

CASE NO. 19-4089

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC.,
LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,
Defendants,

BLACK NIGHT ENTERPRISES, INC., N.P. JOHNSON FAMILY L.P., SOLCO
I, LLC, SOLSTICE ENTERPRISES, INC., STARLIGHT HOLDINGS, INC., and
XSUN ENERGY, LLC

Non-Party Appellants.

On Interlocutory Appeal from the United States District Court, District of Utah,
Central Division, The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' APPENDIX

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that in each appendices volume: 1) all required privacy redactions have been made; 2) the ECF submission is an exact copy of any hard copies that were filed (if any); and 3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Windows Defender, and according to the program are free from viruses. I further certify that the information on this form is true and correct to the best of my ability and belief formed after a reasonable inquiry.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that Appellant's Appendix complies with 10th Cir. R. 25.5 and all privacy redactions required have been made. The undersigned counsel certifies that paper copies submitted are or will be exact copies of the electronic version.

/s/ Denver C. Snuffer, Jr.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	CORRECTED RECEIVERSHIP ORDER Civil No. 2:15-cv-00828-DN District Judge David Nuffer
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ORDER

In accordance with the Memorandum Decision and Order Freezing Assets and to Appoint a Receiver (“Memorandum Decision”),¹ and the Findings of Fact and Conclusions of Law (“FFCL”),² and for good cause appearing,

IT IS HEREBY ORDERED that:

1. Defendants’ Objection to Plaintiff’s Proposed Receivership Order³ is
OVERRULED.

2. This Court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of Defendants RaPower-3 LLC, Neldon Johnson, International Automated Systems Inc. (“IAS”), LTB1 LLC, and R. Gregory Shepard (collectively, the “Receivership Defendants”), together with assets proven to be proceeds of activities of Receivership Defendants in possession of any and all subsidiaries and affiliated entities, including but not limited to:

- a. SOLCO I, LLC;
- b. XSun Energy, LLC;
- c. Cobblestone Centre, LC;
- d. DCL-16A, Inc.;
- e. DCL16BLT, Inc.;
- f. LTB O&M, LLC;
- g. N.P. Johnson Family Limited Partnership;
- h. Shepard Energy;

¹ Docket no. 444, filed August 22, 2018.

² Docket no. 467, filed October 4, 2018.

³ Docket no. 461, filed September 28, 2018.

- i. Shepard Global, Inc.;
- j. Solstice Enterprises;
- k. Black Night Enterprises; and
- l. Starlight Enterprises.

3. Until otherwise ordered, Wayne Klein is appointed to serve without bond as receiver (the “Receiver”) for the estate of the Receivership Defendants and any subsidiaries or affiliated entities, and he has standing to prosecute claims under the Uniform Voidable Transactions Act.⁴

A. Asset freeze.

4. The asset freeze included in the Memorandum Decision (“Asset Freeze”) is hereby continued, which states:

Except as otherwise provided herein, all assets of the Receivership Defendants are frozen until further order of this Court (“Receivership Property”). Accordingly, all persons and entities with direct or indirect control over any Receivership Property, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing such Receivership Property. This freeze shall include, but not be limited to, Receivership Property that is on deposit with financial institutions such as banks, brokerage firms and mutual funds, shares of stock, and any patents or other intangible property.⁵

5. The Asset Freeze is extended to include the subsidiaries and affiliated entities of the Receivership Defendants for the purpose of permitting the Receiver to investigate the assets, property, property rights, and interests of the subsidiaries and affiliated entities (“Extended Asset Freeze”). The Receiver is authorized, directed, and empowered to investigate all subsidiaries and

⁴ UTAH CODE § 25-6-101, et seq.

⁵ Memorandum Decision, *supra* note 1, ¶ 3.

affiliated entities of the Receivership Defendants to determine whether the assets, property, property rights, or interests of the subsidiaries and affiliated entities derive from the abusive solar energy scheme at issue in this case⁶ or from an unrelated business activity. Once the Receiver completes his investigation of the subsidiaries and affiliated entities, he shall make a recommendation to this Court about whether the Receivership should extend to any of the investigated subsidiaries or affiliated entities or specific property of those entities. The subsidiaries and affiliated entities which the Receiver is directed to investigate include, but are not limited, to the entities listed in Paragraph 2 of this Order.

6. The Extended Asset Freeze shall be in force for a period of 120 days. Before the expiration of the Extended Asset Freeze in 120 days, the Receiver shall file his report and recommendation with this Court. The report and recommendation shall include the Receiver's recommendation as to whether the receivership should be extended to any of the investigated subsidiaries and affiliated entities or specific property of those entities. If the Receiver is unable to complete his investigation before the expiration of 120 days, the Receiver shall file a motion with this Court to extend the Extended Asset Freeze for the period of time needed to complete his recommendation. Nothing in the Receiver's report and recommendation shall prohibit or estop the Receiver from subsequently recovering assets, property, property interests, or rights from any subsidiary or affiliated entity by other means (e.g., a suit for a voidable transaction or fraudulent conveyance).

7. During the Extended Asset Freeze, the Receiver may communicate and consult with counsel for the United States regarding his investigation and may request counsel's opinion

⁶ See FFCL, *supra* note 2; Memorandum Decision, *supra* note 1.

on whether the subsidiaries and affiliated entities or specific property of those entities should be included in the receivership estate.

8. The Asset Freeze extends to any subsidiaries or affiliated entities of the Receivership Defendants, their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, and each of them shall hold and retain within their control and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of assets, funds, or other properties (including money, real or personal property, securities, choses in action, or property of any kind whatsoever) of the Receivership Defendants. This applies to assets held by Receivership Defendants or under their control, at any time after inception of this action, whether such assets were or are held in the name of any Receivership Defendant or for their direct or indirect beneficial interest wherever situated. The Receivership Defendants shall direct each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding such assets, funds, or other properties of any Receivership Defendant to hold or retain within their control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.

B. Termination of authority and removal of officers and directors.

9. The directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys, and other agents of RaPower-3 LLC, IAS, and LTB1 LLC (collectively, the “Entity Receivership Defendants”)⁷ are hereby dismissed, and the powers of any general

⁷ If the Receiver determines after his investigation that the Receivership should be extended to include any of the subsidiaries or affiliated entities, and the Court agrees, then this provision (and all provisions involving the Entity Receivership Defendants) shall extend to the additional subsidiaries and affiliated entities that are subsequently made part of the receivership. This shall be deemed to occur on the date the Court agrees with the Receiver’s recommendation even if an amended order has not yet been issued.

partners, directors, or managers are hereby suspended. Such persons shall have no authority with respect to the Entity Receivership Defendants' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver.

