

No. 10-11202
In the
United States Court of Appeals
for the Fifth Circuit

NETSPHERE, INC. Et Al,
Plaintiffs

v.

JEFFREY BARON,
Defendant-Appellant

v.

ONDOVA LIMITED COMPANY,
Defendant-Appellee

Appeal of Order Appointing Receiver Ex Parte
to Solicit and Prosecute Non-Diverse Claims against Jeff Baron
and Prevent Baron from Hiring Counsel to Defend Himself

Cons. w/ No. 11-10113

NETSPHERE INC., Et Al, Plaintiffs

v.

JEFFREY BARON, Et Al, Defendants

v.

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

v.

PETER S. VOGEL,
Appellee

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

**RESPONSE TO VOGEL MOTION FOR FURTHER LIQUIDATION
AND MORE FEES**

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

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

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

Cons. w/ No. 11-10501
NETSPHERE, INC. ET AL, Plaintiffs
v.
JEFFREY BARON, Defendant – Appellant
QUANTEC L.L.C.; NOVO POINT L.L.C., Appellants
CARRINGTON, COLEMAN, SLOMAN & BLUMENTHAL, L.L.P.,
Appellant
v.
PETER S. VOGEL; DANIEL J. SHERMAN, Appellees

TO THE HONORABLE JUSTICES OF THE FIFTH CIRCUIT:

COME NOW Appellants Jeff Baron, Novo Point LLC, and Quantec LLC, and make this response and motion. Appellants respectfully object to the motion made by Vogel to liquidate further assets¹, and further move to strike the motion for failure to comply with the requirements of Local Rule 27.4 as follows:

1. Vogel has failed to include the mandatory certificate of interested persons. This failure is particularly relevant because the Court is not able to determine if there is a conflict of interest with respect to the proposed purchasers, or the attorneys representing them.
2. Vogel has attempted to bypass the requirements of conference by pretending that James Eckels is the counsel representing Novo Point LLC and Quantec LLC in this appeal. Eckels is not. Rather, he works for Vogel as a ‘receivership professional’, and is a party for whose benefit Vogel seeks to liquidate assets. Notably, the conflict of interest for Eckels to purport to represent both the LLCs whose assets are threatened, and to be a primary beneficiary of the requested asset liquidation is substantial.

¹ Only a substantially redacted version of the motion was served on Appellants, entitled “RECEIVER’S SECOND SEALED EX PARTE MOTION FOR ORDER ALLOWING LIQUIDATION OF ASSETS TO PAY RECEIVERSHIP PROFESSIONALS, THE RECEIVER, AND THE RECEIVER’S COUNSEL”. Vogel has not disclosed to Appellants when the motion was filed, in which case(s), or with what file number.

I. OVERVIEW

The following issues are presented:

1. *The Court Lacks Jurisdiction to Act against the Seized Property*
2. *Jurisdiction Aside, the Court still lacks Discretion to Award Costs*
3. *The U.S. Constitutional Prohibits Taking the Receivership Property*
4. *The Court Lacks Discretion to Award Fees not Segregated by Estate*
5. *Granting Vogel's Requested Relief would Violate the Fifth Amendment*
6. *Secret Proceedings Violate the Constitution*

II. ARGUMENT & AUTHORITIES

1. The Court Lacks Jurisdiction to Act against the Seized Property

The Federal District Court is a passive vessel that is empowered only to resolve qualifying disputes that are pled before it.² The court is not an executive of the sovereign empowered to proactively seek out controversies, exert its power over them, and resolve them.³ Thus, the district court must wait for qualifying claims to be pled before it in order to endue the court with jurisdiction.⁴ Accordingly, this Honorable Court has established the precedent that **a district**

² *E.g.*, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); 28 U.S.C. §§ 1330-1339.

