IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NETSPHERE, INC.,	§	
MANILA INDUSTRIES, INC., and	§	
MUNISH KRISHAN,	§	
Plaintiffs.	§	
	§	Civil Action No. 3-09CV0988-F
v.	§	
	§	
JEFFREY BARON, and	§	
ONDOVA LIMITED COMPANY,	§	
Defendants.	§	

RE-FILED MOTION TO STAY DOMAIN NAME SALES PENDING APPEAL FILED PER COURT ORDER

TO THE HONORABLE JUDGE ROYAL FURGESON:

COMES NOW JEFF BARON, and files, pursuant to the Order of this Court and directive of the Court's Law Clerk moves this Court to immediately issue of a stay date to prevent the sale of the domains pending appeal as this Honorable Court advised would be done. [Doc 631].

1. This Honorable Court has ordered that any motions filed on behalf of Baron be filed as motions for leave.

2. The domain names are unique, and if lost through sales the damage would be irreparable. Sherman and Vogel have taken the position that sale of domains are non-appealable. If that is correct, allowing the sales of unique names wrongfully would be irreparable. That is because once an asset is sold, might not be subsequently restored and appeal might be made moot as Sherman and Vogel

argue. *See, e.g,. American Grain Ass'n v. Lee-Vac, Ltd.*, 630 F.2d 245, 247 (5th Cir. 1980). Additionally, there is no party with sufficient assets to cover the loss should the sales be found to be wrongful.

3. For further cause, the argument of appellate briefing is attached hereto as Exhibits "A" and "B" and incorporated herein by reference.

4. For further cause movant shows:

TABLE OF CONTENTS

Your Honor entered an Advisory to this Honorable Court stating that if the stay was lifted, Your Honor would grant the motions to liquidate the assets and **"would stay orders concerning the sale of domain names and orders concerning fees to be paid to the Baron attorneys pending appeal".** However, instead of doing that the District Court has ordered the liquidation of the domain name assets and *immediate* payment to Vogel and firm.

There are no exigent circumstances requiring that the sales occur immediately and, granting an emergency stay is necessary to protect the jurisdiction of this Honorable Court over the receivership res currently in the possession of this Honorable Court.

Factual Background of the Liquidation and Massive Scope

Overview

It is unknown (as Vogel has kept the matter secret) which domains actually make up the 'big 50' Vogel seeks to liquidate, or if the buyers have agreed to later split the profits with Nelson and/or Vogel (as the buyers' identities have also been kept secret by Vogel). However, **it appears that Vogel is seeking to sell those domain names whose values exceed One Million Dollars per domain**. Thus, the sales sought by Vogel could constitute a liquidation of as much as 95% of the total value of LLC assets— a liquidation of $60 Million (or more) in assets. **Notably, the *per domain* market value in excess of one million Dollars *per domain*, has been admitted by Sherman:** Sherman has explained that "These names have both

high revenue potential and can be sold individually - sometimes for **in excess of $1 million a piece**." R. 2687 (lines 10-11).

In other words, it appears that Vogel is attempting to liquidate the 'big 50' domain names that can be sold individually in excess of $1 million *a piece*, for only around $1 million in total. That would leave 99.9% of the domain names intact numerically. However, the vast bulk of domain names are valued at only between $50.00 and $600.00 (as compared to the $1 Million to $4 Million per domain valuation of the 'big value' domains). Accordingly, Vogel is apparently seeking to secretly liquidate up to 80-95% of the value of the LLCs' assets— **in private sales (at $0.02 cents on the Dollar) to his hand-picked buyers**.

The Motion to Liquidate was Functionally *Ex Parte* and Granted without Hearing

In a very unusual process, the fundamental operative information about Vogel's motion to liquidate were kept secret. For example, the LLCs have been kept in the dark as to the individual domain names proposed to be sold— (1) preventing the parties from soliciting an alternative purchaser for more money and (2) preventing the parties from researching and gathering evidence to establish the market value of the domains in question. The LLCs have been also kept in the dark about the sales price of any domain name (even if the domain name were kept secret, the sales price of each 'secret' domain could be stated), and the LLCs have been kept in the dark as to appraised value of those domain names with the

'appraiser' relied upon by the receiver. Accordingly, we move to have that information released, and a reasonable opportunity allowed to respond to the specific domains in question.