10. No person holding or claiming any position of any sort with any of the Receivership Defendants shall possess any authority to act by or on behalf of any of the Receivership Defendants. Neither Johnson nor Shepard, nor anyone acting on their behalf, shall make any court filings or submissions to other government entities on behalf of the Entity Receivership Defendants other than in this case or in the pending appeal of an order in this case. Payment for any attorneys' fees, expenses, or other costs of such court filings or submissions shall be made from property that is not Receivership Property ("Non-Receivership Property"). Any filing or submission by any Receivership Defendant must contain a statement, made under penalty of perjury, identifying the source of the funds for the filing or submission in sufficient detail to show that the funds are not Receivership Property or otherwise derived from the solar energy scheme.

C. General powers and duties of Receiver; control over entities.

11. The Receiver shall have all powers, authorities, rights, and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners of the Entity Receivership Defendants under applicable state and federal law, by the governing charters, bylaws, articles, or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959, 1692, and Fed. R. Civ. P. 66, and this Court. The Receiver is authorized to sue and be sued as provided in 28 U.S.C. §§ 754, 959, 1692, and Fed. R. Civ. P. 66, and by this Court.

12. The Receiver shall assume and control the operation of the Entity Receivership Defendants and shall pursue and preserve all their claims.

13. Subject to specific provisions in this Order, the Receiver shall have the following general powers and duties:

a. To use reasonable efforts to determine the nature, location and value of all property interests of each of the Receivership Defendants, including Johnson and Shepard. These property interests include, but are not limited to: monies, accounts, trusts, funds, digital currencies, securities, credits, stocks, bonds, effects, goods, chattels, intangible property (including patents and other intellectual property), real property, lands, premises, leases, claims, rights, ownership interests in domestic or foreign entities, and other assets, together with rents, profits, dividends, receivables, interest, or other income attributable thereto, of whatever kind, that the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (“Receivership Property”).

b. To take custody, control, and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive, and take into possession from third parties all Receivership Property and records relevant thereto.

c. To manage, control, operate, and maintain the Receivership Property and hold in his possession, custody, and control all Receivership Property, pending further order of this Court.

d. Except as otherwise provided in this Order, to use Receivership Property for the benefit of the receivership, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his duties as Receiver.

e. To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, members, shareholders, trustees, and agents of the Entity Receivership Defendants.

f. To engage and employ persons in his discretion to assist him in carrying out his duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, forensic experts, securities traders, registered representatives, financial or business advisers, liquidating agents, real estate agents, brokers, traders, or auctioneers.

g. To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property.

h. To open all mail directed to or received by or at the offices or post office boxes of the Receivership Defendants, and to inspect all mail opened prior to the entry of this Order, to determine whether items or information therein fall within the mandates of this Order; provided, however, that mail originating with counsel for Receivership Defendants may only be opened after a court order.

i. To assert, prosecute, and negotiate any claim under any insurance policy held by or issued on behalf of the Receivership Defendants or their officers, directors, agents, employees, or trustees, and to take any and all appropriate steps in connection with such policies.

j. To issue subpoenas and letters rogatory to compel testimony of persons or production of records, consistent with the Federal Rules of Civil Procedures and applicable Local Rules, except for the provisions of [Fed. R. Civ. P. 26\(d\)\(1\)](#), concerning any subject matter within the powers and duties granted by this Order.

k. To seek information from governments and entities outside the United States pursuant to mutual legal assistance treaties or other agreements to which the United States or an instrumentality of the United States is a party.

l. To bring legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his duties as Receiver. In determining which legal actions are likely to be cost effective, the Receiver may consult with counsel for the United States in making decisions on which actions to pursue.

m. To pursue, resist, defend, and settle all suits, actions, claims, and demands which may now be pending or which may be brought by or asserted against the receivership estate. In determining which suits, actions, claims and demands to pursue, resist, defend, or settle, the Receiver may consult with counsel for the United States in making decisions on such suits, actions, claims, and demands.

n. To assume all legal privileges, including attorney-client and accountant-client privileges, belonging to the Receivership Defendant entities, and determine in his discretion whether and when to assert or, on motion, to waive such privileges.

o. To compromise accounts receivable and other contractual claims of the Receivership Defendants and to abandon non-real-estate Receivership Property deemed by the Receiver to be of inconsequential value or benefit to the receivership estate on terms and in the manner the Receiver deems necessary or appropriate in the Receiver's business judgment.

p. To seek the assistance of the U.S. Marshals Service or from any other federal, state, county, or civil law enforcement offices or constables of any jurisdiction.

q. To alert the appropriate federal, state, local, or other law enforcement agency if the Receiver discovers a violation, or suspected violation, of federal, state, local, or other law in the course of his duties in administering the receivership, and to share such information and documents as may be necessary regarding the violation with that agency.

r. To take such other action as may be approved by this Court.

D. Receiver's control over assets, books, records, and accounts.

14. The Receivership Defendants, as well as their past and present officers, directors, agents, managers, servants, employees, attorneys, accountants, general and limited partners, trustees, and any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, electronic transmission, or otherwise, are directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, or relating to, the Receivership Property. The Receiver is authorized to request a modification of this provision or the previously issued Preservation Order.⁸

15. The Receiver is authorized to take immediate possession of all assets, bank accounts or other financial accounts, contents of safe deposit boxes, books, records, and all other documents or instruments—whether in paper or electronic form—relating to the Receivership Defendants; provided, however, that Receivership Defendants may retain copies at their own expense.

16. All persons and entities having control, custody, or possession of any Receivership Property or records of Receivership Defendants are hereby ordered to turn such

⁸ Docket no. 419, filed June 27, 2018.

property over to the Receiver; provided, however, that Receivership Defendants may retain copies at their own expense.

17. The Receivership Defendants, as well as their agents, servants, employees, attorneys, any persons acting for or on behalf of the Receivership Defendants, and any persons receiving notice of this Order by personal service, electronic transmission, or otherwise, having possession of the property, business, books, records, accounts, or assets of the Receivership Defendants, are hereby ordered to deliver the same to the Receiver or his agents or employees.

E. Access to and control over real and personal property.

18. The Receiver is authorized, as the Receiver deems necessary or appropriate in the Receiver's business judgment, to take immediate possession of all personal property of the Receivership Defendants, wherever located, including but not limited to: electronically-stored information, computers, laptops, hard drives, external storage drives, and any other such memory, media or electronic storage devices, books, papers, data processing records, evidence of indebtedness, bank records and accounts, savings records and accounts, brokerage records and accounts, certificates of deposit, stocks, bonds, debentures, and other securities and investments, contracts, mortgages, furniture, office supplies, solar thermal lenses, machinery and equipment, tools, fixtures, metal, plastic, and other building materials.

