No. **13-10696**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NETSPHERE, INCORPORATED; ET AL,

Plaintiffs,

v.

JEFFREY BARON,

Defendant–Appellant,

QUANTEC L.L.C.; NOVO POINT, L.L.C.,

Movants–Appellants

v.

GARDERE WYNNE SEWELL, L.L.P.; PETER S. VOGEL,

Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas Division
Docket No. 3:09-CV-988

(CORRECTED) REPLY BRIEF OF APPELLANTS, NOVO POINT, LLC AND QUANTEC, LLC (HEREIN "APPELLANTS") TO RESPONSES OF APPELLEES

/s/ *Paul Raynor Keating*
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Certificate of Interested Persons

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record for Appellant, NOVO POINT, LLC AND QUANTEC, LLC, certify that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARING ORAL ARGUMENT

Appellants reiterate their belief that oral argument would be highly beneficial to this Court, among other things, oral argument would permit this Court to:

- Explore the applicable precedent and logic of counsels' arguments;
- Test the accuracy of counsels' reliance upon the record, which, as shown in *Netsphere I* was not exactly as submitted.
- Engage in discussion that would lead to a result that could be efficiently applied at the district court level so as to minimize the potential for subsequent appeal.

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I. LAW OF THE CASE

1. APPLICATION OF THE LAW OF THE CASE REQUIRES REVERSAL.

The law of the case and its subset, the Mandate Rule, bind a lower court on remand and limit the parties in subsequent appeals[1]. Absent exceptional circumstances the rule compels a lower court to comply with the dictates of a superior court, foreclosing re-litigation of issues of law or fact previously decided by the superior court[2]. Post-remand interpretations by lower courts are reviewed de novo[3].

Determining the law of the case requires identifying the express findings and those presented by *necessary* implication in the opinion. *Dicta* is not controlling. "Necessary implication" is that which is so strong in its probability that the contrary thereof cannot be reasonably supported.[4] If the court's language is clear there should be no need to search for implication. Using statutory interpretation by analogy, judges should be presumed to "say what they mean" and "mean what they say". Interpretation should not result in absurdity or an implication contradictory to controlling principles of law or equity. Logically, the

[1] *Gene & Gene, LLC v. BioPay, LLC*, 624 F.3d 698, 702 (5th Cir. 2010).
[2] *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004).
[3] *Gene & Gene, supra*, 624 F.3d at 702.
[4] See e.g., *Grubb & Ellis Co. v. Bello*, 19 Cal. App. 4th 231 (1993).

law of the case must be supported by its *ratio decidendi* – the reasoning behind the decision.

This Court may re-examination previously decided issues if: (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice[5].

Appellants argue that they are not precluded from raising the issues herein.

a. **Law of the Case: Appellants Are Separate From Baron.**

This case suffers historically from an unsupported amalgamation of Mr. Baron. The district court's failure to treat Appellants separately was rectified in *Netsphere I.*[6] Appellees continue the error, intentionally misrepresenting the record by regular referring to "Baron and his entities" when discussing culpability and equity[7]. Unfortunately the district court continued the error in the Fee Order. Appellees claim this Court's reference to "Baron" was used as "loose shorthand" really intending to include Appellants.[8] This ignores the opinion's clear language.

Continuance of the error is key to Appellees' case and understanding

[5] *Gene & Gene*, supra 624 F.3d at 702.
[6] E.g. *Netsphere I*, *Netsphere Inc. v. Baron*, 703 F.3d 296 (5th Cir. 2010) p.310 ("Although Novo Point and Quantec were listed as parties on the global settlement agreement, they were never named parties in the Netsphere lawsuit or the Ondova bankruptcy."
[7] Receiver'directly contradicts its positions before the district court wherein he argued (and the District Court ruled) that Baron was so separate from Appellants he had no standing to make arguments on their behalf, including the correct person to whom Appellants' assets should be delivered. ROA.29396; ROA.29349-60, ROA.29414-17.
[8] Receiver, p.5.

its shines a bright light on the inequitable result they seek. Appellees need to paint Appellants with the brush of Baron so they can continue to use Appellants as the piggy bank notwithstanding *Netsphere I*'s clear statement that doing so was, and remains, *jurisdictionally* improper and inequitable given well-established rules applicable to multi-estate receiverships[9].

Netsphere I refers to Novo Point and Quantec by name 20 times and 19 times, respectively as separate and distinct from Baron throughout and references only Baron when discussing culpability and equity[10]. They are identified as parties to the court-approved Global Settlement Agreement ("GSA"),[11] which treated each separately, specifying simple bulk domain name transfers from one pre-existing entity to another.[12] As of September 15, 2010 the domain names at issue had been transferred to Appellants.[13] Referring to Appellants by name, the Court found they were never parties and that subject matter jurisdiction over them was lacking.[14]

In Section 1(B) this Court reviewed the attorney claims separately

[9] e.g. (*Potts II) W.F Potts Son & CO. v. Vochrane, 59 F.2d 375, 377-78 (5th Cir. 1932)*; *Bank of Commerce & Trust Co. v. Hood,* 65 F.2d 281 (5th Cir. 1933).
[10] The majority of references were in the body of the opinion.
[11] *Netsphere I*, p.303. GSA, ROA.1681; The Trustee was also a party ROA.16921. Appellants predated the GSA and were owned by the Village Trust. (ROA.1692, 1714). The GSA contained a release of all claims, including by the Trustee and referenced Appellants as pre-existing entities. (ROA.1708-1709). The Ondova Estate disclaimed any right to Appellants' assets (ROA.1712) and was bound by the GSA (ROA.1715).
[12] The asset transfer and separate ownership of Appellants by a single trust is detailed in the GSA. Receiver's arguments concerning "complex offshore trusts" are disingenuous.
[13] "Here, the only assets that were the subject matter of the dispute were the domain names that were to be transferred under the settlement agreement. They were transferred." (*Netsphere I*, p. 306).
[14] *Netsphere I*, p.303.

finding them contractual claims by "Baron's former attorneys"[15] and separately noting that to the extent "his companies" owed other amounts, the attorneys could file appropriate actions against them.[16]

In Section 1(C), and elsewhere, the opinion discusses Baron's asserted culpability.[17] There is not a single reference in the entire opinion, which, expressly or implicitly, attributes any improper conduct to Appellants. Appellees' fee applications and the Fee Order are similarly devoid of any reference to improper conduct by Appellants.[18] The specificity used to refer to Baron's asserted conduct and lack of reference to Appellants' precludes any attempt to "imply" findings of impropriety or that Appellants' actions "resulted in more work and more fees for the receiver and his attorneys"[19] so as to justify assessment of fees against Appellants. The record clearly reflects Appellants were included only as a means of funding unliquidated claims.[20] They had not, and did not, act improperly and this is law of the case and the record is devoid of any findings to the contrary.

i. **This Court's Clarification Order of December 31, 2012 Did Not Globally Define Baron to Include Appellants**.

[15] *Netsphere I*, p.310.
[16] *Netsphere I,* p.308; *Griffen v. Lee*, 621 F.3d 380 (5th Cir. September 2010) mandated such claims be addressed in Texas State Court.
[17] *Netsphere I*, pp.310-311.
[18] ROA.27479-27510; ROA.27511-27756.
[19] *Netsphere I,* p.313.
[20] Appellants' Opening Brief, pp.5-6, citing (ROA.4758-4762).

On or about December 31, 2012, Justices DeMoss, Southwick, and Higginson issued an Order in response to clarification motions filed Receiver and Baron ("Clarification Order")[21]. Appellees' remove language in the Clarification Order from its context, arguing the Order acted to define "Baron" to include Appellants throughout the opinion[22]. Appellees are plainly wrong.

The Clarification Order was issued in response to several motions including a Response To Emergency Motion To Clarify Status Of Mandate And Stay filed by Baron ("Baron Clarification Motion"). The Baron Clarification Motion sought a *nunc pro tunc* correction to the *Netsphere I* Court's statement at pp. 313-314 that the receivership assets were to be returned to Baron.[23] In response, this Court stated:

> Baron filed a motion to clarify who is to take custody of the receivership assets upon the dissolution of the receivership. The opinion stated that everything subject to the receivership other than cash "should be expeditiously returned to Baron under a schedule to be determined by the district court for winding up the receivership." Our utilization of a shorthand reference to Baron did not in any way affect the ownership of assets that were brought into the receivership. Assets are to be returned as appropriate to Baron or other entities that were subject to the receivership.[24]

The "shorthand" reference was limited to a specific instance in a specific portion of the opinion. It clarified only that specific property held by the

[21] ROA.26642.
[22] Receiver's p. 18.
[23] A true copy is attached to Appellants' Excerpts to Reply as Exhibit "A" and this Court is requested to take judicial notice thereof.
[24] ROA.26642.

Receivership was to be returned to its rightful owner. It did not globally re-define "Baron" to include "Appellants" or to specify that Appellants' property would be used to satisfy the claims of the Receiver. Such a global substitution would make a mockery of the opinion, leading to absurd results.

Appellees would improperly have this Court attribute an unheard of degree of carelessness to three professional brethren whose 'tools of the trade' are the written word.

ii. Reference to the 1.6 Million Does Not Imply Inclusion of Appellants.

Appellees next focus on the Court's reference to the $1.6 million, arguing without factual reference that it must have included property of Appellants and by referencing the amount, this Court mandated use of Appellants' assets.[25] Appellants respectfully assert that the $1.6 million reference was a factual error unsupported by the record and cannot support Receiver's interpretation that *Netsphere I* expressly or implicitly mandated the use of Appellants' assets to fund receivership fees.