Argument & Authorities

AS A MATTER OF ESTABLISHED LAW, THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER THE ASSETS OF NOVO POINT LLC AND QUANTEC LLC

1. There Must First be a Controversy Pled Before the Court Concerning the Subject Matter

As a preliminary matter, the Constitution requires that for a federal court to have subject matter jurisdiction over any matter, there must first be a controversy concerning that matter pled before the Court. *See Liner v. Jafco, Inc.*, 375 U.S. 301, 306 fn3 (1964). Accordingly, the Fifth Circuit has held that "[T]he exercise of judicial power depends upon the existence of a case or controversy." *Locke v. Board Of Public Instruction of Palm Beach Cty.*, 499 F.2d 359, 364 (5th Cir. 1974). Federal courts are, notably, courts of limited jurisdiction, and that jurisdiction cannot to be expanded by judicial decree. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Further, it is presumed that a matter lies outside a court's subject matter jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction. *Id.*; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183 (1936).

As discussed below, the Fifth Circuit has held that a claim or controversy is not created by a request to impose a receivership. Rather, the district court must have subject matter jurisdiction over a controversy concerning the property before a receivership may be imposed over that property. The Fifth Circuit has specifically held that for a court to have subject matter jurisdiction pursuant to which a receivership (otherwise authorized) can be ordered, there must first be a controversy concerning that property pled before the court. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026, 1027-1028 (5th Cir. 1931).

2. *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026 (5th Cir. 1931)

The Fifth Circuit squarely addressed the issue at bar in *Cochrane.* In *Cochrane*, the plaintiff moved "[T]hat the court appoint a receiver to take charge of the securities of, and act as successor trustee in, all the issues [of stock]." *Id.* at 1027. The *Cochrane* motion was granted and, as requested in the motion, the district court placed the all the stock issues (series A-F) into receivership. *Id.* at 1028. However, outside of series E, no claim against the stock had been made in the pleadings. *Id*. at 1027. The Fifth Circuit therefore found that the district court lacked "jurisdiction over these [other] properties" and the order appointing a receiver to take charge of them was void. *Id.* at 1028.[1]

[1] In *Cochrane*, this Honorable Court announced four key principles of law, as follows:

Accordingly, the application of the Fifth Circuit's holding in *Cochrane* to the case at bar is clear. No claim or controversy was pled against Novo Point, LLC, Quantec, LLC, or their property. Since the pleadings did not put at issue the subject matter of Novo Point LLC, Quantec LLC, or their property, the District Court lacked subject matter jurisdiction with respect to the LLCs and their property. *See Cochrane* at 1028-1029.

SEEKING TO USE NOVO POINT, LLC AND QUANTEC, LLC ASSETS TO PAY OFF NON-JUDGMENT DEBTS ALLEGED AGAINST OTHER PARTIES IS NOT AUTHORIZED BY LAW

Bollore SA v. Import Warehouse, Inc.

The issue was presented to the Fifth Circuit in *Bollore SA v. Import Warehouse, Inc.*, 448 F.3d 317 (5th Cir. 2006). In *Bollore*, the district court entered an order appointing a receiver over an alleged 'alter ego' entity, and ordering turnover of property. *Id*. at 321. The Fifth Circuit vacated the receivership and held that turnover orders do "not allow for a determination of the substantive rights of involved parties" and may not be used "as a vehicle to adjudicate the substantive

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(1) Nothing was alleged in the plaintiff's pleadings to set up any claim against securities series A-D, or series F, and therefore: [T]he plaintiffs' pleadings [did not] put their subject-matter at issue;

(2) The district court therefore had no subject matter jurisdiction over the property, and because: [I]t had no jurisdiction over these properties, its order appointing a receiver to take charge of them was void;

(3) [S]eizing the securities did not, unless the subject-matter was by proper pleadings already before the court, aid its jurisdiction; and

(4) Where judicial tribunals have no jurisdiction of the subject matters on which they assume to act, their proceedings are absolutely void in the strictest sense of the term.

rights of non-judgment third parties". *Id*. at 323. The Fifth Circuit held that this rule ultimately springs from due process concerns. *Id.* (such a remedy "completely bypasses our system of affording due process.").