19. The Receiver is authorized to take immediate possession of all vehicles and aircraft of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures, including the following specific aircrafts:

- a. Cessna, Model 172M, a 1973 fixed wing single-engine with serial number 17261885 and tail number 12213, believed to be located at the Spanish Fork-Springville airport in Utah County, Utah; and

b. Mooney, Model M20C, a 1969 fixed wing single-engine with serial number 700031 and tail number 9400V, believed to be located at the Spanish Fork-Springville airport in Utah County, Utah.

20. The Receiver is authorized to take immediate possession of all real property of the Receivership Defendants, wherever located, including but not limited to all ownership and leasehold interests and fixtures. The Receiver is authorized to file notices or other documents with the appropriate authorities to effectuate notice of its possession of the real property. The Receiver is authorized to take immediate possession of real property in which Receivership Defendants have a record interest, and to file a motion to take possession (a “Possession Motion”) of real property in which Receivership Defendants have a beneficial interest even if titled in the name of another, such as a spouse or an affiliated entity, such as a family limited partnership. If the Receiver later determines the real property was incorrectly included in the receivership, or that a notice was incorrectly filed, the Receiver shall take steps to release possession of such real property to its owners. Specific real property for which the Receiver shall take immediate possession, or file a notice of intent to file a Possession Motion, includes the parcels described as follows:

a. Millard County, Utah assessor’s parcel number 4805, with the following legal description:

THE NORTHWEST QUARTER OF SECTION 27, TOWNSHIP 17 SOUTH, RANGE 9 WEST, SALT LAKE BASE AND MERIDIAN.

b. Millard County, Utah assessor’s parcel number 4806-A, with the following legal description:

ALL OF SECTION 28, TOWNSHIP 17 SOUTH, RANGE 9 WEST, SALT LAKE BASE AND MERIDIAN.

c. Millard County, Utah assessor's parcel number 4806-B, with the following legal description:

THE EAST ONE-HALF OF SECTION 29, TOWNSHIP 17 SOUTH, RANGE 9 WEST, SALT LAKE BASE AND MERIDIAN.

d. Millard County, Utah assessor's parcel number DO-3151, with the following legal description:

BEGINNING WEST 997.12 FEET FROM THE NORTHEAST CORNER OF LOT 1, SECTION 4, TOWNSHIP 16 SOUTH, RANGE 7 WEST, SALT LAKE BASE AND MERIDIAN; THENCE WEST 332.38 FEET, MORE OR LESS, TO THE WEST BOUNDARY OF SAID LOT 1; THENCE SOUTH 1315.8 FEET; THENCE EAST 332.38 FEET; THENCE NORTH 1315.8 FEET TO THE POINT OF BEGINNING.

EXCEPTING THEREFROM (THE SOUTH 2.4 FEET) ALL RIGHTS OF WAY, STOCK TRAILS, DITCHES AND CANALS, GRAVEL PITS AND GRAVEL BEDS.

e. Millard County, Utah assessor's parcel number DO-3276-1-1, commonly known as 4350 W. 5000 N., Delta, UT 84624, with the following legal description:

Beginning 960 feet East of the Southwest corner of the Southwest quarter of the Northeast quarter of Section 17, Township 16 South, Range 7 West, Salt Lake Base and Meridian, thence West 146 feet; thence North 911 Feet; thence East 368.991 feet; thence South 11 feet; thence South 16° 46' West 773 feet; thence South 159.862 feet more or less to the point of beginning.

f. Millard County, Utah assessor's parcel number DO-3396, with the following legal description:

Beginning at the Southeast corner of the Southwest Quarter of the Northeast Quarter of Section 32, Township 16 South, Range 7 West, Salt Lake Base and Meridian; Thence West 600 feet along the South boundary of the said Southwest Quarter of the Northeast Quarter of Section 32; Thence North 29° 23.3' East 998.5 feet; Thence East 110.0 feet to the East boundary of the said Southwest Quarter of the Northeast Quarter of Section 32, Thence South 210.0 feet, more or less to the Northeast corner of the Southwest Quarter of the Southeast Quarter of the Northeast Quarter of said Section 32; Thence East 14.0 feet more or less, Thence South 135.0 feet; Thence East 170.0 feet; Thence North 135.0 feet; Thence East 276.0 feet; Thence South 135.0 feet; Thence West 100.0 feet; Thence South 165.0 feet; Thence East 170 feet; Thence North 300.0 feet; Thence East 130 feet; Thence South 660.0 feet to the Southeast corner of the

g. Millard County, Utah assessor's parcel number DO-3396-5, with the following legal description:

Beginning at a point 130 feet West and 135 feet South of the Northeast Corner of the Southwest 1/4 of the Southeast 1/4 of the Northeast 1/4 of Section 32, Township 16 South, Range 7 West, Salt Lake base and meridian, Thence South 165 feet, Thence West 170 feet, Thence North 165 feet, Thence East 170 feet to the point of beginning.

h. Millard County, Utah assessor's parcel number DO-3396-6, with the following legal description:

BEGINNING 130 FEET WEST OF THE NORTHEAST CORNER OF THE SOUTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 32, TOWNSHIP 16 SOUTH, RANGE 7 WEST, SALT LAKE BASE AND MERIDIAN, THENCE SOUTH 135 FEET; THENCE WEST 70 FEET; THENCE NORTH 135 FEET; THENCE EAST 70 FEET TO THE POINT OF BEGINNING.

i. Millard County, Utah assessor's parcel number DO-3396-10, with the following legal description:

Beginning 476 feet West of the Northeast corner of the Southwest Quarter of the Southeast Quarter of the Northeast Quarter of Section 32, Township 16 South, Range 7 West, Salt Lake Base and Meridian, Thence South 135 feet; Thence West 170 feet; Thence North 135 feet; Thence East 170 feet to the point of beginning.

j. Millard County, Utah assessor's parcel number DO-4568-1, commonly known as 2730 W. 4000 S., Oasis, UT 84624, with the following legal description:

