freedoms by depriving them of access to the primary medium of public expression—paid advertisements. Such an impairment of an individual's First Amendment freedoms, for even minimal periods of time constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-4 (1976).

[28] Jeff Baron is enjoined from engaging in any business transactions, is depended on the receiver for money for food, has no operable vehicle, and has been forced by the receiver for the past several weeks to live in an apartment with no heat, literally freezing at night when the temperature dropped below freezing, etc.

[29] Because his money and credit cards have been seized, Jeff Baron has no money to retain expert to testify as to his condition. The treating physician's diagnoses is attached to Exhibit H. From the stress of the receivership Jeff is suffering heart irregularity requiring the care of a cardiologist, thrombocytopenia, hypokalemia, and hx seizures. (Id.).

[30] Three teams of attorneys at large law firms are working against Mr. Baron, with one firm literally working (per their billing) 20 hours a day to litigate against him. Jeff Baron is prohibited from hiring attorneys to represent him. Jeff cannot pay his appellate counsel, and has no attorney to defend him in the district court. The criminal defense lawyer the district judge 'ordered' to represent him—without pay, has zero civil law experience in the federal court.

than if he had been thrown in jail. Jeff Baron's health and medical condition as a very real matter have dramatically deteriorated under the stress of the receivership.

There is no way to quantify the damage physically suffered by Jeff due to the stress naturally arising out of being stripped of one's assets and control over his own affairs, and the suffering a multitude of deprivations imposed by the receivership order.

No party from which to recover damages

Jeff Baron is faced with a situation where the wrongful actors carry a mantle of immunity. *E.g. Boullion v. McClanahan*, 639 F.2d 213 (5th Cir. 1981). To the extent that absolute judicial immunity attaches to the actions of Mr. Urbanik in his capacity as attorney for a bankruptcy trustee, Jeff cannot seek from him redress for his damages.

As the equitable owner of Ondova (the entity ultimately in who's name Mr. Urbanik has acted), any recovery against Ondova would just be taken out of Jeff Baron's own pocket. As a very real matter the damages being caused to Jeff are irreparable.

C. NO SUBSTANTIAL HARM TO OTHER PARTIES

This case below fully and finally settled. If Jeff Baron hires counsel who make a substantial contribution to the bankruptcy case, that is a benefit, not a harm.

D. PUBLIC INTEREST

There is a compelling public interest in upholding due process and protecting an individual's rights in his property and his privacy, including his right to hire legal counsel. Attorney's fees disputes should be resolved before a state court jury, not in star

chamber like proceedings held by a federal district court.[31]

VI. CONCLUSION

Jeff Baron is likely to succeed on appeal—there has been a complete breakdown of due process in the district court. Additionally, there is clear, long established, controlling precedent prohibiting the imposition of a receivership for the sake of having a receivership. Jeff Baron's constitutional rights to due process, unreasonable seizure, to hire legal counsel, to travel, to work, to engage in commerce and business transactions, etc., have been suspended.

Deprivation of constitutional rights is irreparable injury as a matter of law. Jeff Baron is also suffering very real irreparable injuries as discussed in this motion. His exempt Roth IRAs—his life retirement savings— are next to be liquidated. Intervention and relief by this court is urgently requested and desperately required.

VII. PRAYER

Wherefore, Jeff Baron prays that this Court grant this motion, and stay or vacate the Order Appointing Receiver over Jeff Baron's person and property signed by the district court below on November 24, 2010 [Doc#s124, 130], pending appeal.

Respectfully submitted,

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[31] It is frightening to think that if an individual refuses to pay the excessive demands of an attorney, instead of a right to trial by jury, **without hearing, without findings, without bond, without supporting affidavits**, **a citizen could have all their assets—including their exempt retirement accounts, house keys, cell phones, private documents, etc., ordered immediately stripped from them, and they could be made a ward of the court– incarcerated in 'house arrest' in one district, and prohibited from hiring legal counsel to protect their rights.** The deprivations Jeff Baron is being subject to are grave.

VIII. TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

CERTIFICATE OF SERVICE

This is to certify that this brief was served this day on all parties who receive notification through the Court's electronic filing system and by e-mail to:

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CERTIFICATE OF CONFERENCE

Counsel for Appellee stated they intended to file an opposition.

CERTIFIED BY: /s/ Gary N. Schepps
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