First, the number remains unsubstantiated and is a material factual error. It originated from page 14 of Baron's November 26, 2012 "*Post Argument Emergency Motion For Stay*"[26]. It was attributed to SR v.19, p.398, a fee request by Dykema filed October 17, 2012, which used the

[25] Receiver's p.7, fn.7.
[26] Included as ROA.25191 et. seq. and filed in the District Court as a part of Doc 1093-3.

number without substantiation, stating:

> Therefore, the Receiver asks for authority to prioritize payment to Dykema and to immediately pay Dykema from the more than $1.6 million of Receivership cash on hand.[27]

Gardere admits the figure is wrong and argues it is not "law of the case".[28] Gardere's April 17, 2013 Fee Application (define), expressly admits the 1.6 million figure was "not accurate" and that the district court was "not bound by the Fifth Circuit's suggestion, based on a mere allegation and not a full evidentiary hearing…"[29]

Second, Receiver's argument is based upon a January 2013 inventory, which was obviously not available to this Court when it drafted the *Netsphere I* opinion in 2012.[30] Receiver's final NOTICE of *Receiver's Accounting Report of April 14, 2014* confirmed "Cash" on hand on December 18, 2012 was $4,106,015.08, including $1,761,509.59 belonging to Baron.[31] Gardere's Final Fee Application confirms that as of late 2012, the receivership did include over $1.6 million obtained solely from Mr. Baron.[32] The district court also confirmed that as of March 2, 2011, the receiver had identified accounts totally $3.9 million, "$3 million of which is attributable to Mr. Baron's individual accounts (the "Baron Funds") and approximately $900,000 of which is attributed to the

[27] ROA.25243.
[28] ROA.27501.
[29] ROA.27501.
[30] Receiver's p.7, fn. 7.
[31] SROA.1417, foot 8.
[32] See ROA.27501-27502

accounts in the names of Quantec LLC and Novo Point, LLC (the "LLC Funds").[33] As concerns cash, the court stated ""Additionally, it is reported that thus far the Receiver has gained access to 20 out of the 25 accounts containing the Baron Funds, totaling approximately $1.9 million."[34]

Finally, the $1.6 million appears at the conclusion of Section 1(C), all of which addressed the equitable fairness of assessing fees against Baron as a result of his culpability. Nowhere does the opinion reference any wrongdoing by Appellants and there was thus no logical basis in Section 1(C) upon which this Court could have intended that Appellant's property be used.

Given the above, it would be unwarranted to have the law of the case be determined by an unsubstantiated statement used in a post-briefing emergency motion. The emergency motion was filed solely to prevent the Receiver from undertaking the bulk sale of substantially all receivership assets – a sale that was ultimately precluded by this Court – while the *Netsphere I* appeal was pending. The reference lacked evidentiary support – in other words there is no indication of whose assets comprised the $1.6-million figure. Nor in the context of the Emergency Stay Motion was such specificity required given the exigent circumstances surrounding the motion and its limited purpose.

[33] ROA.5631-2. Consistent also with Receiver's Report of Work Performed in January 2011 (ROA.5171-5285).
[34] Id.

It is thus entirely possible that the reference to $1.6 million represented only the funds of Mr. Baron as of the date of the *Netsphere I* opinion.

The $1.6-million reference cannot be used to support an express or *necessarily implied* mandate that Appellants would remain the piggy bank.

b. **Law of the Case: Appellants Were Improperly Included to Fund the Receivership Because The District Court Lacked Subject Matter And Personal Jurisdiction**.

This Court found no evidence supporting the district court's concern that ''funds'' would be transferred outside of the court's jurisdiction"[35] and concluded it was "a concern grounded in the court's desire to fashion a remedy through a receivership to pay the claims of Baron's former attorneys."[36] This Court concluded that establishing a receivership to secure a pool of assets to pay Baron's former attorneys, all unsecured contract creditors, "was beyond the court's authority".[37] There was no support for disregarding the separate identities of Appellants.

That Appellants were not alter egos of Baron constitutes law of the case.

c. **Law of the Case: Appellants Derived No Benefit From The Receivership**.

[35] *Netsphere I,* p.308; ROA.4758-4762
[36] Id.
[37] Id.

This Court concluded that Baron realized no benefit from the receivership[38]. Given the reason Appellants were included, that they did not benefit is a necessary implication and thus law of the case.

d. **Law of The Case: Appellants Were Not Guilty Of Misconduct**.

The absence of a single reference to Appellants' culpability or improper conduct *necessarily implies* they were culpable in neither the creation nor continuation of the receivership. Nothing they did "resulted in more work and more fees for the receiver and his attorneys."[39]

2. Analysis of Facts and Law Decided in the *Netsphere 1* Case.

The law of the case cannot sustain a finding that Appellants assets be used to satisfy receivership claims. Argument to the contrary conflicts with controlling precedent, including *W.F. Potts Son & Co. v. Cochrane,* (*Potts II*)[40], none of which was overruled or properly distinguished by this Court.

a. Propriety of the Receivership.

The *Netsphere I* opinion first addressed the propriety of the Receivership Order in light of its stated purpose - securing payment of

[38] Id 313.
[39] Id. p. 313.
[40] 59 F.2d 375, 377–78 (5th Cir.1932).

Baron's attorneys' fees and controlling Baron's vexatious conduct[41]. Twice referring to the unsecured, non-judgment claims, the court found them asserted by "Baron's former attorneys" and unrelated to Appellants.[42] The Court concluded that precedent concerning the improper use of injunctions sequestering of property to "aid in a claim for a money judgment" were directly applicable to receiverships.[43]

This Court found subject matter jurisdiction wanting because Appellants "were never named parties" and thus not before the court.[44] Relying upon *Cochrane v. W.F. Potts Son & Co.* ("*Potts I*")[45] this Court found "equity does not allow a receivership to be imposed over property that was not the subject of the underlying dispute", and that "a court lacks subject matter jurisdiction to impose a receivership over property that is not the subject of an underlying claim or controversy."[46] This was entirely consistent with precedent as discussed herein.

In Section I(C), this Court, analyzed the use of a receivership to control Baron's alleged vexatious conduct, ultimately finding that the district court's use of receivership to control Baron's conduct was an abuse of discretion. Importantly, Section 1(C) contains no at all to Appellants.

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[41] *Netsphere I, at* 305-11
[42] *Netsphere I*, pp308, 310.
[43] Id, p 310.
[44] Id.
[45] *Cochrane v. W.F. Potts Son & Co*., 47 F.2d 1026, 1029 (5th Cir.1931) (*Potts I*).
[46] *Netsphere I,* p.310.

b. **Analysis of Potts**.

The Court addressed assessment of receivership fees in Section II, relying upon *Potts II* for the proposition that although Barron did not receive any benefit, "equity is the standard" in assessing costs for an improperly created receivership and "Baron's own actions resulted in more work".[47] Agaiun no reference was made to Appellants.

A careful analysis of *Potts II* reveals a fundamental flaw in the Court's description and application of the case, at least insofar as Appellants. In *Potts I*, the holders of series "E" corporate bonds, alleging issuance fraud, sought and obtained receivership over six series of corporate bonds, series A, B, C, D, E & F[48]. On appeal the *Potts I* court determined the receivership was invalid because the district court had no subject matter jurisdiction over the series A, B, C, D & F bonds; as with Appellants herein, they were not subject of the underlying complaint[49]. Following remand the district court held that all moneys dispersed except taxes should be assessed against Potts as the party having requested the receivership.[50]

Potts appealed arguing consequentially that the assessment of all costs against Potts was unfair at least as to those disbursements which clearly benefited the other bondholders or which represented funds that they

[47] *Netsphere I,* pp.313, 312.
[48] *Potts I,* supra, 47 F.2d at 1027.
[49] *Potts I,* supra, 47 F.2d at 1027-8, 1029.
[50] *Potts II,* supra 59 F.2d at 336, 337, consistent with precedent in cases lacking jurisdiction.

would otherwise have expended had the receivership not existed[51]. Potts likened his claim to one of restitution and unjust enrichment wherein those having received benefit based upon an improper order must restore what they have received.[52]

In *Potts II,* the appellate court began its analysis remarking that appellees had waited six months before undertaking any action[53]. Importantly, *Potts II* also noted appellees had waited over three years before complaining of expenditures and that during that period the receiver had expended substantial time and money for their benefit.[54] Specifically, the Court found *that during appellees' delay*, the receiver had paid taxes, repaired the property, and foreclosed on properties securing the bonds to generate liquidity.[55] The *Potts II* court concluded that appellees should not have the benefit of such expenses without making full allowance therefor.[56]

The *Potts II* court determined that equitable principles guided in cases in which a receivership is improperly imposed, by error of judgment though not intentional fault.

> Equity should be arrived at with the overruling purpose in mind to protect form loss an owner of the seized fund who has not so acquiesced in its administration as to make it equitable to charge the fund with its expenses; but since

[51] *Potts II*, supra, 59 F.2d at 336.
[52] *Id.*
[53] *Id.* p.378
[54] *Id.*
[55] *Id.*
[56] *Id.*

> protection and not advantage is the end desired, the plaintiff causing the receivership may not be charged with those disbursements which have inured to the benefit of the fund, or which, whether resulting in actual benefit or not to it, do not represent losses because the fund would have had to pay them if administered by the rightful owners[57].

The *Potts II* court reversed for error and remanded with direction that each trust within the receivership bear those expenses the court determined to have *inured to each trust's benefit* or which, regardless of benefit, the trust *would have had to undertake* had the receivership not existed[58]. The court also ordered inter-trust accounting for expenses and benefits incurred "with the end in view throughout that plaintiff [the provocateur] shall be ultimately held to pay to each trust the actual losses which, as the result of the receivership, it has sustained"[59]. By "losses" the court meant any receivership cost other than those directly benefiting the estates or which they would necessarily have expended absent the receivership.[60] The *ratio decidendi* of *Potts II* was that equity permitted the allocation based upon restitution and unjust enrichment arising entirely because of appellees' delays, allowing the receivership to continue without objection for their benefit. The remainder was borne by Potts as the provocateur. This *ratio decidendi* simply does not apply as to Appellants.

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[57] *Id.* p. 378.
[58] *Id.*
[59] *Id.*
[60] *Id. p. 379* – the language "leaving for the plaintiff to pay to each trust only the amount of its actual losses" makes mathematical sense only if representing the remainder following assessment of costs benefiting or inuring to the benefit of each estate. If not there would remain unallocated amounts.

c. Neither Equity nor Potts II Support Charging Appellant's Assets.

The *Netsphere 1* Court ruled, "equity does not allow a receivership to be imposed over property that was not the subject of the underlying dispute."[61] This being a correct statement of the law, it is also true that a district court may not employ equitable considerations to allow receivership expenditures to be charged against Appellants' assets. The absence of jurisdiction rendered the receivership void as to Appellants (not as noted below, merely an erroneously applied remedy as was the case concerning Baron)[62].