COMMENCING AT A POINT LOCATED NORTH 89°33'23.5" EAST 1080.19 FEET ALONG THE QUARTER SECTION LINE FROM THE WEST QUARTER CORNER OF SECTION 34, TOWNSHIP 17 SOUTH, RANGE 7 WEST, SALT LAKE BASE AND MERIDIAN; THENCE NORTH 00°41'09.5" EAST 77.73 FEET; THENCE NORTH 36°08'16" EAST 161.44 FEET; THENCE NORTH 69°36'58" EAST 49.80 FEET; THENCE NORTH 34°49'13.5" EAST 67.18 FEET TO AN EXISTING FENCE LINE; THENCE NORTH 65°24'28" EAST 195.30 FEET ALONG AN EXISTING FENCE LINE; THENCE NORTH 67°05'16" EAST 90.54 FEET ALONG AN EXISTING FENCE LINE; THENCE SOUTH 30°31'07" EAST 100.20 FEET; THENCE SOUTH 25°26'12" WEST 234.94 FEET TO THE NORTH SHOULDER OF AN EXISTING COUNTY ROAD; THENCE NORTH 77°51'02" WEST 12.17 FEET ALONG SAID NORTH SHOULDER OF THE EXISTING COUNTY ROAD; THENCE ALONG A CURVE TO THE LEFT 22.87 FEET WITH A RADIUS OF 43.026 FEET AND A CHORD BEARING AND DISTANCE OF SOUTH 86°55'28.5" WEST 22.60 FEET ALONG SAID NORTH SHOULDER OF THE EXISTING COUNTY ROAD; THENCE SOUTH 71°41'59" WEST 41.15 FEET ALONG SAID NORTH SHOULDER OF THE EXISTING COUNTY ROAD TO THE WEST RIGHT-OF-WAY LINE OF THE UNION PACIFIC RAILROAD; THENCE SOUTH 25°26'12" WEST 94.045 FEET ALONG SAID UNION PACIFIC RIGHT-OF-WAY TO QUARTER SECTION LINE; THENCE SOUTH 25°26'12" WEST 362.64 FEET ALONG SAID UNION PACIFIC RAILROAD RIGHT-OF-WAY; THENCE ALONG A CURVE TO THE LEFT 351.22 FEET WITH A RADIUS OF 706.78 FEET AND A CHORD BEARING AND DISTANCE OF NORTH 20°37'37" WEST 347.618 FEET TO THE QUARTER SECTION LINE AND THE POINT OF BEGINNING.

EXCEPTING: ANY PORTION WITHIN THE BOUNDARY OF THE COUNTY ROAD RIGHT-OF-WAY AND THE UNION PACIFIC RAILROAD RIGHT-OF-WAY.

**** RESERVING UNTO THE GRANTOR ANY AND ALL WATER RIGHTS ****

k. Millard County, Utah assessor's parcel number DO-SS-136 & 137, with the following legal description:

LOTS 136, 137 AND 138 SHERWOOD SHORES, A SUBDIVISION, ACCORDING TO THE OFFICIAL PLAT THEREOF, AS RECORDED IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY.

l. Millard County, Utah assessor's parcel number HD-3511, with the following legal description:

SECTION 16, TOWNSHIP 16 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.
LESS: BEGINNING AT THE SOUTHWEST CORNER OF SECTION 16, THENCE NORTH 1320 FEET; THENCE EAST 1320 FEET; THENCE SOUTH 1320 FEET; THENCE WEST 1320 FEET TO THE POINT OF BEGINNING.
SUBJECT TO A 30 FOOT EASEMENT AROUND THE PERIMETER OF SAID PROPERTY.(HD-3511)

m. Millard County, Utah assessor's parcel number HD-3511-1, with the following legal description:

BEGINNING AT THE SOUTHWEST CORNER OF SECTION 16, TOWNSHIP 16 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN; THENCE NORTH 1320 FEET; THENCE EAST 1320 FEET; THENCE SOUTH 1320 FEET; THENCE WEST 1320 FEET TO THE POINT OF BEGINNING.(HD-3511-1)

n. Millard County, Utah assessor's parcel number HD-4497-1, with the following legal description:

Beginning 18 rods South and 3 rods East of the Northwest Corner of the Southwest Quarter of Section 33, Township 17 South, Range 7 West, Salt Lake Base and Meridian; thence South 145 feet; thence East 15 rods, thence North 145 feet; thence West 15 rods to the point of beginning.

EXCEPTING THEREFROM that portion lying within the boundaries of the State Road right of way.

o. Millard County, Utah assessor's parcel number HD-4606-2, with the following legal description:

THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SECTION 2, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN. LESS: BEGINNING AT THE SOUTHEAST CORNER OF SECTION 2, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN, THENCE SOUTH 89°51'00" WEST 544.50 FEET ALONG THE SOUTH BOUNDARY OF SECTION 2, THENCE NORTH 600 FEET PARALLELING THE EAST BOUNDARY OF THE SOUTHEAST QUARTER OF SECTION 2; THENCE NORTH 89°51'00" EAST 544.50 FEET PARALLELING THE SOUTH BOUNDARY TO THE EAST BOUNDARY OF SECTION 2; THENCE SOUTH 600 FEET ALONG THE EAST BOUNDARY OF SECTION 2, TO THE POINT OF BEGINNING. EXCEPTING THEREFROM ALL RIGHTS OF WAY, STOCK TRAILS, DITCHES AND CANALS, GRAVEL PITS AND GRAVEL BEDS. TOGETHER WITH WATER RIGHT NO. 68-2388, APP.*CLAIM NO. A57256. SUBJECT TO A RIGHT OF WAY FOR A COUNTY ROAD, AND INCIDENTAL PURPOSES AS NOW EXISTS.

p. Millard County, Utah assessor's parcel number HD-4606-2-1, with the following legal description:

THE SOUTH HALF OF THE SOUTHEAST QUARTER OF SECTION 2, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN. LESS: BEGINNING AT THE SOUTHEAST CORNER OF SECTION 2, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN, THENCE SOUTH 89°51'00" WEST 544.50 FEET ALONG THE SOUTH BOUNDARY OF SECTION 2, THENCE NORTH 600 FEET PARALLELING THE EAST BOUNDARY OF THE SOUTHEAST QUARTER OF SECTION 2; THENCE NORTH 89°51'00" EAST 544.50 FEET PARALLELING THE SOUTH BOUNDARY TO THE EAST BOUNDARY OF SECTION 2; THENCE SOUTH 600 FEET ALONG THE EAST BOUNDARY OF SECTION 2, TO THE POINT OF BEGINNING. EXCEPTING THEREFROM ALL RIGHTS OF WAY, STOCK TRAILS, DITCHES AND CANALS, GRAVEL PITS AND GRAVEL BEDS. TOGETHER WITH WATER RIGHT NO. 68-2388, APP. CLAIM NO. A57256. SUBJECT TO A RIGHT OF WAY FOR A COUNTY ROAD, AND INCIDENTAL PURPOSES AS NOW EXISTS.

q. Millard County, Utah assessor's parcel number HD-4609, with the following legal description:

THE WEST HALF OF THE SOUTHWEST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 2, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.