As explained by the Fifth Circuit in *Bollore*, alter ego proceedings are substantive proceedings arising out of state law. *Id.* at 324. Pursuant to Texas law, a party must pursue their alter ego proceedings in a separate trial on the merits. *Id.* No such proceedings were pled against Novo Point or Quantec, and no such trial was ever held. As in *Bollore*, because no independent trial was held against Novo Point or Quantec to establish an alter ego claim, their assets cannot be taken to satisfy someone else's debts.

By contrast, it is long settled law that receivership "determines no substantive right; nor is it a step in the determination of such a right." *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 497 (1923).

Notably, if Novo Point and Quantec *had been* served with citation and appeared as parties in a lawsuit seeking to impute liability upon them under an alter ego or reverse piercing theory (neither of which has occurred), they would have prevailed at trial as a matter of law. **The first step to a claim for piercing the corporate veil (although notably, no such claim was pled or heard) is to determine which jurisdiction's law controls the issue. *E.g.*, *Sommers Drug Stores Co. Emp. P. Sharing Trust v. Corrigan*, 883 F.2d 345, 353 (5th Cir. 1989).**

Novo Point, LLC and Quantec, LLC are incorporated under the laws of the Cook Islands. The law of the Cook Islands therefore applies. *See e.g.*, *Alberto v. Diversified Group, Inc.*, 55 F.3d 201, 203 (5th Cir. 1995); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Pursuant to Cook Islands law, there is no basis to impose reverse alter-ego liability. *Cook Islands Ltd.Liab.Cos.Act 2009 §45.*[2]

THE REQUIREMENTS OF 28 U.S.C. 2001 APPLY TO PERSONALTY PURSUANT TO 28 U.S.C. 2004.

If there were a legal basis to liquidate any domain name, as a general rule "Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title". 28 U.S.C. 2004. No justification has been offered to explain a different approach in this case. If there are parties interested to purchase a domain, there is no logical reason why they would not bid on the domain in a public auction.

IT IS PATENTLY UNREASONABLE NOT TO ENGAGE IN <u>ANY</u> MARKETING EFFORTS WITH RESPECT TO THE DOMAIN NAMES SOUGHT TO BE LIQUIDATED.

Mr. Nelson states in his affidavit that he did not engage in **<u>any</u>** marketing

[2] The same result would be reached in applying Texas corporate law. As explained by the Fifth Circuit in *Bollore*, "Texas courts will not apply the alter ego doctrine to directly or reversely pierce the corporate veil unless one of the 'alter egos' owns stock in the other." *Id.* at 325. Since Jeff Baron owns no stock in either Novo Point, LLC, nor Quantec, LLC, alter-ego liability would not apply.

efforts with respect to the domain names the receiver desires to liquidate. Mr. Nelson admits that he created a protocol for selling domain names at a reasonable value. That protocol includes advertisements on industry websites, press releases, engaging brokers, using an auction, and maintaining a sales website. None of these procedures were followed with respect to the domain names now at issue. That is patently unreasonable.

Mr. Nelson's affidavit establishes that the sales prices for many of the domains sought to be sold are "substantially lower than their appraised values." Liquidation in such circumstance is patently unreasonable.

MR. NELSON'S SOURCE FOR 'APPRAISALS' AND METHODOLOGY FOR DETERMINING DOMAIN VALUE IS NOT RELIABLE NOR REASONABLE

Background

There are different aspects of domain name value, as follows:

1. "Parking" value. This aspect of value relates to the random traffic a name may obtain. "googl.com" for example may enjoy heavy traffic intended for google.com. Or, "hotmeals.com" may receiver traffic for those looking for hot meals. Or, if a website has appropriate content, a name may facilitate search traffic . With the last option value is dependent upon content, so that appraisal of value requires analysis of possible content and not just the name itself. Notably, many of the factors used to evaluate

the parking value of a domain can be affected. Web content, back links, and other factors can be modified to substantially increase the 'parking' value and passive income of a website. A website that generates only $1 a month might generate a thousand times that amount if content is added that generates search results, or if links to the site are seeded over the internet, etc. Accordingly, a 'developed' parking domain can have a thousand times value to an undeveloped site.

2. "Marketing" value. This value is the value to a company or advertiser for use in a marketing campaign. For example, the domain "Slice.com" might be worth a million dollars as a knife industry website, or half a million dollars as a Mrs. Baird's Bread promotion site. Or, for example, a PriceLine competitor could market "Slice the Price" using "Slice.com" with a valuation for the domain at several million dollars. Determination of the marketing value of any domain requires an expert opinion from a marketing professional in the relevant, applicable fields for which the domain would provide marketing value. Notably, because the value is determined by the marketing value to the company who purchases the domain based on marketing value, while Pure Smoothies may offer $10,000.00 as its maximum offer for the domain "Pure.com", Pure Investements might offer a hundred times that about for the same domain.