It is axiomatic that what is void cannot be reborn in equity.[63] Lack of subject matter jurisdiction is not waivable or curable by consent.[64] As to Appellants, the lack of equitable justification here was overshadowed by the lack of subject matter jurisdiction.[65]

In *Atlantic Trust Co. v. Chapman,*[66] the Supreme Court enunciated the fundamental principle of receivership law that a court is prohibited from using property of an entity not a party to the receivership or related lawsuit to pay a receiver's expenses. The Court said:

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[61] *Id.* at 306.
[62] Even if the district court retained jurisdiction to assess costs, the Fee Order is erroneous because the court failed to find direct benefit or identify fees that would have been incurred by Appellants in the absence of the receivership.
[63] *Lion Bonding & Surety Co. v. Karatz,* 262 U.S. 640, 641–42 (1923); *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc*., 527 US 308, 323 (1999) legal recovery right is required before applying equitable remedies; FRCP, Rule 18(b) requiring establishment of legal rights prior to application of equitable principles. *Netsphere I*, - no merger of law and equity.
[64] *Ruhrgas Ag v. Marathon Oil Co. et al*., 526 U. S. 574, 583 (1999). For the same reasons it cannot be resurrected as a result of "inequitable" conduct by the complaining party.
[65] *Netsphere I*, p. 310.
[66] *Atlantic Trust Co. v. Chapman*, 208 U.S. 360 (1908).

> If he [the receiver] has taken property into his custody under an irregular, unauthorized appointment, he must look for his compensation to the parties at whose instance he was appointed, and the same rule applies if the property of which he takes possession is determined to belong to persons who are not parties to the action, and is taken from his possession by paramount authority. As to such property his appointment as receiver was unauthorized and conferred upon him no right to charge it with any expenses.[67]

The teachings of *Atlantic Trust Co.* do not assist Appellees, particularly when the irregularity is the want of subject matter jurisdiction and those complaining were neither proper parties to the receivership nor culpable. There is nothing in *Atlantic Trust* opinion reference to the use of equity to support a charge the fund or Appellants' assets.

In such instances, controlling precedent requires that the party whose property was seized without jurisdiction to be made whole fully, and all of his property restored, even to the extent that a receiver and his professionals go unpaid.[68] The court must return the property to its rightful owner without any fees or expenses taxed to the property.[69] As this Court stated in *Potts I*, "courts may not seize property without jurisdiction and then claim jurisdiction over the property because it is in the possession of the court."[70]

d. **Connolly Does Not Support Appellees**.

[67] Id. at pp. 376–76.
[68] *Lion Bonding Co.*, supra 262 U. S. at 641–42; *Beach v. Macon Grocery Co.*, 125 F. 513, 515 (5th Cir. 1903).
[69] *Noxon Chem. Products Co. v. Leckie*, 39 F.2d 318, 321–22 (3rd Cir. 1930), *cert. denied*, 282 U.S. 841 (1930).
[70] *Potts I*, supra 47 F.2d at 1028 (5th Cir.1931); See: *Hawes v. First Nat'l Bank of Madison*, 229 F. 51, 59 (8th Cir. 1915).

Appellees raise *Commercial Nat'l Bank v. Connolly*[71] as an example, but the facts of *Connolly* do not support Appellee's contention that the Court intended *Connolly* to control as to Appellants. First, this Court's reference to *Connolly* applied as to Baron, not Appellants. Second, the *Connolly* receivership was jurisdictionally proper.[72] In *Connolly,* a receivership over "Old Bank" had been created for the benefit of its shareholders. Old Bank had been reorganized and certain assets spun off to New Bank in exchange for a contractual obligation that New Bank would liquidate specific assets and return the profits to Old Bank.[73] New Bank did not perform its contractual obligations and Old Bank was placed into receivership.[74] The New Bank shareholders challenged the lower court's order that fifty-percent of receivership expenses be taxed against them. The court also found that while the receiver had recovered benefits for the Old Bank shareholders beyond all expectations, in reality, it had done nothing but perform the unperformed contractual obligations originally undertaken by the New Bank.[75] The language of *Connolly* quoted by *Netsphere I* was predicated on the "ordinary" situation[76]. *Connolly* was certainly not ordinary and its decision confirmed a lower

[71] *Commercial Nat'l Bank v. Connolly*, 176 F.2d 1004 (5th Cir. 1949).
[72] Id. p. 1008.
[73] Id. p.1006-1008.
[74] Id. p.1009.
[75] Id. p.1009.
[76] *Netsphere I*, p. 312.

court's discretion in unusual cases[77]. Even so, *Connolly* did nothing but allocate costs based upon who actually provoked the receivership, assessing against New Bank an amount representing the costs they would have incurred had they actually performed the contract[78].

e. The Trustee Provoked The Receivership.

The *Netsphere 1* panel next cited *Porter v. Cooke*[79], with approval for the rule that "the parties whose property has been wrongfully seized are entitled, on equitable principles, to recover costs from those who have wrongfully provoked the receivership."[80] What *Netsphere I* omits is that the *Porter* receivership was jurisdictionally sound and the court directed costs be paid by the party who initiated the receivership[81].

The panel in *Netsphere 1* disregarded *Porter* concluding that because "[i]n this case, no party provoked the receivership," the predicate was not present and expenses could thus be assessed against the estates[82]. The conclusion that no party provoked the receivership is a plain error of fact and not law of the case.

First, "provoke" means merely "to cause to act or behave in a certain manner; incite or stimulate. Neither *Porter* nor any other authority defines "provoked" as requiring any intentional misconduct. The

[77] *Commercial Nat'l Bank v. Connolly*, supra 176 F.2d at 1009.
[78] Id. p.1010.
[79] *Porter v. Cooke*, 127 F.2d 853 (5th Cir.1942); citing with authority *Potts I, Potts II,* and *Sp*eakman.
[80] *Id*. at 859
[81] *Porter v. Cooke, supra* 127 F.2d at 859 (5th Cir.1942).
[82] *Netsphere I*, p.312

reference in *Porter* to "provoked" was used to indicate only that the defendant had in fact requested the institution of receivership based upon an "unfounded claim"[83].

Second, the district court expressly found to the contrary, stating: "the Court cannot avoid the fact that the Trustee promoted the idea of the receivership to this Court."[84] Judge Furgeson's conclusion is entirely supported by the Record which unequivocally establishes that Mr. Sherman as trustee for the Ondova Estate requested the receivership. It was thereafter continued in existence solely as a result of the ill-advised actions of the Trustee and Receiver and their counsel who, although unsuccessful in every appeal. They were nevertheless paid for doing so under the Fee Order.

On September 16, 2010, after the legal-counsel-payment issues became known, Baron complied with Judge Jernigan's order depositing $330,000 with the Ondova Trustee to be held to satisfy the attorney claims.[85] After days of show cause hearings, Judge Jernigan did not recommend receivership. Instead she issued an October 12, 2010 *Report and Recommendation to district court (Judge Royal Furgeson): That Peter Vogel, Special Master, Be Authorized and Directed to Mediate*

[83] *Porter v. Cooke, supra* 127 F.2d at 859 (5th Cir.1942);
[84] ROA.28148, lns. 4-5.
[85] ROA.1850.

Attorneys Fees Issues.[86] The Recommendation confirmed that the Trustee held the $330,000 in cash paid by Mr. Baron. On October 19, 2010, the district court adopted Judge Jernigan's Recommendation and ordered Mr. Vogel mediate the Attorney Claims.[87] At this stage, the claims of "Baron's former attorneys", who were "unsecured contract creditors", had been secured and further involvement was beyond the district court's authority.[88]

The Trustee confirmed that Baron had not breached the GSA[89] and the record shows no attorney substitutions.[90] There is no record to support that of the complained of activities were taking place.

The GSA contractually obligated the Trustee to file dismissal.[91] All parties, including the Trustee, executed comprehensive waivers[92] and the GSA limited remedies to injunction or specific monetary claims allowing recovery and attorneys' fees against the breaching party.[93] Good faith by a breaching party is not a defense to contractual liability.[94] Assessing

[86] ROA.1841-51.
[87] ROA.1026.
[88] Netsphere I p 308; citing *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).
[89] When asked under oath if Baron had breached the GSA prior to receivership, Sherman testified "maybe not" (ROA28324). Such a statement is rather shocking given Sherman recommended the receivership because of Baron's breach of the GSA and continuing to hire-and-fire attorneys.
[90] See Ondova Docket Sheet, ROA1841-51.
[91] GSA §10-ROA.2247; Section 10 states in pertinent part: "each of the Parties agrees, within two (2) business days after the Transfer Date, to execute and deliver to Munsch Hardt Kopf & Harr, P.C., in escrow for filing, and it shall promptly file, Agreed Orders of Dismissal and/or Joint Stipulations of Dismissal with Prejudice in the Texas Case, VI Case, Phonecards.com Case and Dallas Federal Case in the exact form attached hereto as Exhibits H, I, J, and K, respectively." The executed Stipulated Dismissal of this case was Exhibit I, ROA.2346-2347. Dismissals were filed in every other case.
[92] GSA, §15-ROA.2251-2253
[93] GSA §31-ROA.2259.
[94] Whether or not anyone acted maliciously or with other wrongful purpose in creating the receivership was not before the Court in *Netsphere 1;* no complaint or motion had been filed with the district court where such issues were ever arose and no applicable order or judgment was before this Court for consideration in *Netsphere 1*.

receivership costs against the Trustee would be no more than an application of *Connolly*.

As this Court recognized, the "jurisdiction 'being exercised' by the district court in this case prior to the receivership order was enforcing a settlement agreement" which would end the litigation.[95] At the time of Trustee's *ex parte* request, Baron and Appellants had complied with the GSA and neither had attempted to frustrate its purpose.[96] Even if the Trustee believed, notwithstanding the 5th Circuit September 2010 *Griffen* decision, and the long-standing precedent cited in *Netsphere I*, he was acting in good faith (that the receivership was somehow proper), such does not preclude the fact that the Trustee was in fact the provocateur.[97]

Appellants did not waive their rights by becoming subject to the Receivership Order. Their improper inclusion on December 10, 2010 was conditioned on the clear understanding that they were innocent third parties and that their funds would only be used to satisfy Appellant expenses.[98]

[95] Netsphere I, p. 307.
[96] See: Netsphere I, pp. 306, 307, 308.
[97] Any statement by appellees that judge Jernigan recommended the receivership is unsupported by the evidence in the record.
[98] ROA ROA4760; ROA.4826 "MR. JACKSON: Your Honor, again, part of the agreement is Quantec and Novo Point's money is Quantec and Novo Point's money to be used for their purposes and their purposes only, and our point in that agreement is they are separate and distinct from any of these other problems involving Mr. Baron. So our funds are to be used for the business purposes of Quantec and Novo Point only."