EXCEPTING THEREFROM ALL OIL, GAS AND/OR OTHER MINERALS IN, ON OR UNDER SAID LAND, TOGETHER WITH THE RIGHT OF INGRESS AND EGRESS FOR THE PURPOSE OF EXPLORING AND/OR REMOVING THE SAME.

r. Millard County, Utah assessor's parcel number HD-4612, with the following legal description:

THE SOUTH HALF OF SECTION 3, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.

s. Millard County, Utah assessor's parcel number HD-4648, with the following legal description:

THE NORTH HALF OF THE NORTHEAST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN. (HD-4648)

t. Millard County, Utah assessor's parcel number HD-4654, with the following legal description:

THE NORTHWEST QUARTER OF THE SOUTHEAST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.

EXCEPTING THEREFROM ALL RIGHTS OF WAY, STOCK TRAILS, DITCHES AND CANALS, GRAVEL PITS AND GRAVEL BEDS.

u. Millard County, Utah assessor's parcel number HD-4657, with the following legal description:

THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.

EXCEPTING THEREFROM ALL RIGHTS OF WAY, STOCK TRAILS, DITCHES AND CANALS, GRAVEL PITS AND GRAVEL BEDS.

EXCEPTING THEREFROM ALL OIL, GAS AND/OR OTHER MINERALS IN, ON OR UNDER SAID LAND, TOGETHER WITH THE RIGHT OF INGRESS AND EGRESS FOR THE PURPOSE OF EXPLORING AND/OR REMOVING THE SAME.

v. Millard County, Utah assessor's parcel number HD-4658, with the following legal description:

BEGINNING AT THE SOUTHWEST CORNER OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN, THENCE NORTH 0°48'32" EAST 234.51 FEET ALONG THE SECTION LINE; THENCE NORTH 78°41'15" EAST 680 FEET; THENCE SOUTH 03°07'08" WEST 378.38 FEET TO THE SOUTH BOUNDARY OF SAID NORTHWEST QUARTER OF THE NORTHWEST QUARTER; THENCE NORTH 89°07'23" WEST 649.59 FEET ALONG SAID SOUTH BOUNDARY TO THE POINT OF BEGINNING. (HD-4658)

w. Millard County, Utah assessor's parcel number HD-4658-1, with the following legal description:

THE NORTH HALF OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN.

EXCEPTING THEREFROM ALL OIL, GAS AND/OR OTHER MINERALS IN, ON OR UNDER SAID LAND, TOGETHER WITH THE RIGHT OF INGRESS AND EGRESS FOR THE PURPOSE OF EXPLORING AND/OR REMOVING THE SAME.

LESS: BEGINNING AT THE SOUTHWEST CORNER OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 11, TOWNSHIP 17 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN, THENCE NORTH 0°48'32" EAST 234.51 FEET ALONG THE SECTION LINE; THENCE NORTH 78°41'15" EAST 680 FEET; THENCE SOUTH 03°07'08" WEST 378.38 FEET TO THE SOUTH BOUNDARY OF SAID NORTHWEST QUARTER OF THE NORTHWEST QUARTER; THENCE NORTH 89°07'23" WEST 649.59 FEET ALONG SAID SOUTH BOUNDARY TO THE POINT OF BEGINNING.

x. Millard County, Utah assessor's parcel number MA-2662-B, with the following legal description:

THE SOUTHEAST QUARTER AND THE NORTH HALF OF THE SOUTHWEST QUARTER AND THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER AND THE SOUTH HALF OF THE NORTHWEST QUARTER OF SECTION 27, TOWNSHIP 15 SOUTH, RANGE 8 WEST, SALT LAKE BASE AND MERIDIAN. (MA-2662-B)

EXCEPTING THEREFROM: THAT PORTION WITHIN THE BOUNDARY OF THE MILLARD COUNTY ROAD RIGHT-OF-WAY.

y. Utah County, Utah assessor's tax parcel number 55-718-0006, commonly known as 11404 S. 5825 W., West Mountain, UT 84651, with the following legal description:

Lot 6, Plat "A", West Mountain Estates Amended Subdivision, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

z. Utah County, Utah assessor's parcel number 514680132, commonly known as 1045 S. 1700 W., Unit 132, Payson, UT 84651, with the following legal description:

UNIT 132, BUILDING 1, CONTAINED WITHIN THE PLAT "A" RIDGESTONE CONDOMINIUMS, A CONDOMINIUM PROJECT AS THE SAME IS IDENTIFIED IN THE RECORD OF SURVEY MAP RECORDED ON AUGUST 23, 2006, IN UTAH COUNTY, AS ENTRY NO. 109522:2006 (AS SAID RECORD OF SURVEY MAP MAY HAVE HERETOFORE BEEN AMENDED OR SUPPLEMENTED) AND IN THE DECLARATION RECORDED ON AUGUST 23, 2006 IN UTAH COUNTY, AS ENTRY NO. 109524:2006 (AS SAID DECLARATION MAY HAVE HERETOFORE BEEN AMENDED OR SUPPLEMENTED.)

TOGETHER WITH THE APPURTENANT UNDIVIDED INTEREST IN SAID PROJECT'S COMMON AREAS AS ESTABLISHED IN SAID DECLARATION AND ALLOWING FOR PERIODIC ALTERATION BOTH IN THE MAGNITUDE OF SAID UNDIVIDED INTEREST AND IN THE COMPOSITION OF THE COMMON AREAS AND FACILITIES TO WHICH SAID INTEREST RELATES.

aa. Los Angeles County, California assessor's ID number 2842-027-174, commonly known as 18850 Vista Del Canon, Unit G, Newhall, CA 91321, with the following legal description:

TR=44328 Lot 9 Condo Unit 305

bb. San Bernardino County, California assessor's parcel number 0541131080000, with the following legal description:

W 1/2 W 1/2 E 1/2 W 1/2 SEC 33 TP 11N R 4E EX PTN LYING S OF N LI HWY 91 AND EX COM AT NW COR E 1/2 W 1/2 SD SEC TH S 3874.72 FT ALG W LI SD E 1/2 W 1/2 TH N 61 DEG 16 MIN 00 SECONDS E 375.96 FT TO E LI W 1/2 W 1/2 E 1/2 W 1/2 SD SEC TH N 3697.59 FT TH W 331.2 FT M/L TO POB 6.2 AC M/L

cc. Howard County, Texas assigned property id number R000046408, with the following legal description:

Acres 18.380, SC 36 BK 32 1N 009.01 ACQ 031306 BLK/TRACT 32 1N 18.38 ACRES

dd. Howard County, Texas assigned property id number R000046407, with the following legal description:

Acres 608.680, SC 36 BK 32 1N 009 ACQ 031306 BLK/TRACT 32 1N 608.68 ACRES

ee. Salt Lake County, Utah property with the address of 858 W. Clover Meadow Drive, Salt Lake City, UT 84123, with the following legal description:

LOT 112, MISTY MEADOWS SUBDIVISION NO. 2, ACCORDING TO THE OFFICIAL PLAT THEREOF, RECORDED IN THE OFFICE OF THE COUNTY RECORDER, COUNTY OF SALT LAKE, STATE OF UTAH.