For that reason valuation requires knowledge of the relevant markets, and has nothing to do with the internet searches or current domain traffic. Similarly, marketing value cannot be determined by comparing physically 'similar' domains. For example "Coke.com"'s value has nothing to do with the value of "Poke.com" or "Joke.com". The bottom line in determining the marketing value of any domain is that it requires significant expertise and research into the "brick and mortar" world in order to determine a domain's value.

3. "Ego" value. For example, "Jones.com" may be worth a hundred thousands dollars someone named Jones that could afford the price. Accordingly, properly advertised auctions are necessary to realize a domain's ego value.

Nelson's Appraisals Unreliable

Estibot, like the other 'appraisal' sources relied upon by the receiver do not involve valuation of the domain's "Marketing" value. Rather Estibot and the other on-line 'appraisal' sources used by the receiver use a computed valuation based on the semantics of the domain name. The 'appraisal' sites are designed for amateurs who do not understand the domain name industry. That Mr. Nelson clearly has no idea what he is talking about and clearly lacks experience is

established by his claim that Estibot's appraisals typically are within 20% of the eventual sale price. Any credible and independent industry expert will confirm this, and so does Estibot.com.

Estibot expressly discloses that they are not offering an actual dollar appraisal for domain names, and expressly directs that their "appraisals" should not be used in making sales decisions. At the bottom of each appraisal **Estibot.com discloses** "**The dollar valuation is not to be taken literally …. Do not make a purchase or sale decisions based on this appraisal.**"

Just like a US District Court should not base decisions on the contents of fortune cookies, Estibot's 'appraisals' should not be used in making a sales decision. Here is a simple example to illustrate. Estibot.com 'appraised' "Japan.com" at $9,900.00 when Vogel's motion to liquidate was filed. (Today the estibot appraisal of Japan.com is $69,000.00). That is not very much money. By contrast, Estibot.com appraised "Germany.com" at around $1,600,000.00. Clearly, "Germany.com" is not worth by a factor of more than 160 (16,000%) the value of "Japan.com". Or, for example, Estibot.com values "Korea.com" based on the actual sale of the name, at over $5,000,000.00. Accordingly, **if Mr. Nelson and the receiver were relied upon to sell "Japan.com" it would be under-valued by around 50,000%**. Ie., if Estibot is the source of valuation (which Mr. Nelson relies upon to determine value within 20% of sales price) then

the domains will be sold at a 99.5% discount, essentially giving the domains away.

The other web based 'appraisal' services relied upon by Mr. Nelson and the receiver are similar. Factors used to determine domain value are "backlinks, Google PageRank, Compete rank, Quantcast rank, and Alexa rank" as well as "the meaning of the keywords present in the domain name". For the web based appraisal services such as DomainApprisal.com, "Commerce Potential" means "monthly keyword search volumes, CPC advertising cost, historical search volume trends, and seasonal search volume trends." None of these statistics about internet traffic have anything to do with the marketing value of any particular domain name with relationship to any particular industry or product.

Respondent acknowledges that the *current* "Parking" wholesale market value of a non-generic domain name site (such as 'bigsadangles.com") can be reasonably determined by an 'appraisal' by a site like sedo.com. That evaluation methodology is not appropriate nor reasonable for marketing name websites. The result is that domain names worth millions of dollars, such as "Japan.com" are 'appraised' at under $10,000.00, or 99.5% below their real market value.

THE ORDERS GRANTING THE RECEIVER'S FEES ARE ERRONEOUS

Lack of Subject Matter Jurisdiction

The Supreme Court has held that where a district court lacks subject matter jurisdiction over assets placed into receivership, the court is without power to make

any charge upon, or disposition of, the property seized. *E.g., Lion Bonding & Surety Co. v. Karatz*, 262 U.S. 640, 642 (1923). As explained by the Supreme Court, "**If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."** *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896). Pursuant to the holding of the Fifth Circuit in *Cochrane v. WF Potts Son & Co.*, 47 F.2d 1026 (5th Cir. 1931), because the pleadings in the district court lawsuit did not put the subject matter of the property ordered into receivership at issue, the district court lacked subject matter jurisdiction over the property. It is, moreover, presumed that a court lacks subject matter jurisdiction. *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). Further, lack of subject matter jurisdiction cannot be waived nor overcome by an agreement of the parties. *E.g., Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Accordingly, fees may not be awarded from the receivership estates' property. E.g., *Lion Bonding* at 642.