Given these incontrovertible facts, Appellants respectfully note that the conclusion that "no one provoked the receivership" was in plain error, unsupported by any record or *Porter*. It is therefor not law of the case.

f. *Palmer* Does Not Apply; *Porter* Does.

Supporting its adoption of *Potts II* as controlling, the *Netsphere 1* panel then stated that the Supreme Court had "a similar focus on equity", citing *Palmer v. Texas.*[99] In *Palmer,* a receivership was imposed over Waters-Pierce Company in Texas State court. Immediately after staying the Texas action by posting a bond, Palmer moved for receivership over the same company in federal court. Promoting federal jurisdiction, Waters-Pierce immediately waived service of the federal subpoena, confessed the averments of the bill. The federal receiver was immediately appointed and took possession.[100] Although having jurisdiction, the federal court's receivership was improper. Noting the state receivership costs had been assessed against Palmer, the court held that the costs of the federal receivership were properly charged against the "fund realized" from the Waters-Pierce's estate – logically as the party responsible for the federal receivership. *Palmer* does not support *Netsphere I* because the court in *Palmer* had jurisdiction and the Netsphere district court did not.

[99] Palmer v. Texas, 212 U.S. 118 (1909).
[100] Id. p.435-436.

Additionally, in *Lion Bonding & Surety Co. v. Karatz,*[101] a later case, the Supreme Court specifically ruled that the holding in *Palmer* did not apply where the trial court lacked the jurisdiction to impose the receivership.[102] The Supreme Court's teachings in *Lion Bonding is that Palmer* is limited to cases where courts had jurisdiction whereas Lion Bonding applies where jurisdiction is lacking.

Very early on, the Supreme Court enunciated the oft repeated fundamental principles that jurisdiction is required to "exercise any judicial power,"[103] and that a "court, not having jurisdiction of the *res*, cannot affect it by its decree."[104] Appellants have found no U.S. Supreme court case that assessed receivership fees against a party over whom the court lacked subject matter jurisdiction. *Connolly, Palmer and Lion Bonding* are consistent with its long-standing, unwavering precedent of the Supreme Court and of this Court - that a federal court that lacks subject matter jurisdiction lacks the power to award costs against the party over which it had no jurisdiction.[105]

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[101] 262 U.S. 640, 641–42 (1923); *Lion* is not a bankruptcy case.
[102] Id. at 642.
[103] *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). *See also, Reynolds v. Stockton, 140 U.S. 254, 268-9 (1891),* For a more recent case, *see United States Catholic Conference v. Abortion Rights Mobilization, Inc*., 487 U.S. 72, 76-7 (1988), where the Supreme Court stated: "The challenge in this case goes to the subject matter jurisdiction of the court and hence its power to issue the order.… [this] is not a mere nicety of legal metaphysics. It rests instead on the central principle of a free society that courts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power."
[104] *Fall v. Eastin*, 215 U.S. 1, 11 (1909).
[105] *Smyth v. Asphalt Belt Ry*., 267 U.S. 326, 330 (1925); *Citizens Bank v. Cannon*, 164 U.S. 319, 324, (1896); *United States v. Jardine,* 81 F.2d 747, 747-8 (5th Cir. 1936).

This Court's decision in *Speakman v. Bryan*[106] is a good example of the jurisdictional distinction. The *Speakman* Court was addressing the competing rights of the federal court and state courts to tax receivership costs[107] framing the issue as:

> ***IF*** *the question here were as to the right and duty of the court having jurisdiction* of it to charge against the property or funds accrued from property, in its hands, expenses incurred by a receiver which have inured to the benefit of the property, or have created the funds in his hands, we should have no hesitation in affirming that the right exists. *That is, however, not at all the question here*.[108]

The Court did not dictate fees be paid but only that the issue of federal receivership fees was one for the State Court to determine as the sole court having jurisdiction. The necessary predicate "if" was made abundantly clear when the *Speakman* court continued:

> We think it cannot be doubted as established that, ***except*** where the court appointing the receiver is entirely wanting in jurisdiction as a court (Lion Bonding Co. v. Karatz, 262 U.S. 640, 43 S. Ct. 641, 67 L. Ed. 1151) the costs, expenses, and disbursements incurred by a receiver whose appointment was improvidently made, or who has taken wrongful possession of property, will, upon equitable principles, be charged by the court of jurisdiction against the property to the extent that they have inured to its benefit. State of Missouri v. Angle (C.C.A.) 236 F. 644; *Palmer v. State of Texas*, 212 U.S. 118, 29 S. Ct. 230, 53 L. Ed. 435; Burnrite Coal Co. v. Riggs, 274 U.S. 208, 47 S. Ct. 578, 71 L. Ed. 1002; In Re Zier Co. (D.C.) 127 F. 399; Id. (C.C.A.) 142 F. 102; W.F. Potts Son Co. v. Cochrane (C.C.A.) 59 F.2d 375.[109]

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[106] *Speakman v. Bryan*, 61 F.2d 430 (5th Cir. 1932); *see also Tucker v. Baker*, 214 F.2d 617, 632 (5th Cir. 1954).
[107] In a prior decision this Court had already found the federal court without jurisdiction due to the earlier created State court receivership. See: *Bryan v. Speakman*, 51 F.2d 463 (5th Cir. 1931).
[108] Id. at p. 431. Emphasis added.
[109] *Id*. Emphasis added.

The predicate "IF" was present neither in *Speakman* nor *Netsphere I*. *Speakman* offers no shelter for Appellees because in the case at bar the district court was "entirely wanting of jurisdiction"; the district court was without any authority to tax fees to Appellants.

Appellees confuse the cases in which receivership though jurisdictionally sound was otherwise improper (resulting in fees being assessed against the fund or allocated among the parties),[110] with those in which the receivership lacked jurisdictional foundation (resulting in no fees assessed and the non-parties property returned)[111]. As to Appellants, it is the later line of cases that apply.

This Court was well aware of this distinction in *Netsphere I* when it quickly resolved the jurisdictional issues as to Appellants while thereafter continuing to address the equitable issues without a single reference to Appellants. Post-remand the district court well aware that it did not have subject matter jurisdiction over Appellants because it consistently referred to the lack thereof in its orders, including those of February 28, 2014 and March 11, 2014.[112]

g. Proper Application of Potts II.

[110] e.g. *Commercial Nat'l Bank v. Connolly*.
[111] E.g. *Atlantic Trust v. Chapman* and *Potts I*.
[112] ROA.29349–60 and ROA.29414–17; the district court should not have it both ways; lacking subject matter jurisdiction, it should not be permitted to charge Receivership expenses based upon "equity" but then ignore such principles and rely upon the lack of subject matter jurisdiction by refusing to conduct hearings to ensure that Appellants' assets were delivered to a person with authority; hearings which were urged by the Receiver

Thus given the *Netsphere 1* Panel's conclusion that the district court lacked subject matter jurisdiction over Appellants, and recognizing that they were neither culpable nor dilatory in objecting to the receivership, reliance on *Palmer* as approval to assess receivership fees against the estate was error.

Potts II stands for the proposition that, even when culpably having contributed to the costs of the receivership (in *Potts II* by not timely objecting), equity is correctly applied by limiting any assessment of costs against the fund to those representing a direct benefit or which, regardless of benefit, the fund would have expended in absence of the receivership.[113]

Potts II does not support wholesale assessment against those lacking culpability. If it did, it would contravene this Court's prior decisions, including *Beach v. Macon Grocery Co.*[114] and *Speakman* and the U.S. Supreme Court, including *Lion Bonding* and *Atlantic Trust*, all of which direct that in a receivership where jurisdiction is lacking, the innocent party is entitled to the full return of its property and that, in the absence of recovery from the party who initiated the receivership, the receiver's fees and costs go unpaid[115]. Neither *Potts II* nor *Netsphere I* expressed or implied they were overturning or changing precedent. Thus, neither case

[113] *Id*.
[114] *Beach v. Macon Grocery Co., 1*25 F. 513, 517 (5th Cir. 1903).
[115] A receiver is not obligated to accept appointment and does so at risk; he may decline or require a bond from the invoking party. *Beach v. Macon Grocery Co*., 125 F. 513, 517 (5th Cir. 1903).

may be applied so as to conflict with the decisions of the Supreme Court or prior Circuit decisions.

If *Potts II* has application to Appellants, it is to ensure judicial economy in cases where the estate being charged with receivership fees acted culpably. In such instances assessment of the costs permitted in *Potts II* serves only to preclude the need for the receiver to bring a separate claim for restitution and unjust enrichment, allowing recovery for *only* the *direct benefit* Appellants obtained notwithstanding the impropriety of the receivership and crediting those costs Appellants would "*would have had to pay*" in absence of the receivership.[116] This necessitates placing the burden of proof as to establish culpability, restitution and unjust enrichment upon those seeking reclamation from Appellants' assets.[117] However, Appellees made no such showing in their fee applications and the district court made no such findings in the Fee Order.

It is important to note that *Potts II* leaves the receiver and his professionals with a remedy: pursue the payment of such unreimbursed fees, expenses and charges from Sherman, Trustee, his attorneys or any other party who caused the institution of the receivership.

However, regardless of whether one considers *Potts II* to have been correctly decided, nothing in *Potts II* supports the conclusion in

[116] Left unanswered is whether Potts II applies in the absence of fault.
[117] Gardere's fee application incorrectly placed the burden upon Baron. ROA.27494.

Netsphere I to penalize the innocent Appellants with assessment, particularly those beyond which directly benefited them Appellants or which, regardless of benefit, they necessarily would have expended absent the receivership. The necessary predicate for Appellees' argument - "that, to a large extent, Baron's own actions resulted in more work and more fees for the receiver and his attorneys"[118] - simply does not apply to Appellants or justify assessment of their assets.