21. Upon receiving actual notice of this Order by personal service, electronic service, or otherwise, all persons other than law enforcement officials acting within the course and scope of their official duties, are prohibited (without the express written permission of the Receiver) from: (a) entering such premises; (b) removing anything from such premises; or (c) destroying, concealing or erasing anything on such premises.

22. To execute the express and implied terms of this Order, the Receiver is authorized to change locks to the premises described above. The Receiver shall have exclusive control of the keys. The Receiver is also authorized to implement surveillance or other security measures to ensure that the terms of this Order are enforced. The Receivership Defendants, or any other person acting or purporting to act on their behalf, are ordered not to change the locks in any manner, nor to have duplicate keys made, nor shall they have keys to these properties in their possession during the term of the receivership. The Receivership Defendants shall not otherwise

interfere with the surveillance or security measures put in place by the Receiver on the premises described above.

F. Duties of Receivership Defendants, subsidiaries, and affiliated parties to provide information and assist the Receiver.

23. The Receivership Defendants, their subsidiaries, any affiliated entities, and any affiliated individuals (including spouses and other family members) shall cooperate with and assist the Receiver in the performance of his duties and obligations. As such, they must respond promptly and truthfully to all requests for information and documents from the Receiver.

24. The Receivership Defendants and the past and present officers, directors, agents, managers, general and limited partners, trustees, attorneys, transfer agents, website and electronic mail administrators, database administrators, accountants, and employees of the Entity Receivership Defendants, as well as those acting in their place, are hereby ordered and directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, or relating to, the Receivership Defendants or Receivership Property; such information shall include, but is not limited to: books, records, documents, accounts, stock certificates, intellectual property records, evidence of intellectual property rights, computer and electronic records, and all other instruments and papers. If these documents and records are no longer within their control, they must provide information to the Receiver identifying the records, the persons in control of the records, and efforts undertaken to recover the records.

25. Within 30 days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver and counsel for the United States, a sworn statement, listing: (a) the identity, location, and estimated value of all Receivership Property; (b) all employees (and job titles thereof), other personnel, attorneys, accountants, and any other agents or contractors of the Entity Receivership Defendants; (c) the names, addresses, and amounts of

claims of all known creditors of the Receivership Defendants; (d) the existence of and information about all insurance policies owned by, issued to, or obtained by any of the Receivership Defendants or for which a Receivership Defendant is the beneficiary; (e) the password for all computers, electronic devices, software programs, online financial accounts, websites, social media accounts, cloud storage, servers, and any other book or record or account of the Receivership Defendants that is accessible by password; (f) the status of any pending litigation to which any of the Receivership Defendants are involved, other than this instant case, including the names of the parties, the names of attorneys who have represented the Receivership Defendants, and the location of any records relating to the litigation which records are not under the control of Receivership Defendants; and (g) a financial statement setting forth the identity, value, and location of all assets of each Receivership Defendant, including assets held outside the territory of the United States.

26. Within 60 days of the entry of this Order, the Receivership Defendants shall file with the Court and serve upon the Receiver and counsel for the United States a sworn statement and accounting, with complete documentation, covering the period from January 1, 2005, to the present:

a. Of all Receivership Property, wherever located, held by or in the name of the Receivership Defendants, or in which any of them, directly or indirectly, has or had any beneficial interest, or over which any of them maintained or maintains or exercised or exercises control, including, but not limited to: (i) all securities, investments, funds, digital currencies, real estate, vehicles, aircraft, watercraft, recreational vehicles, jewelry and other assets, stating the location of each; (ii) all patents and other intellectual property, including documents of the grants of intellectual property, all documents used in

support of the applications, all models or samples of products that are the subject of intellectual property grants, and any documents showing the assignment, sale, or licensing of any intellectual property; and (iii) any and all accounts, including all funds held in such accounts, with any bank, brokerage, or other financial institution, including the account statements from each bank, brokerage, or other financial institution.

b. Identifying every safe deposit box, commercial mail box, business office, storage facility, or other building or facility belonging to, for the use or benefit of, controlled by, or titled in the name of any Receivership Defendant, or subject to access by any Receivership Defendant or other person subject to the Asset Freeze in Section A of this Order.

c. Identifying all credit, bank, charge, debit, stored-value, or other deferred payment card issued to or used by each Receivership Defendant including, but not limited to, the issuing institution, the card or account numbers, all persons or entities to which a card was issued or with authority to use a card, the balance of each account or card as of the most recent billing statement, and all statements for the last twelve months.

d. Identifying for the Entity Receivership Defendants: (i) the names, contact information, and number of shares for all shareholders as of November 23, 2015, and all purchases and sales of stock, including common and preferred shares, since November 23, 2015, which information shall include identification of the buyers and sellers, the number of shares transferred, the dates of the transfers, and the value of the transfers; and (ii) the names and contact information for transfer agents, market makers, attorneys, and accountants who provided services to IAS relating to its status as an issuer or publicly-held company.

e. Of all assets received by any of the Receivership Defendants from any person or entity, including the value, location, and disposition of any assets so received.

f. Of all funds received by the Receivership Defendants, and each of them, in any way related, directly or indirectly, to the conduct alleged in the United States' Complaint in this case. The submission must clearly identify, among other things, all purchases of solar lenses or alternative energy systems or other products sold by Receivership Defendants, the dates and amounts of the purchases, and the current location of funds received from the sales.

g. Of all expenditures exceeding \$1,000 made by any of them, including those made on their behalf by any person or entity.

h. Of all transfers of assets by them, including a description or identification of: (i) the assets; (ii) the transferees of the assets; (iii) the date of the transfers; (iv) the amount or value of the assets transferred; (v) a description of any goods or services received in exchange for the assets, including the value of any goods or services received; and, (vi) to the best of their knowledge, the current location of the assets.

27. Within 30 days of the entry of this Order, the Receivership Defendants shall provide to the Receiver and counsel for the United States copies of the Receivership Defendants' federal income tax returns for the fiscal or calendar years beginning with January 1, 2010, with all relevant and necessary underlying documentation.

28. Johnson and Shepard, as well as all past and present officers, directors, agents, attorneys, managers, shareholders, employees, accountants, debtors, creditors, managers, and general and limited partners of the Entity Receivership Defendants, and other appropriate persons or entities, including the family members of Johnson and Shepard, shall promptly

answer under oath to the Receiver all questions which the Receiver may put to them and produce all documents as required by the Receiver regarding the business of the Receivership Defendants or any other matter relevant to the operation or administration of the receivership or collection of funds due to the Receivership Defendants. If the Receiver deems it necessary to require the appearance of the aforementioned persons or entities, then the Receiver shall make his discovery requests in accordance with the Federal Rules of Civil Procedure.