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

⁴ *E.g.*, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 fn 3 (1964); *Locke v. Board Of Public Instruction of Palm Beach Cty.*, 499 F.2d 359, 366 (5th Cir. 1974) (when a court cannot render a decree responsible to the complaint there is “no longer a subject matter”)

court lacks jurisdiction to impose a receivership over property that is not itself the subject of an active claim pled before the district court. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1029 (5th Cir. 1931) (Court lacks jurisdiction to impose receivership over property for which no claim of interest in, or right to has been pled). This lack of subject matter jurisdiction cannot be waived nor overcome by an agreement of the parties.⁵ Further, this lack of subject matter jurisdiction is entitled to a presumption by this Honorable Court, and it is the burden of the proponent of jurisdiction to establish how the District Court has subject matter jurisdiction.⁶ Because there is a failure of jurisdiction, expenses may not be awarded from the receivership estates' property.⁷

Moreover, as a matter of binding precedent, the Supreme Court has ruled that at any stage in the proceedings, when an objection to jurisdiction is raised **“[The objection to jurisdiction] must be considered and decided, before any court can move one further step in the cause”**. *The State of Rhode Island v. The State of Massachusetts*, 37 U.S. 657, 718 (1838). The Supreme Court explained: “[A]ny movement is necessarily the exercise of jurisdiction.” *Id.* Accordingly, before any further judicial action is taken against the receivership property, this Honorable Court must both consider and decide the issue of subject matter

⁵ *E.g.*, *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

⁶ *E.g.*, *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895); *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

⁷ *E.g.*, *Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923).

jurisdiction. As discussed above, the established precedent of this Honorable Court is that where property is not subject to a claim pled before the court, **the court lacks jurisdiction to appoint a receiver over that property and any attempt to do so is absolutely void for lack of subject matter jurisdiction.** *Cochrane v. WF Potts Son & Co.*, 47 F.2d at 1029.

2. Jurisdiction Aside, the Court still lacks Discretion to Award Costs

The District Court has discretion to exert authority over private property through a receivership only in order to conserve property that is subject to competing parties' claims pending before the Court, or in supplementary proceedings in aid of execution of a judgment.⁸ The Supreme Court has explained this limitation on the court's power as follows: "Where a final decree involving the disposition of property is appropriately asked, the court in its discretion may appoint a receiver to preserve and protect the property pending its final disposition." *Gordon v. Washington*, 295 U.S. 30, 37 (1935). As a matter of binding precedent, the Supreme Court has held that the District Court lacks discretion to exert receivership authority over private property for any other purpose. *Id.* Accordingly, a court may not appoint a receiver to act as an

⁸ *E.g.*, *Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997).

investigational and prosecutorial branch of the court.⁹ Similarly, as a matter of established law, a court lacks the legal authority and discretion to use receivership to liquidate private property to pay the costs of a court ordered investigation and prosecution. *See e.g., Tucker v. Baker*, 214 F.2d 627, 631 (5th Cir. 1954).

As a matter of binding precedent, where a court lacks jurisdiction or authority to impose a receivership over property, it does not have discretion to use that property to pay the costs of the receivership. *E.g., Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908); *and see Lion Bonding* at 642. In the case at bar there was no asserted or pleaded claim of interest or right to the property ordered by the District Court into receivership. Accordingly, the District Court lacked both the authority and the jurisdiction to impose a receivership over the property seized. Therefore, the court does not have discretion to use the property placed in receivership to pay the receivership's alleged costs. *Atlantic Trust Co.*, 208 U.S. at 373.

3. The U.S. Constitutional Prohibits Taking the Receivership Property

The Fourth and Fifth Amendments prohibit a court from seizing property without a sworn showing of probable cause, and from taking property without just compensation. *E.g., Severance v. Patterson*, 566 F.3d 490, 511 (5th Cir. 2009). The prohibition of taking property without just compensation applies to the courts. *Id.*

⁹ See e.g., SR. v2 p264, lines 18-21.

In the case at bar, no sworn showing of probable cause has been made out with respect to the assets seized by the District Court. Further, those assets may not be taken by the court without just compensation being paid to the property's owner. U.S. CONST. amend. V. In a normal receivership case, a receiver's allowances would be allowed only to the extent the fees benefited the receivership res. Thus, the owner of the property would automatically be receiving just compensation, i.e., the benefit for which the fees were charged. However, in the case at bar the fees are being sought for work assisting the 'receiver' in acting as a private prosecutor and investigator. There has been no claimed equivalent benefit provided to the receivership estate against which the fees are sought to be charged. *See e.g., United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534 (3rd Cir. 1970); *Speakman v. Bryan*, 61 F.2d 430, 431, 432 (5th Cir. 1932). Accordingly, seizure of the receivership res to be used to pay such fees would directly violate the Fifth Amendment.