The contrary means that the *Netsphere I* Court eviscerated *Potts II, Atlantic Trust, Speakman, Connolly, Lion Bonding*, (and others) and created a new rule requiring that an innocent party subjected to a receivership completely wanting of jurisdictional foundation, and who received no direct benefit, must still bear the costs of the receivership without regard to whether it would have expended any of the amounts in absence of the receivership. Respectfully, there is no support for such a rule. As to Appellants, the provision of a "meaningful discount" could not substitute for the rule of precedent, and even if it could, it was not applied as to reach a result justified as to Appellants given the guidance of *Potts II*.

The district court committed legal error to charge the estates of Novo Point and Quantec as set out in the Fee Order.[119]

[118] *Netsphere 1,* at 313.

[119] Novo Point and Quantec are hereinafter jointly referred to as the "Appellants".

3. The District Court had No Authority to Award Fees As Against Appellants' Assets and Even if Authorized Did so Improperly.

a. The Fee Orders Have Been Properly Challenged.

Appellants challenged the award of fees on four grounds:

- they were not authorized as to Appellants[120];
- the district court failed to review all fee requests;
- in those reviewed the district court acted improperly and misapplied the law and the equitable mandate of *Netsphere I;* and
- the district court failed to properly apply the equitable guidelines of Netsphere I and the cases cited therein, including Potts II.

With respect to Baron, the *Netsphere I* Court held: "Fees already paid were calculated on the basis that the receivership was proper. Therefore, the amount of all fees and expenses must be reconsidered by the district court."[121]

The district court was not presented with and thus did not review all prior fee requests.[122] For example, in addition, the Receiver's Final Fee Application covered the Receiver's fees and expenses, the fees and

[120] See §1 (Law of the Case).
[121] Netsphere I, p.313.

[122] ROA.28124-26169.

expenses of 13 law firms outside of Texas, and the fees and expenses of the following additional professionals: Thomas Jackson, Joshua Cox, James Eckels, Jeffrey Harbin, Gary Lyon, Grant Thornton, LLP, Martin Thomas, Damon Nelson and Matt Morris. These additional fees and expenses represented at least $700,000 previously paid out of the receivership estate[123] and approved without regard to jurisdictional issues or review of factors made relevant under *Johnson* or *Potts II*.[124]

In those fees it did review, the court described its obligation as only a 2-step process: "[the Johnson] analysis controls the initial inquiry, but after determining what fees were reasonable in general, the Court must then discount meaningfully those fees to account for the fact that this Receivership was improper."[125] This was not the correct standard as to Appellants. And, as noted, the district court failed to properly apply even its espoused standard.

Appellees' had the burden of proof and were required to provide specific detail supporting the fee applications. Such necessitated specific entries sufficiently detailed so the court and opposition could determine (a) whether the specific charge was a fee otherwise recoverable in a receivership action (e.g. precluding costs of preparing fee requests and

[123] ROA.27513. Gary Lyon is one of the attorneys whose unsecured claims were cited as a reason for the receivership. Notwithstanding obvious conflict, Receiver nevertheless retained him in February 2011 as a "consultant". ROA.5163.
[124] Nor were any many other receivership expenses reviewed. The April 2014, "accounting" by Receiver did not segregate or tally such fees and expenses, totaling over $11,000,000, nor comply with *Potts II*.
[125] ROA.28149.

defending the receivership, improper or duplicative work) and (b) as to those fees otherwise proper, determine the estate for which the services had been performed, the direct benefit obtained by the estate therefrom and whether Appellants would have expended the amount in the receivership's absence.

The nature of the evidence submitted precluded the district court from making the required findings. None of the fee applications provided the district court with sufficient information upon which to determine the appropriateness of the underlying fee to be assessed even under applicable precedent, including *Potts II*. There was no segregation, fees were improperly included, invoices were summarized or consisted of block billing, and any summarized description in the applications did not provide reference to supporting evidence or show any relation thereto.

The Twisted assertions of culpability by "Baron and his entities" cannot substitute for specificity.

b. Culpability by Receiver is Not the Standard.

Receiver acknowledges that a party having sought an improper receivership is accountable[126]. The Receiver caveats this statement by the phrase "at times". As discussed, the "times" estate have been limited to instances in which the receivership was not completely lacking of

[126] Receiver, p.45.

jurisdiction. Receiver's reliance on *Connolly*[127] is unavailing because *Connolly* involved a receivership as to which jurisdiction was proper. Cases assessing receivership fees where jurisdiction was proper are inapplicable. Lacking culpability, Appellants do not even fit within the exception recognized by *Potts II.*[128]

c. There Was No Segregation by Estate

Appellees' argument that they were not required to account separately for each estate is incorrect. Appellees may not rest on past practices or failure to previously object; *Netsphere I* vacated the Receivership Order(s) and mandated a review of all prior fees.[129] Appellees were on notice of the need to segregate and originally did segregate.[130] *Bank of Commerce Trust Co. v. Hood*[131] and *Potts II*[132] both mandated segregation.[133] In *Bank of Commerce,* the logic was supported by the fact that the estate included both mortgaged and unsecured property. In *Netsphere I,* Baron's property was subject to asserted claims; Appellants were not and consisted of separately operating businesses. In *Potts II,* segregation was supported by the need to assess direct benefit and whether expenses would otherwise have been

[127] 176 F.2d 1004, 1009 (5th Cir. 1949).
[128] See discussion, Section 2.
[129] Netsphere I, p. 311, 313
[130] ROA.4820-4821; ROA.4826.
[131] *Bank of Commerce Trust Co. v. Hood, 65 F.2d 281 (5th Cir. 1993);*
[132] *Potts II, supra* 65 F.2d at 283-4 (5th Cir. 1933); see discussion, Section 2.
[133] The court's reference to losses reflected any non-allocable expense.

necessary. *Netsphere I* does not support a derivation from their rule or logic.

d. The Fee Order Did Not Properly Determine Benefit to Any Estate.

Gardere asserts the court found Gardere's fees benefited the estate even though it had no obligation to do so.[134] However, its summary is unsupported by any evidence[135]; adoption required the court to accept the summarized statement which contained no detail and which did not specify the time or fees attributed to any summarized activity.

Gardere's summaries describing "benefit" contradicted other assertions – e.g. admissions that "much of Gardere's time" was spent defending the receivership or dealing with Baron's attorney claims[136]. They also included work for "court-ordered domain name sales", hardly a benefit to Appellants – who regularly objected.

No justification was provided for using attorneys for such work as opposed to lower-cost personnel. "An attorney may not be compensated for tasks which are properly the responsibility of the trustee or receiver, and may not be compensated at a rate applicable to legal work for tasks which properly could have been performed by less costly non-legal

[134] Gardere, pp.43-46.
[135] ROA.27502-27505.
[136] ROA.27495.

employees."[137] No evidence was provided showing that Appellants would have otherwise incurred theses unspecified costs.

Appellees' applications cannot stand in the place of evidence required for the record. The district court's conclusive statements of benefit are insufficient to justify the amounts set out in the Fee Order.

e. Costs of Defending the Improper Receivership are Not Recoverable.

Appellees mistakenly assert costs incurred in unsuccessfully defending the receivership were properly charged and criticize Appellants the use of *U.S v. Larchwood Gardens, Inc.*[138] and *In re Marcuse & Co.*[139] as out-of-circuit opinions. The inescapable logic of *US v. Larchwood* applies to defense costs and those incurred in preparing or defending fee applications[140].

> If appellees' position were adopted, these appellants, as the 'owners' of the receivership assets, would be burdened with both their own expenses and those of their 'unsuccessful' opponent[141].

Both are consistent with the U.S. Supreme Court case of *Hardt v. Reliance Standard Life Ins. Co.* holding that each party must bear their own attorneys fees absent express statutory authorization to the contrary[142]. The prohibition applies without regard to whether the

[137] *Matter of U.S. Golf Co.,* 639 F.2d 1197, 12010-1202 (5th Cir. 1981).
[138] *U.S v. Larchwood Gardens, Inc*., 420 F.2d 531 (3rd Cir. 1970).
[139] In re Marcuse & Co., 11 F.2d 513, 516 (7th Cir. 1926).
[140] Both allowed by the Fee Order. ROA.28151-28152.
[141] *United States v. Larchwood Gardens, Inc.*, supra 420 F.2d 534.
[142] *Hardt v. Reliance Standard Life Ins. Co*., 560 U.S. 242, 252-253 (2010).

receiver was duty-bound or successful.[143] Such double billing would chill the legitimate right to question the receivership, making it virtually impossible to challenge an improper receivership. Charging the estates with defense fees and fees to prepare or defend fee requests would constitute fee-shifting, unsupported by any statute or case authority. It would contradict the fundamental holding in *Potts II* approving only those expenses the estates would have otherwise incurred in absence of the receivership or which resulted in a direct benefit to the estate.

Both *Larchwood* and *Marcuse* are consistent with *Speakman* – defending an improper receivership certainly derives no benefit for the estate and *Potts II* - allowing only costs directly benefiting the estate.

The Fee Order stated Receiver had no duty to defend the receivership and references the many appeals and motions to stay raised by Baron but justifies the award of defense costs to Gardere stating that Gardere had a duty under the Receivership Order to defend appeals, particularly those in which it was named as appellee[144]. This rationale is inconsistent with the authority noted above. Nothing in *Potts II* would support charging the estate with the costs of repeatedly defending an improper receivership.

[143] Id; - "We do not think the choice between these policies should be dictated by the outcome of the appellate proceedings."
[144] ROA.28152.

Receiver argues *Arco, LLC v. Jordan et al*[145] is inapplicable because the ASARCO Court allowed fees for defense where "an adverse party has acted in bad faith, vexatiously, wantonly or for oppressive reasons".[146] The only post-receivership-finding this Court made was that Baron's purportedly "resulted in more work and more fees for the receiver and his attorneys."[147] There was no such finding as against Appellants.