Receivership Fees Unauthorized

Moreover, even where there is subject matter jurisdiction (there is none here– no claim was pled against Novo Point LLC, Quantec LLC, or their assets, nor against the assets of Jeff Baron) the Supreme Court has held that "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". *Atlantic Trust Co. v. Chapman*, 208 U.S. 360, 373 (1908)(emphasis). The instant receiverships are both irregular (being commenced in off-the-record, *ex parte* proceedings without any supporting affidavits or even a claim to some 'emergency' that could not be protected against by a restraining order) and unauthorized ("there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition" and "a federal court of equity will not appoint a receiver where the appointment is not ancillary to some form of final relief which is appropriate for equity to give", *Gordon v. Washington*, 295 U.S. 30, 37-38 (1935)). Accordingly, the receiver must look for compensation from the parties at whose instance he was appointed. *Atlantic Trust* at 373. Notably, it was at Vogel's own insistence that he was appointed receiver over Novo Point LLC and Quantec LLC.

Unclean Hands

Moreover, even if the receiverships were authorized by law (they are not), and were not tainted by the irregular proceedings to obtain them, the factual and legal basis upon which the receiverships were founded have been shown to be false. Accordingly, the only right to expenses would be an equitable right that is limited to expenses incurred to the extent they have inured to the benefit of the receivership estate that is sought to be charged. *E.g. Speakman v. Bryan*, 61 F.2d 430, 431, 432 (5th Cir. 1932). None of the fees sought by Vogel for himself and

his partners has benefited any receivership estate. Moreover, Vogel is barred by the equitable maxim that "he who comes into equity must come with clean hands". The doctrine of unclean hands requires that the Court refuse "any relief whatsoever [and] not to compromise with it .. by allowing a part of what was claimed" *E.g., Manufacturers' Finance Co. v. McKey*, 294 U.S. 442, 451 (1935). Vogel clearly comes with unclean hands. Vogel, while holding quasi-judicial office of special master in the case, in order have himself appointed as receiver, deceitfully led the District Court—in secret, ex parte, off the record proceedings— to wrongfully believe that Jeff Baron had caused a mediation, for which Vogel was the mediator, to fail. In truth, Vogel had not even scheduled the mediation yet. The deceit was fundamental and material. The District Judge, wrongfully or rightfully, was concerned that Jeff Baron had allegedly not paid a long list of attorneys. The District Judge ordered mediation to resolve the perceived problem that the District Judge found personally disturbing. Since he had ordered mediation to resolve the issue, the District Judge would not have taken the much more drastic step of receivership, without waiting to see what result was produced by the mediation. Accordingly, in order to have himself appointed receiver, Vogel needed to torpedo the mediation. So, as mediator, he failed to schedule the mediation, and falsely represented to the District Judge that the mediation had failed.

Fee Award was Not For Actual Services to Benefit of LLCs

The Fifth Circuit has held that compensation paid from a receivership estate must be for actual services provided to that estate. *E.g.*, *Commodity Credit Corporation v. Bell*, 107 F.2d 1001, 1001 (5th Cir. 1939); *Securities and Exchange Com'n v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) ("The court in equity may award the receiver fees from property securing a claim if the receiver's acts have benefited that property."). No allegation has been made and no evidence has been offered to sustain a showing that the fee request is for reasonable or necessary fees to the benefit of any estate, nor are the fees segregated between estates. The limitation upon attorneys to charge only a reasonable legal fee and to charge only for legal services that are actually provided is a legal and ethical duty imposed by law in Texas. *Lee v. Daniels & Daniels*, 264 SW 3d 273, 280-281 (Tex.App.-San Antonio 2008, pet. denied)(noting "[A]ttorneys are members of an ancient profession with unique privileges and corresponding responsibilities" and rejecting the right of attorney to seek fees where "None of that time was spent engaged in 'legal services' performed or rendered on behalf of Cummings, his client.").