29. Counsel or other retained parties who prepared or submitted intellectual property applications for Johnson, RaPower-3, or IAS shall provide to the Receiver all information requested by the Receiver relating to the applications, intellectual property rights granted, transfer of intellectual property rights, and information regarding the present holders or owners of those rights.

G. Repatriation of foreign assets and documents.

30. The Receivership Defendants are hereby ordered to forthwith transfer to the Receiver all Receivership Property outside the United States held jointly or singly or under their direct or indirect ownership or control, in whole or in part, with such Receivership Property transferred to the possession of the Receiver or to one or more accounts as may be determined by the Receiver.

31. The Receivership Defendants shall provide to the Receiver full and complete access to records of their accounts or assets held by any financial institutions outside the United States and shall deliver to the Receiver and counsel for the United States such consents to release financial records or assets as may be reasonably requested by the Receiver or the United States.

32. In furtherance of the foregoing repatriation provisions, the Receivership Defendants, their successors and assigns, and their officers, agents, servants, employees, affiliates, and attorneys, and all persons in active concert or participation with them who receive

actual notice of this Order by personal service or otherwise, are hereby enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign Receivership Property, or in the hindrance of the repatriation required by this Order, including but not limited to:

a. Sending any statement, letter, fax, e-mail, or wire transmission, or telephoning or engaging in any act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a “duress” event has occurred under the terms of foreign trust agreement, until such time that all Receivership Property has been fully repatriated in accordance with this Order; and

b. Notifying any trustee, trust protector, or other agent of any foreign company, trust, or similar entity of either the existence of this Order, or of the fact that repatriation is required pursuant to court order, until such time that all Receivership Property has been fully repatriated in accordance with this Order.

33. In the Receiver’s sole discretion, after consultation with counsel for the United States, the Receiver may take such steps as are necessary or appropriate to repatriate to the territory of the United States, all Receivership Property that is located outside the territory of the United States and to prevent any transfer, disposition, or dissipation whatsoever of any Receivership Property located outside the United States.

34. Within 30 days of the date of this Order, the Receivership Defendants shall file with the Court and serve on the Receiver and counsel for the United States a sworn statement:

(a) certifying their compliance with the repatriating provisions of this Order; (b) describing actions they have taken to repatriate assets to territory of the United States; (c) describing any

assets that remain outside the jurisdiction of the United States; and (d) explaining reasons any assets outside the jurisdiction of the United States have not been repatriated.

H. Cooperation with Receiver; injunction against interference.

35. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile, electronic transmission, or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver, which would interfere with or prevent the Receiver from performing his duties, including conduct that would or might:

a. Interfere with the Receiver's efforts to take control, possession, or management of any Receivership Property. Such prohibited actions include, but are not limited to, using self-help or executing or issuing (or causing the execution or issuance of) any court attachment, subpoena, replevin, execution, or other process for the purpose of impounding or taking possession of or interfering with or creating or enforcing a lien upon any Receivership Property.

b. Hinder, obstruct, or otherwise interfere with the Receiver in the performance of his duties. Such prohibited actions include, but are not limited to, concealing, destroying or altering records or information.

c. Dissipate or otherwise diminish the value of any Receivership Property. Such prohibited actions include, but are not limited to, releasing claims or disposing, transferring, exchanging, assigning or in any way conveying any Receivership Property; enforcing judgments, assessments, or claims against any Receivership Property or any Receivership Defendant; and attempting to modify, cancel, terminate, call, extinguish, revoke, or accelerate the due date of any lease, loan, mortgage, indebtedness, security

agreement, or other agreement executed by any Receivership Defendant or which otherwise affects any Receivership Property.

d. Interfere with or harass the Receiver or interfere in any manner with the exclusive jurisdiction of this Court over the receivership estate.

36. All banks, brokerage firms, financial institutions, and other persons or entities which have possession, custody, or control of any assets or funds held by, or in the name of, or for the benefit of, directly or indirectly, the Receivership Defendants that receive actual notice of this Order by personal service, electronic transmission, or otherwise shall:

a. Not liquidate, transfer, sell, convey or otherwise transfer any assets, securities, funds, or accounts in the name of or for the benefit of the Receivership Defendants except upon written instructions from the Receiver.

b. Not exercise any form of setoff, alleged setoff, lien, or any form of self-help whatsoever, or refuse to transfer any funds or assets to the Receiver's control without the permission of this Court.

c. Deny Receivership Defendants access to any safe deposit box without the written consent of the Receiver.

d. Within five business days of receipt of notice of this Order, file with the Court and serve on the Receiver and counsel for the United States a certified statement setting forth, with respect to each such account or other asset, a balance in the account or description of the assets as of the close of business on the date of receipt of the notice.

e. Cooperate expeditiously in providing information and transferring funds, assets, and accounts to the Receiver or at the direction of the Receiver.

37. All persons and entities owing any obligation, debt, or distribution to any Receivership Defendant shall, until further order of this Court, pay all such obligations to the Receiver, in accordance with the terms thereof and the Receiver's receipt of such payments shall have the same force and effect as if the Receivership Defendant had received such payment. Prior to depositing or cashing any payments made to the Receiver, the Receiver shall investigate whether the payor is a person or entity who purchased a solar lens or alternative energy system or other product from Receivership Defendants. If so, the Receiver shall return the payment along with a copy of the FFCL.⁹

38. Subject to payment for services provided, any entity furnishing water, electric, telephone, sewage, or garbage or trash removal services to the Receivership Defendants shall maintain such service and transfer any such accounts to the Receiver unless instructed to the contrary by the Receiver.

39. The Receiver shall not be responsible for payment or performance of any obligations of the Receivership Defendants that were incurred by or for the benefit of, the Receivership Defendants prior to the date of this Order, including but not limited to any agreement with third-party vendors, landlords, brokers, purchasers, or other contracting parties.

40. Upon the request of the Receiver, the United States Marshal Service, in any judicial district, is hereby ordered to assist the Receiver in carrying out his duties to take possession, custody, and control of, or identify the location of, any assets, records, or other materials belonging to the receivership estate.

41. All attorneys, accountants, and auditors who have represented any of the Entity Receivership Defendants shall cooperate fully with the Receiver in providing the Receiver the

⁹ *Supra* note 2.

contents of their files relating to those representations. Any claim of attorney-client or accountant-client privilege shall be made on motion and include a privilege log specifically identifying each document or item withheld from production and provide sufficient foundational information to allow an individualized assessment as to the applicability of the claimed privilege. The privilege log should include a document's date of creation, author, title or caption, addressee, recipients, and general nature or purpose for creation.