The fee applications and Fee Order dedicate pages describing Baron's conduct, almost all of which was pre-receivership and little of which acknowledged his success. Neither attributes waste or complicit behavior to Appellants.[148] Nowhere did the district court consider the inequities of assessing such substantial costs against Appellants, who innocent parties dragged into the receivership as a mechanism for funding unsecured claims, which were not reduced to judgment and over which claims the court had no jurisdiction.[149]

Baron is criticized for not sitting back and allowing the receivership to proceed, being content in the end with whatever may be left. Appellants are now criticized for not doing the opposite. Had they chosen the path of non-opposition they would have both subject to a waiver

[145] *Arco, LLC v. Jordan et al*, 751 F.3.d 291, 301 (5th Cir. 2014).
[146] Receiver's Brief, p.46.
[147] Netsphere I, p.213.
[148] ROA.27479-51.
[149] *Griffen v. Lee*, supra 621 F.3d at 390 (5th Cir. September 2010); *Griffen* was cited to the court during the January 4, 2011 hearing and its clear ruling dictated that pendent attorney claims must be remanded to state courts (ROA.30157).

claim and run afoul of the criticism noted in *Potts II*[150]. Appellees are playing "Catch-22". Any real chaos resulted from the improper receivership, its draconian measures and Receivers continued attempts to defend it. Assigning fault to Appellants for mounting successful appeals and challenges is akin to fee-shifting. Charging Appellants for the failure of the Receiver and his counsel runs counter to established precedent and the "American Rule".

f. The Fee Invoices Lacked Sufficient Detail to Permit Proper Assessment.

Receiver's fees consisted almost entirely of block billing in which identical text was used for each entry and examples were provided[151]. Even if not expressly precluded, block billing made assessment impossible under *Potts II*, let alone *Johnson* and provided no basis from which any meaningful discount could be made. The district court nevertheless improperly awarded 70% of the fees.

Receiver attempts to overcome the lack of specificity by improperly incorporating Appellants into the "equitable" considerations undertaken by the district court in issuing the Fee Order – none of which relate to Appellants.[152] There is nothing in the *Netsphere I* opinion or the December 31, 2012 Clarification Order that expressly or implicitly

[150] Gardere argued this point at ROA.27494-27499 claiming, among other things they had no notice there would be objection to their fees (ROA.27494).
[151] ROA27576-27756. The district court noted this at ROA.28160.
[152] E.g, Receiver states: "Appellants contest the District Court's recognition of Baron and his entities as 'vexatious' litigants…" and "[t]his Court's opinion in *Netsphere I* repeatedly acknowledged the clear record of vexatious conduct by Baron and his entities." Receiver's Brief, p.53.

acknowledges any culpable conduct by Appellants. It is entirely inappropriate for Receiver to falsely mislead this Court in this manner.

Contrary to Receiver's claims, the receivership was not sophisticated and complex. The Record establishes that the receivership dealt solely with (a) domain name assets held by Appellants – all of which were held at two registrars, (b) revenues from domain names – all of which was generated by a single source – Domain Holdings, and, (c) Mr. Baron's personal assets, consisting largely of investment accounts as to which the Receiver made no investment decisions or claims to liquidate. Aside from domain name renewals (which are monthly), expenses were largely limited to accounting and defending the receivership and the actions of the Receiver.

Receiver made no attempt to separately account for or manage the various receivership estates and did not even file tax returns based upon the income Appellants' assets generated, leaving Appellants at risk for substantial penalties.[153] Complexity stemmed from the very creation of the receivership – as to which Receiver insisted all records and property of operating businesses be transferred to a law firm for management - and the continued attempts of the Receiver to prolong it over the strenuous and continued objection.

[153] Arguments that no returns could be filed because "all" of the income was unknown would be news to the IRS. Although Receiver obtained an order of the court permitting him not to file Appellants returns it was founded on the supposed refusal of Baron to provide prior tax returns (ROA.21411-12). Given his authority, Receiver could have easily obtained the historical returns directly from the IRS and had a financial statement prepared. ROA.21086-21104.

Gardere improperly focuses on the word "block billing" ignoring that block billing is simply a subset of providing insufficient detail as addressed above. Gardere admits to block billing but, relying on non-binding case law, argues that the practice is not prohibited and was in any event *de-minimis,* thereby justifying forgiveness. Although Gardere's application attempted to summarize the nature of work performed, the summary could not support the court's ultimate finding that 80% of the total fees were correctly charged. The summaries provided no information as to the fees attributable to any summarized item and the summarized items were themselves inconsistent.

Dykema's application suffered from the same deficiencies. Any summary did not link the factors to any work performed or even the general amount of fees. That fees had been previously "earmarked" is no justification given the mandate of *Netsphere I*.

The remaining fee applications and disbursements, to the Trustee, suffered from the same defects noted herein and specific examples would be duplicative.

Appellants addressed the lack of specificity and both *Kearney v. Auto-Owners Insurance*[154] and *Seastrunk v. Darwell Integrated Technology, Inc.*[155] are directly applicable. Here the estates constituted

[154] 713 F.Supp.2d 1369 (M.D.FL 2010).
[155] No.3:05-cv-0531, 2009 WL 2705511 (N.D.TX. Aug. 27, 2009).

separate parties and the basis for the receivership as against each constituted separate claims.

Walker v. HUD[156] is not inapposite. In *Walker* the court held that the moving party is charged with the burden of showing the reasonableness of the hours they bill and the exercise of billing judgment and that the submission must distinguish work which is purely legal and non-duplicative from that which is not. Appellees did not comply with the standard.

g. No Meaningful Discounting Was Undertaken.

Even if otherwise proper, the district court failed to incorporate a meaningful discount. "Meaningful" is defined as full of meaning, significance, purpose, or value; purposeful; significant."[157] The district court only discounted Gardere's fees by 7%, leaving the rest un-touched by the *Netsphere I* decision. This is not "meaningful"

Receiver's fees were not discounted at all. Any reduction was wholly attributed to his lack of specificity "making it difficult to determine exactly what work was done when".[158]

Gardere's fees were discounted by only 7%. Although Gardere argues it suffered a 27% discount because the district court awarded only 73% of its fees, Gardere that 20% of that was a reduction was to

[156] *Walker v.* United *States Department of Housing and Urban Development, 99 F.3d 761 (5th Cir. 1996),* approving *Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir.1987) – failure to provide specificity and distinguishing between purely legal and monitoring work.
[157] Random House Dictionary, © Random House, Inc. 2014.
[158] ROA.28160.

eliminate fees considered to be duplicative or unnecessary.[159] Seven percent is not a meaningful amount considering the impropriety of the receivership (and the substantial amount of the fees they wasted defending it) or the guiding principles of *Potts II*.

Dykema's fees were not discounted at all. The reduction (4%) was attributed to other reasons, including:

- The reduction of the 1,153,247 billed from July 6 through December 18 2012 was discounted a paltry 2% without stated reason.
- The reduction of the $392,811 billed between December 18, 2012 and April 2013 was reduced "to account for billing hours that would have been reduced to some extend given that the Receivership had been found to be improper and to account for the fees incurred solely defending Dykema's own interests as relates to their fees,"
- The $82,095 billed for April 2013 was discounted because "the majority of the work during this period was in an attempt to reach a global settlement in this case."[160]
- The District Court's Award of Fees to the Ondova Trustee.

The Trustee's fees were not discounted at all. The district court

[159] . ROA.28154.
[160] ROA.28165-28166.

allowed the Trustee to retain all fees previously paid. The refusal to pay new fees due to lack of legal entitlement.

All other previous fees were neither reviewed nor discounted in the Fee Order.

h. The District Court Improperly Awarded Fees to the Ondova Trustee.

Refusal to pay new fees It is undisputed that the district court found that the Trustee was not a Receivership Professional, that "the Fifth Circuit's directive and equity considerations prohibit payment of additional fees to the Trustee" and was not entitled to recovery under a quantum merit.[161] The court concluded that "the Court may not reimburse the Trustee for fees incurred."[162] However, the district court then erred by ignoring the *Johnson* factors (and *Potts II*) and "awarding" retention of prior fees based upon "equity" even though the trustee "promoted the idea of the receivership" to the court.[163]

i. Disgorgement Was Anticipated in the Mandate.

The district court erred in not ordering disgorgement. This Court's Mandate clearly obligated the Court to review ALL fee requests in light of its opinion. A review would have no meaning if not presuming the possibility of disgorgement. It was improper for the district court to use the equitable principles of *Netsphere I* to deny a current fee request and

[161] ROA.28140-28146.
[162] ROA.28147.
[163] ROA.28148

then turn those same equitable principles on their head to preclude disgorgement.

As to Trustee, There is no need to remand this issue for further consideration. It is sufficient for this Court to merely find the failure to order disgorgement. improper.

4. Issues of Waiver.

Re-hashing its Motion to Dismiss, Gardere relies entirely upon *dicta* in *Searcy v. Philips Elec. N. Am. Corp*[164] incorrectly arguing waiver because Appellants did not participate in the trial court, equity precludes standing, and the non-party exception is inapplicable. apply. [165]

a. Appellants Sufficiently Participated.

Appellants have shown "significant involvement with the judgment." Appellants' August 13, 2009 request to intervene was denied August 18, 2009[166] and all orders remained in place.[167] Although not parties to the Ondova, Appellants actively participated in settlement, signed the "GSA" and performed all their obligations thereunder.[168]

Appellants were taken off-guard by the Trustee's exparte receivership application; the Bankruptcy Court had recommended

[164] Gardere Motion, Doc 0051224150, p. 5; citing *Searcy v. Philips Elec. N. Am. Corp*., 117 F.3d 154, 157 (5th Cir. 1997).
[165] The ruling determined a statutory right per 31 USC §3730(b)(1), *Searcy*, p.160; See Appellants' Opposition to Motion to Dismiss, Doc. 00512745631, incorporated by reference.
[166] ROA.846; original order was vacated and stayed indefinitely – an effective denial.
[167] ROA.26647, 28134.
[168] ROA.1681; *Netsphere I* p.307.

mediation of the only open issue – payment of Mr. Baron's attorneys. Appellants raised objections. In resolving the district court's December 17, 2010 "Clarification Order", Appellants merely agreed that the Receiver's Order included them by reference.[169] They claimed to be innocent third parties, stated their understanding that Appellants' assets would only be used for Appellant matters, and successfully appealed, resulting in the Order being declared void for want of subject matter jurisdiction.[170] The district court then entered an order stating that Appellants had "always" been included.