No Hearing was Held on the Contested Fee Applications

The District Court also erred in refusing to hold an evidentiary hearing on Vogel and Gardere's disputed fees. The Fifth Circuit has held that "the judge must hold an evidentiary hearing if there are any disputed factual issues." *Matter of US*

Golf Corp., 639 F.2d 1197, 1202 (5th Cir. 1981). The District Court also erred in failing to explain the basis of his award. The Fifth Circuit has held that "Finally, the judge must explain the basis of his award. In particular, he must briefly describe his findings of fact and explain how an analysis of the appropriate factors has led to his decision. Significantly, the judge must indicate how each of the twelve Johnson factors affected his decision." *Id.* The District Court's order fails to meet this standard.

Fees Erroneously Awarded for Work on A Different Receivership Estate

The Fifth Circuit has held that receivership fees must be charged against each fund held by the receiver as if separate receivers had been appointed for each. *Bank of Commerce & Trust Co. v. Hood*, 65 F.2d 281, 283-4 (5th Cir. 1933). The District Court may award the receiver fees from property only if the receiver's acts have benefitted ***that*** property. *E.g.*, *Securities and Exchange Com'n v. Elliott*, 953 F.2d 1560 (11th Cir. 1992) (relying upon *Bank of Commerce & Trust Co. v Hood* at 283). The Million Dollar fee award (making a total of Two Million Dollars awarded to Vogel and Gardere) was not segregated nor shown to have been for any acts to the benefit of Novo Point LLC nor Quantec LLC.

For further cause Appellants also argue the following:

Further, pursuant to Texas law, an attorney is paid (when they actually do work on behalf of a client providing legal services) not solely based on their work,

but also based on their loyalty to the client. *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999). Vogel's law firm has not been loyal to any of the receivership estates in Vogel's hands. Rather, Vogel has worked in clear conflict of interest between various estates and against the estates. For example, Vogel and his law firm have clearly been acting as prosecutors against Baron and his estate, actively soliciting claims against the estate and arguing actively against the interests of the estate. At the same time Vogel has held the conflicted position of being charged with defending LLC assets against 'claims' made against Baron, while at the same time Vogel has prosecuted the claims and forcibly sought to liquidate company assets to pay 'Baron' claims. Similarly, in acting as receiver both of Baron and of AsiaTrust, Vogel is clearly conflicted over the adverse claims of AsiaTrust against Baron, and to claims by former attorneys employed by AsiaTrust who seek to make Baron personally liable for the fees due from AsiaTrust. The Fifth Circuit has held that "[W]here an actual conflict of interest exists, no more need be shown in this type of case to support a denial of compensation." *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249, 1256 (5th Cir. 1986). The Supreme Court has explained the rule as follows:

> "[R]easonable compensation for services rendered" necessarily implies loyal and disinterested service in the interest of those for whom the claimant purported to act. *American United Mutual Life Ins. Co. v. City of Avon Park*, 311 U.S. 138. Where a claimant, … was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no

> answer to say that fraud or unfairness were not shown to have resulted. *Cf. Jackson v. Smith*, 254 U.S. 586, 589.

Woods v. City Nat. Bank & Trust Co. of Chicago, 312 U.S. 262, 268 (1941). Notably, Vogel is also conflicted as a fiduciary and partner of Gardere. On hand as a fiduciary for Gardere Vogel is charged with maximizing the fees received by Gardere and paid a bonus based on the more he bills on Gardere's behalf. At the same time, Vogel is charged as a fiduciary for the receivership estates and has the conflicting duty to conserve estate property and minimize unnecessary fees and charges.

Finally, Vogel and his firm should not be paid from receivership assets for work done in defending Vogel or in engaging in a controversy with parties to the lawsuit. *E.g. In re Marcuse & Co.*, 11 F.2d 513, 516 (7th Cir.1926) (the receiver has ordinarily no justification for engaging in a controversy with one who claims adversely to him and because "the receiver was without authority to participate in the litigation involving the … liability of these men, there should be no allowance against the estate of attorney's fees for such services."); *United States v. Larchwood Gardens, Inc.*, 420 F.2d 531, 534-535 (3rd Cir. 1970) ("the receivers' expenses and costs in defending their allowances on appeal are not proper charges against the receivership estate").