4. The Court Lacks Discretion to Award Fees not Segregated by Estate

There is an additional non-discretionary failure in Vogel's requested relief because his requested billing is not segregated by estate. The established precedent of this Honorable Court requires that the billing be distinguish clearly between the different receivership estates held by the receiver. *E.g., Bank of Commerce & Trust*

Co. v. Hood, 65 F.2d 281, 283 (5th Cir. 1933). Vogel's motion fails to segregate fees, and therefore the court lacks discretion to award the fees. *Id.*¹⁰

5. Granting Vogel's Requested Relief would Violate the Fifth Amendment

As a fundamental cornerstone of Due Process, the Constitution guarantees every citizen the right to a meaningful opportunity to be heard in a meaningful manner. *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). As a matter of established precedent, this means the right to be represented by paid legal counsel. *E.g.*, *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 942, 946 (5th Cir. 1981); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). **In the District Court proceedings, Jeffrey Baron is being denied this fundamental right.** The District Court seized all of Baron's assets and denied Baron's motions to access his own money to hire counsel, and moreover ordered that the undersigned appellate counsel could not be paid during the pendency of the receivership. *E.g.*, R. 2720, 4580-4581; SR. v2 p384-390 (Doc 264); SR. v4 p119 (Doc 316). Accordingly, continuing proceedings against Baron and his legal and beneficial interests while denying Baron his Constitutional right to work, earn

¹⁰ Appellants further adopt by reference the substantive arguments in opposition to the fee requests, previously filed of record, including the responsive pleadings filed as appellate docket numbers: 6897175, 6932346, 6941547, 6959248, 6984651, 6999939, 7021915, 6939722, 6995722, 7010786, 6924420, 6950423, 6970404, 6995723, 6999940, 7020523, 6937133, 6959249, 6984652, 7025389, 7025390, 6970403, 6902500, and 6950422.

money, and employ counsel to represent him is directly violative of the Constitution.

6. Secret Proceedings Violate the Constitution

The Supreme Court has described secret judicial proceedings as “a menace to liberty”. *Gannett Co. v. DePasquale*, 443 U.S. 368, 412 (1979). The most basic principle of Due Process is notice and the opportunity to be heard. *E.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *and see Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Phillips v. Vandygriff*, 711 F.2d 1217, 1227 (5th Cir. 1983); *Registration Control Systems v. Compusystems, Inc.*, 922 F.2d 805, 807 (Federal Cir. 1990). Vogel’s motion is *ex parte* and he has redacted much of the motion he served on Appellants. Vogel has not disclosed to Appellants any of the information regarding what assets he purports to sell, at what valuation, and to whom. However, absent “extraordinary circumstances” the liquidation of assets by a federal receiver requires open, public auctions. 28 U.S.C. § 2004; *Tanzer v. Huffines*, 412 F.2d 221, 222 (3rd Cir. 1969). There is no exigent or extraordinary circumstance present in the circumstances at bar. Rather, what Vogel is attempting to prevent is the ability of the Court to consider both sides of the issue. Vogel is attempting to persuade the Court to continue with the *ex parte*, secret proceedings by which the receivership was imposed, and prior asset sales were authorized. However, Due Process requires more. As discussed above, Due process requires,

as a Constitutionally mandated requirement, that the Appellants be provided notice of the assets, the amount of the proposed sales, etc. Further, Due Process requires that the Appellants be allowed the opportunity to argue, for example, that the method of sale is unreasonable¹¹, that the purchasers are insiders, or that the sale price is unreasonably low, etc. Accordingly, in seeking to bypass the Constitutional requirement of Due Process, Vogel's motion should be denied.

II. CONCLUSION AND PRAYER

WHEREFORE, for the reasons discussed above, Vogel's motion should be struck, and jointly and in the alternative Vogel's motion should be denied and overruled.

Respectfully submitted,

/s/ Gary N. Schepps

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¹¹ The sales method used by Vogel has been vaguely described by Vogel as "unsolicited purchase inquires ... [resulting in] negotiated sales prices .. substantially lower than their appraised values". See page 5 of the Nelson affidavit attached to Vogel's motion.

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CERTIFICATE OF SERVICE

This is to certify that this motion was served this day on all parties who receive notification through the Court's electronic filing system.

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