There was no "consent" to being included or to the use of their assets for purposes unrelated to Appellants. The district court, Receiver and its counsel were on notice as of December 2010 that Appellants' objected to the use of their property for matters not related to their operations.[171] Objections were filed but quickly quashed. Although the Record reflects Receiver began by treating each estate separately, including payment of Cox only using LLC funds,[172] this ceased after Mr. Cox became subsumed as a receivership employee exclusively subject to Receiver's instruction[173]. Appellants' property and records were confiscated.[174] They were

[169] *Netsphere I*; ROA.4760; 4820-4821; ROA.4826.
[170] ROA.4826.
[171] ROA3766.67, 3768-3769. Objecting to the use of Appellants funds for non-Appellant purposes.
[172] ROA.30135-30136, lns. 14-19, 20-21; see: *Bank of Commerce & Trust Co. v. Hood, 65 F.2d 281, 283-4 (5th Cir. 1933)*. Where as here a receiver holds multiple estates in a single receivership, the separate estates must be separately managed and fees must be charged against each estate as if separate receivers had been appointed for each.
[173] ROA.3443, 1032–60, 1135–48.
[174] ROA1168-71.

prohibited by court order from engaging independent counsel or otherwise attending to their corporal affairs;[175] Receiver "became" sole owner, director and CEO. The district court disregarded documents if not filed by Cox.[176] There was no one left to object.

Netsphere I did little to alter the district court's caustic attitude towards counsel attempting for Mr. Baron or Appellants. A contempt hearing was brought against Baron's counsel.[177] Attempts by counsel to appear for Appellants in the Ondova Bankruptcy were met with orders to show cause re contempt leading Mr. Schepps to becoming so disjointed he claimed the 5th amendment. The Receiver went out of its way to supply the district court with Judge Jernigan's May 4, 2012 letter[178] prohibiting *any* counsel (other than Receiver's counsel Cox/Jackson) to appear for Appellants absent "live" testimony from the Village Trust. (ROA.21494). Everyone knew Appellants had no assets and could not sustain the cost of paying the Trust's counsel to travel internationally and appear. As corporal bodies they could not appear *in pro per.*[179]

A February 17, 2011 transcript exemplifies the extent of Receiver's openness to any other counsel being retained:[180]

> MR. VOGEL: Fine. But what I'm telling you is we're not hiring any new lawyers.

[175] ROA.28371, 1291, 29254-29257.
[176] ROA.30433
[177] For activities occurring prior to this Court's December 31, 2012 Clarification Order.
[178] ROA.27490.
[179] Baron's request for fees to pay counsel and conduct discovery were denied. ROA.28124–69.
[180] ROA29263, lns 5-10.

> MR. SCHEPPS: Well, the judge said we could request one.
> MR. VOGEL: Fine. You requested. Request denied. Now let's move on.

Barron's insistence upon counsel and continued formal objections are regularly were cited as examples of vexatious behavior by Appellees and the district court[181]. There is every reason to presume that Appellant would have been similarly branded had they made continued requests.

Appellants nevertheless successfully appealed in *Netsphere I. However*, all prior district court orders remained in effect;[182] obviously including the prohibition of counsel retention.[183]

b. Equity Favors an Opportunity to be Heard.

Appellants promptly and successfully appealed the Receiver Orders and others and ultimately prevailed on their many attempts to block Receiver's conducting a fire sale of their assets to an undisclosed third parties.[184]

Appellants did not waive their rights by not appealing the district court's denial of intervention. The order was not appealable;[185] Appellees forget that "technically" the Receivership Orders specified that Receiver was supposed to adequately represent the interests of Appellants rendering any intervention as permissive.

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[181] *Netsphere I*, p. 313; e.g. ROA.27479-27510; ROA.27511-27756. Baron's attempts to act as a voice for Appellants were met with objections that he lacked standing and summarily denied by the district court - ROA.29396; ROA.29349-60, ROA.29414-17
[182] The Receivership was not immediately dissolved following *Netsphere I* (ROA.26366).
[183] Appellants' Opening Brief and authority cited therein, ROA.7071.
[184] *Netsphere I, 313.*
[185] It was "effectively" denied by being granted, vacated and indefinitely stayed; see: *J.B. Stringfellow v. Concerned Neighbors In Action*, 480 U.S. 370, 377 (1987).

Claims that Appellants had Payne independent counsel is a gross misrepresentation. Mr. Payne did not appear for Appellants until August 12, 2013.[186] The district court was aware that Mr. Schepps was unqualified as litigation counsel but forced him to remain nonetheless.[187] Cox was employed by Receiver and not independent as shown by the minimal work he performed.

Gardere's misrepresentation that "there was nothing to indicate that counsel for Novo Point and Quantec failed or otherwise refused to carry out instructions by Novo Point and Quantec".[188] Only Receiver was authorized to give instructions concerning Appellants.[189] There is nothing in the Record supporting a contention that the Receiver's exclusive control over Appellants had come to an end or that Appellants were free to act independently; they certainly had no financial ability to do so[190].

c. The Non-Party Exception Applies.

Appellants participated as actively as realistically permitted and did not lose[191]. There is a real and substantial risk that Appellants "interests will not be adequately protected by the parties" to the action. Conflict exists in the impermissible use of Appellants' assets to satisfy fees - most of which were had no relationship to Appellants or the reason they were included in

[186] ROA28362.
[187] ROA30145; Schepps clarified he was retained by Appellants for the appeal (ROA.30431(ln.8)-30433(ln.14)). The court makes it clear that Schepps is not authorized to file anything in his court for Appellants.
[188] Gardere, p.63.
[189] E.g.-ROA.26647.
[190] See Fn. 214.
[191] Issues of "law-of-the-case" are addressed above.

the first place – and justification thereof by reference to Baron's conduct[192]. There was a complete "lack of untoward interference in the affairs of the parties." Appellants objections do not *per-se* invalidate the fee orders to the extent properly satisfied using Baron's assets. Gardere attempts to benefit from the conflict by continually painting Appellants with the brush of Baron. The Receiver's exclusive control thereafter dictated that Receiver was responsible to ensure Messrs. Cox/Jackson were fully representing the independent interests of Appellants; that they didn't should not be laid at the feet of Appellants as equitable justification to deny their right of appeal. Receiver was responsible as a fiduciary to ensure it happened and Gardere was his counsel; they should not benefit from their own failures .[193]

Arguing Appellants "chose" not to participate is a gross misrepresentation. At some point the district court and the Receiver become at least equitably responsible to ensure that parties are adequately represented, and given the exclusive control granted the Receiver under the Receivership Orders, the Receiver had a duty to do so – acting as a neutral to preserve assets, not destroy them. Appellees' arguments smack of the days prior to the Voting Rights Act when people of color were "given" the right to vote only if they passed a literacy test; the fact that most saw passing the test as impossible and did not endure the humility

[192] Gardere, p. 67, almost all pre-receivership.
[193] ROA29263; Receiver under oath that he is a fiduciary acting as the estates' counsel.

was not recognized as a reason to deny them standing in claiming Constitutional abridgement.

In the end, Appellants were improperly and unfairly swept into the Receivership merely providing the funds everyone else desired to use to satisfy the unliquidated claims of Baron's counsel. Being unfairly caught up in the caustic environment, Appellants were denied the right to intervene and precluded from retaining counsel. The preclusion continued in effect by withholding the economic means of retaining competent counsel.[194] Appellants' due process rights were violated. They continued to be abused post *Netsphere I* by forcibly acting as the piggy bank. Arguing now that they are unable to appeal is rather like saying that the chickens should not be heard to complain about being left in a trap to bait the fox.

The conditional language of *Searcy*[195] does not support a waiver because the Fee Order was void as applied to Appellants. In *Searcy*, the Government's appeal right was statutory.[196] It is inconsequential whether the "right" to appeal is guaranteed statutorily or constitutionally because subject matter jurisdiction was lacking. A void order can be attacked at

[194] Denial of means of payment is tantamount to denial of counsel who do not work for free. The District Court understood this when he ordered that See continue to receive a non-refundable replenishing retainer of $50,000. (ROA.28127).
[195] 117 F.3d 154, 158 (5th Cir. 1997).
[196] "the government's appeal is properly before us even though the government is not a party that ordinarily could challenge as of right the district court's final order." … "If, as we conclude, the district court was mistaken in determining that the government has no veto power, the government should be able to correct that error by raising its veto power in an appeal to this court, even if it chooses not to intervene." Id. at p. 157. Alternatively, the District Court erred as set forth herein below.

any time, in any court, either directly or collaterally;[197] it is void *ab-initio.*[198]

> [If a court is] without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers[199].

A void judgment or order has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally.[200] It does not require judicial reversal or vacating. It cannot be made valid by any judge, nor does it gain validity by the passage of time. It can never acquire validity through laches.[201]

Even if delay were present, relief is mandatory; it involves neither discretion nor equity.[202] While *Potts II* may have tempered the language of *Elliot* and *Valley*, Appellants did not delay in their opposition and are not at risk as to such temperament.

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[197] *Netsphere I*, p. 310; a judgment or order issued in the absence of subject matter jurisdiction is void. *United States v. 119.67 Acres Of Land, Etc.*, 663 F.2d 1328 (5th Cir. 1981); 7 MOORE'S FEDERAL PRACTICE ¶ 60.25[2], 11 WRIGHT MILLER, *Federal Practice and Procedure* § 2862 (1973)..

[198] *Valley v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348, 41 S.Ct. 116 (1920).

[199] *Elliot v. Piersol*, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828); *World-Wide Volkswagen Corp. v. Woodson* , 444 U.S. 286 (1980).

[200] *Reynolds v. Volunteer State Life Ins. Co.,* 80 S.W.2d 1087, 1092 (Tex.Civ.App.—Eastland 1935).

[201] See: *Crosby v. Bradstreet Co., 312 F.2d 483 (2nd Cir.*) cert. denied, 373 U.S. 911 (1963) judgment held void 30 years after entry. *Carter v. Fenner*, 136 F.3d 1000 (5th Cir. 1998); *New York Life Insurance Company v. Brown*, 84 F.3d 137, 142-43 (5th Cir.1996) (quoting *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir.1993)); accord: See: *Long v. Shorebank Development Corp.*, 182 F.3d 548 (C.A. 7 Ill. 1999) – limit of Rule 60(b)(4) ionapplicable.

[202] *Orner. v. Shalala*, 30 F.3d 1307 (10th Cir. 1994); accord, *See Fritts v. Krugh, Supreme Court of Michigan*, 92 N.W.2d 604, 354 Mich. 97 (1958) (holding a "void" judgment grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack without regard to the statute of limitations or repose, or res judicata because it is as though trial and adjudication had never been); *see also City of Lufkin v. McVicker*, 510 S.W.2d 141 (Tex.Civ.App.-Beaumont 1973) (holding a void judgment is one which has no legal force or effect whatever, it is an absolute nullity, its invalidity may be asserted by any person whose rights are affected at any time and at any place and it need not be attacked directly but may be attacked collaterally whenever and wherever it is interposed).