The Fifth Amendment Question

Baron repeatedly moved in the District Court to be allowed access to his

own money in order to hire attorneys to represent him. E.g., R. 2720; SR. v2 p384-390 (Doc 264); SR. v5 p139 (Doc 445). However, the District Court did not allow Baron to hire counsel. E.g., Doc 316 (SR. v4 p119). Baron has made a similar motion before the Fifth Circuit. That motion is pending ruling, and, to this point, Baron has not been permitted to (1) Earn wages and engage in business transactions to earn money to pay an attorney; (2) Be allowed access to his own money held by the receiver to pay an attorney to represent him; nor (3) Hire paid legal counsel. However, the Fifth Circuit has held that a civil litigant has a constitutional right to retain hired counsel. *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1104 (5th Cir. 1980). Moreover, the Fifth Circuit has held that "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement." Id. at 1118; *Mosley v. St. Louis Southwestern Ry.*, 634 F.2d 942, 946 (5th Cir. 1981). An individual's relationship with his or her attorney "acts as a critical buffer between the individual and the power of the State." *Johnson v. City of Cincinnati*, 310 F.3d 484, 501 (6th Cir. 2002). Further, the Supreme Court has held that a party must be afforded a fair opportunity to secure counsel "of his own choice" and that applies "in any case, civil or criminal" as a due process right "in the constitutional sense". *Powell v. Alabama*, 287 U.S. 45, 53-69 (1932). That basic right was denied Baron by the District Court, and is pending ruling by the Fifth Circuit.

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 law, this means **the right to be represented by paid legal counsel**. *E.g.*, *Mosley*, 634 F. 2d at 946; *Powell*, 287 U.S. at 53; *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 instant proceedings, Jeffrey Baron is being denied this fundamental right. Accordingly the substantive motions pending against Baron and his property while he is being deprived of his basic constitutional right to pay an attorney to represent him should be denied. Because the undersigned is a solo practitioner with no funding for discovery or manpower to perform itemized review of fee applications, or manpower to attend all of the various bankruptcy court proceedings, etc., the representation provided Baron is limited in scope to appellate legal issues. Baron is entitled as a matter of constitutional right to more. A citizen is entitled to use their own money to hire paid legal counsel to fully represent them, including conducting discovery, attending hearings, reviewing line by line items on fee applications, hiring expert witnesses to provide evidence that fee requests are not reasonable, to investigate the claims against them, etc.

Standard in Granting Stay Pending Appeal

The Fifth Circuit has adopted the four factor test set out in *Virginia Petroleum Job. Ass'n v. Federal Power Com'n*, 259 F.2d 921 (DC Cir. 1958) to determine whether stay pending appeal should be granted. *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968). Those factors are: (1) Likelihood of success on the merits; (2) A showing of irreparable injury if the stay is not granted; (3) Whether granting the stay would substantially harm the other parties; and (4) Granting of the stay would serve the public interest. *Id.*

First, the substantive merits of the liquidation and receivership addressed above, establish a clear likelihood of eventual success on the merits. Secondly, irreparable injury is established as a matter of law, as Novo Point LLC may have no right to appeal a sale that has been consummated. *See Lee-Vac, Ltd.*, 630 F.2d at 247. Sherman and Vogel have both argued this position. Third, there is no harm to any party caused by granting the stay. Finally, the public interest is served in allowing a company—not in bankruptcy— to appeal a court's order to liquidate their assets. **There is a substantial disruptive effect to commerce in allowing a judge power to effectively dissolve companies not in bankruptcy by liquidating their assets—when no claims have been pled against them-- and empowering a court to prevent appellate review of such orders by acting to liquidate before the matter can be appealed.**

CONCLUSION

The District Court was stayed from liquidating the assets of Novo Point LLC, and Quantec LLC. The District Court then advised the Fifth Circuit that if allowed to rule on the motions to sell the domain name assets it would stay the sales to allow appeal. Neither Novo Point LLC nor Quantec LLC was the party to any claim in the District Court. The liquidation threatens complete destruction of the companies, giving away up to $60 Million or more in assets for $0.02 cents on the dollar in secret, private sales. The appeal of the receivership will be meaningless if the companies are allowed to be liquidated before the validity of the receivership is determined on appeal.

WHEREFORE, Jeff Baron requests the Court to immediately stay the sale of all domain names pending resolution of the issues on appeal to the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that this document 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

CERTIFICATE OF CONFERENCE

This is to certify that the undersigned attempted to conferred with counsel for Sherman and Vogel by E-mail.

CERTIFIED BY: /s/ Gary N. Schepps
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