Even if equity applies, what is void cannot be reborn out of equity to preclude this Appeal.[203] Indeed, *Netsphere I* specifically found that the receivership could not be supported based upon equitable principles.[204] The lack of subject matter jurisdiction over Appellants is not subject to waiver and cannot be cured by consent or waiver.[205]

The conclusion that Appellants must have formally participated (more than they did) to protect their rights in the context of proceedings that were void as against Appellants would render the above-cited authority meaningless.

Appeal is Appellants only remedy. Appellees' are not attempting to enforce a judgment; Appellants are challenging what Appellees have already taken. Appellants can only challenge by appeal, asking for this Court to confirm that the taking was impermissible and that the funds must be returned.

d. Appellees Must Make Up Their Mind About Baron.

Gardere argues that Baron himself is precluded from complaining of the use of Appellants' assets because "he is merely a beneficiary of the

[203] See*: Lion Bonding & Surety Co. v. Karatz,* 262 U.S. 640, 641–42 (1923). See also: *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc*., 527 US 308, 323 (1999), ("equitable remedies of a creditor are dependent upon the creditor first having obtained a monetary judgment; See Also: FRCP, Rule 18(b) requiring establishment of legal rights prior to application of equitable principles.

[204] *Netsphere I*, p. 310.

[205] *Ruhrgas Ag v. Marathon Oil Co. et al*., 526 U. S. 574, 583 (1999). For the same reasons it cannot be resurrected as a result of "inequitable" conduct by the complaining party.

trust that owns [them]".[206] Gardere thus audaciously proposes this Court is entirely precluded from considering the misuse of Appellants' property.

This is a 180-degree turn from Gardere's argument in its Motion To Dismiss wherein it argued that "[Appellants] have no personal stake in the outcome of this appeal, and only Baron does" as the principal beneficiary of the Trust which owns Appellants.[207] Appellees cannot have it both ways; their contradictory arguments warrant ignoring their entire argument.

e. **The February 3, 2011 Vacate Order**.

Appellees point to the February 3, 2011 Vacate Order[208], which the panel in *Netsphere 1* seized upon as a basis for determining that Baron was a "vexatious litigant" and that "there was no malice nor wrongful purpose" in instituting the receivership. Reliance is misplaced. First, the order had nothing to do with Appellants and the Vacate Order made no findings against them.

Second, it was not appealable; it was never appealed, and was never ripe for consideration by the Court *Netsphere 1*[209]. Finally, as with many of the district court and bankruptcy court orders – those appealed and those not, the fate and validity of the Order denying Vacate or Stay Motion was necessarily tied to that of the Receivership Order. The

[206] Gardere, p.71.
[207] Gardere Motion to Dismiss, Doc 00512724150, p.5.
[208] Order Denying Emergency Motion to Vacate Order Appointing Receiver and in the Alternative, Motion to for Stay Pending Appeal. ROA.4887-4907
[209] See: *London Records v. De Golyer*, 217 F.2d 574, 574-575 (5th Cir. 1954).

underlying motion was intended to vacate or stay the Receivership Order, which is exactly what the *Netsphere 1* panel did. A judgment or order is void if the court that rendered it lacked jurisdiction over the subject matter or the parties. *New York Life Ins. Co. v. Brown*[210].

Accordingly, the Vacate Order is and has always been void and unenforceable and does not bar Appellants.

f. **Due Process Rules Are Intended To Ensure A Fair Fight**.

Appellees argue Baron "and his entities" were accorded due process but fail to acknowledge the vast inequities presented. Appellants were complete strangers to the dispute resulting in the receivership. Their assets and records were ceased. They were used only to satisfy claims as to which they had no obligation and which were not even properly before the district court.

Appellants' only recognized counsel was employed by and serving the interests of the Receiver. The Receiver, a supposed neutral fiduciary tasked with preserving Appellants' assets, failed to pursue either task. Receiver and his counsel spent most of their efforts defending the receivership "to preserve the Fifth Circuit's

[210] 84 F.3d 137, 143 (5th Cir. 1996) and cases supra.

ability to have a rehearing or an en banc ruling" as such an event could have potentially validated the Receivership."[211]

Appellants were expressly precluded from engaging counsel. When Baron sought to challenge what was happening and fight the district court's preclusion by having unpaid counsel appear, Receiver trumpeted such conduct as evidence of vexatiousness and culpability, justifying the receivership's continuance and cost. It is odd to see the Receiver now suggesting that Appellants should have undertaken similar behavior.

Receiver falsely claims "[t]he district court ordered the Receiver to release funds from the Receivership to Appellants' counsel and Receiver's counsel complied with this order [citing ROA 13-10696-28006-13 and 28014-18]".[212] The record cited does not contain any such reference and Appellants challenge the Receiver to provide evidence to support its statement. The district court denied requests to pay counsel, conduct discovery or continue the proceedings.[213] By contrast, the Receiver and other fee applicants

[211] 28164. Not one justice voted to review *Netsphere I*.
[212] Receiver's Brief, p.56-57.
[213] E.g. *Bank of Commerce & Trust Co. v. Hood,* 65 F.2d 281 (5th Cir. 1933).

clearly knew the contents of their records, most having been prepared during the lengthy course of their engagement, and had already received millions in compensation.

With a purportedly straight face, Receiver argues that the constitutional right to counsel does not guaranty the right to "paid counsel" and that a court is not required to "provide a lawyer". Receiver would be hard pressed to locate counsel to represent him if he did not offer the prospect of payment.[214]

Receiver's reliance[215] on *McCuin v Tex. Power & Light Co.*[216] as justification for the court's impingement of Appellants constitutional rights is misplaced. In *McCuin*, the court justified disqualification of defense counsel because counsel was retained solely to influence the trial court and seek disqualification of the judge (who was defense counsel's brother-in-law). *McCuin* offers no justification.

Springing from *McCuin*, Receiver then point to Baron's "as recognized by this Court in *Netsphere I*" supports a restriction on

[214] See disc. Fn. 194 (ROA.28127).
[215] Receiver's Brief, p.59.
[216] McCuin v Tex. Power & Light Co., 714 F.2d 1255, 1262-63 (5th Cir. 1983).

Appellants' choice of counsel.[217] *Netsphere* I merely noted the court *could* have required Baron to proceed in pro per *IF* he had ignored a court order but found there was no order[218]. Nor, of course, is Baron's conduct attributed to Appellants. *Netsphere I* does not assist Receiver.

Denial of due process is never a harmless error and is reviewed de novo.[219] This was not a fair fight and Receiver is still using every card in the deck to preclude Appellants (and Baron) from mounting any challenge to Receiver's conduct.

5. Appellants' Fourth Amendment Rights Were Violated.

Contrary to Receiver's argument at p. 62, the U.S. Supreme Court has long recognized corporate entities as "people".[220] Receiver "seized" Appellants property, taking control as if becoming the sole owner, director and CEO, in lieu and in place of the Trust. That it was taken pursuant to the void Receivership Order does not negate the claim. The assessment of Appellant

[217] Receiver's Brief, p.59-60.
[218] *Netsphere I*, p. 311.
[219] Caccaro v. United States, 461 F.2d 626, 625 (5th Cir. 1972).
[220] E.g. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1976); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1977); *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1977); and, *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, reh'g denied, 475 U.S. 1133 (1986).

assets to compensate Receiver for doing so continues represents a continuing impermissible seizure in conflict with the established precedent discussed above.

CONCLUSION

Appellants were the innocent victims here. They were involved in the receivership solely to act as a piggy bank.

No matter how often written, Appellees' contention that Baron and Appellants were one-in-the-same is simply not supported by any record in this matter. Appellants were separate on-going businesses both prior to and immediately following the GSA. The GSA represented a fully and fairly negotiated agreement to which Trustee was a party. Claims that Appellants were somehow involved in whatever the Trustee, and subsequently the Receiver, has alleged as impropriety, simply did not involve Appellants.

There is nothing in *Netsphere I* that would operate to the contrary. As such, there is no reason to assess culpability against Appellants or to require that they finance the Trustee-recommended, ill-conceived, receivership.

Precedent from both the Supreme Court and this Circuit mandate

that Appellants *not* suffer the additional burden of having to pay for a seizure of their property and business interests that they never agreed to and in which they had no "dog-in-the fight".

Application indeed mandates that they made whole and Receiver look to the Trustee as provocateur. Nevertheless, Appellants are willing to bear the costs of those expenses which they would, but for the receivership, have *necessarily* expended (e.g. renewals and the like). However, no information has been provided in the fee applications (or any other accounting) or Receivership Order that would identify what such costs were or establish the necessary predicate. For this reason, and for those asserted in this appeal, the Fee Order must be vacated.

That Receiver, his professionals, and the Ondova Trustee have expended significant time and expense is simply not an issue. They were fully aware of the risk and the weakness upon which their position stood. They could have refused to serve or demanded a bond from the Trustee prior to undertaking their positions. That they did neither should not be laid at the feet of Appellants. Receiver and his professionals have a remedy for disgorgement and refusal to approve fees/costs; they may seek recovery against the provocateur. That the provocateur is a bankruptcy trustee must not stay this court in applying the precedent.

WHEREFORE, for the foregoing reasons, Appellants request that this

Court grant the relief requested in Appellants Opening Brief.

Respectfully Submitted,

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Certificate of Compliance

This brief contains ***14,192** words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word for Mac 2011 using Times Roman New 14-point font in the body of the text and 12-point text in footnotes.

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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the Appellants' **REPLY BRIEF** was electronically filed with the Clerk of the United States Court of Appeals for the Fifth Circuit using the Appellate CM/ECF system. Accordingly, counsel who have entered an appearance in this case and are registered Appellate CM/ECF users will be served electronically by the Appellate CM/ECF system through their registered e-mail addresses.

The undersigned further certifies that a true and correct copy of this Appellants' Brief was served on counsel who do not participate in the Appellate CM/ECF system by courier in accordance with Fed. R. App. P. 25 and 5TH CIR. R. 25 on **5th day of December 2014**.

Service List:

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