42. The Receiver shall promptly notify the Court and counsel for the United States of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order, the Preservation Order,¹⁰ the Memorandum Decision,¹¹ or the FFCL.¹²

43. In the event any person fails to deliver or transfer any Receivership Property or otherwise fails to comply with any provision of Section H of this Order, the Receiver may file ex parte an "Affidavit of Non-Compliance" regarding the failure, provided, however, if such an affidavit is directed to a Receivership Defendant, such Receivership Defendant shall be entitled to ten days' notice thereof (unless shortened by an order of this Court) and an opportunity to be heard. Except as set forth above, upon the filing of the affidavit, the Court may authorize, without additional process or demand, writs of possession or sequestration or other equitable writs requested by the Receiver. The writs shall authorize and direct the United States Marshal or any federal or state law enforcement officer to seize the Receivership Property, document, or other thing, and to deliver it to the Receiver.

¹⁰ *Supra* note 8.

¹¹ *Supra* note 1.

¹² *Supra* note 2.

I. Stay of litigation.

44. The proceedings described below (“Ancillary Proceedings”)—excluding the instant proceeding, all appeals related to this proceeding, and all policy or regulatory actions and actions of the United States related to the above-captioned action—are stayed until further order of this Court: All civil legal proceedings of any nature, including but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving:

- a. the Receiver in his capacity as Receiver;
- b. any Receivership Property, wherever located;
- c. any of the Receivership Defendants, including subsidiaries, partnerships, or joint ventures; or
- d. any of the Receivership Defendants’ past or present officers, directors, managers, agents, or general or limited partners sued for, or in connection with, any action taken by them while acting in such capacity—whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise.

45. The Receiver shall file a notice of stay in any and all currently pending litigation (excluding this action) and in any and all actions that may be filed against Receivership Defendants while the receivership is ongoing.

46. The parties to any and all Ancillary Proceedings are enjoined from commencing or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process.

47. All Ancillary Proceedings are stayed in their entirety, and all courts having any jurisdiction thereof are enjoined from taking or permitting any action until further order of this Court. Further, as to a cause of action accrued or accruing in favor of one or more of the

Receivership Defendants against a third person or party, any applicable statute of limitation is tolled during the period in which the injunction against commencement of legal proceedings is in effect as to that cause of action.

48. Upon a determination by the Receiver that action should be taken in any of the Ancillary Proceedings, the Receiver shall seek a lift of stay of litigation from this Court prior to taking any action in the Ancillary Proceeding.

J. Notice to third parties.

49. The Receiver shall promptly give notice of his appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers, and general and limited partners of the Receivership Defendants as the Receiver deems necessary or advisable to effectuate the operation of the Receivership.

50. In furtherance of his responsibilities, the Receiver is authorized to communicate with and serve this Order upon any person, entity, or government office that he deems appropriate to inform of the status of this matter or the financial condition of the receivership estate. All government offices which maintain public files of securities interests in real and personal property shall, consistent with such office's applicable procedures, record this Order upon the request of the Receiver or counsel for the United States.

51. The Receiver is authorized to instruct the United States Postmaster to hold and reroute mail which is related, directly or indirectly, to the business, operations, or activities of any of the Receivership Defendants (the "Receiver's Mail"), including all mail addressed to, or for the benefit of, the Receivership Defendants. The Postmaster shall not comply with, and shall immediately report to the Receiver, any change of address or other instruction given by anyone other than the Receiver concerning the Receiver's Mail. The Receivership Defendants shall not open any of the Receiver's Mail and shall immediately turn over such mail, regardless of when

received, to the Receiver. All personal mail of Johnson or Shepard, any mail appearing to contain privileged information, and any mail not falling within the mandate of the Receiver, shall be released to the named address by the Receiver. The foregoing instructions shall apply to any proprietor, whether individual or entity, of any private mail box, depository, business, service, or mail courier or delivery service hired, rented, or used by the Receivership Defendants. The Receivership Defendants shall not open a new mailbox or take any steps, or make any arrangements, to receive mail in contravention of this Order, whether through the U.S. mail, a private mail depository, or courier service.

K. Managing assets.

52. The Receiver shall establish one or more custodial accounts at a federally insured bank to receive and hold all cash equivalent Receivership Property (the “Receivership Funds”).

53. The Receiver’s deposit accounts shall identify the account as a receivership account by using a label on the account such as “Wayne Klein, Receiver for RaPower-3” or “Receivership Estate of RaPower-3.”

54. Except as otherwise provided in this Order and specifically as provided in Section L of this Order, the Receiver may, after consultation with counsel for the United States and without further order of this Court, transfer, compromise, sell, or otherwise dispose of any Receivership Property, other than real estate, in the ordinary course of business on terms and in the manner the Receiver deems most beneficial to the receivership estate and with due regard for the realization of the true and proper value of such Receivership Property.

55. Subject to Paragraph 56 of this Order, the Receiver is authorized to locate, list for sale or lease, engage a broker to sell or lease, cause the sale or lease, and take all necessary and reasonable actions to cause the sale or lease of all real property in the receivership estate, either at public or private sale, on terms and in the manner the Receiver deems most beneficial to the

receivership estate and with due regard to the realization of the true and proper value or such real property.

56. Upon further order of this Court, in accordance with such procedures as may be required by this Court and additional authority, such as 28 U.S.C. §§ 2001 and 2002, the Receiver is authorized to sell and transfer clear title to all real property in the receivership estate.

57. The Receiver is authorized to take all actions to manage, maintain, and wind down business operations of the receivership estate, including making legally-required payments to the United States, creditors, employees, and agents of the receivership estate and communicating with vendors, investors, government and regulatory authorities, and others as appropriate.

58. The Receiver shall take all necessary steps to enable the Receivership Funds to obtain and maintain the status of a taxable “Settlement Fund,” within the meaning of Section 468B of the Internal Revenue Code and or the regulations, when applicable, whether proposed, temporary, or final, or pronouncements thereunder, including the filing of the elections and statements contemplated by those provisions. The Receiver shall be designated the administrator of the Settlement Fund, pursuant to Treas. Reg. § 1.468B-2(k)(3)(i), and shall satisfy the administrative requirements imposed by Treas. Reg. § 1.468B-2, including, but not limited to: (a) obtaining a taxpayer identification number; (b) timely filing applicable federal, state, and local tax returns and paying taxes reported thereon; and (c) satisfying any information, reporting, or withholding requirements imposed on distributions from the Settlement Fund. The Receiver shall cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a “Qualified Settlement Fund.” The Receivership Defendants shall

cooperate with the Receiver in fulfilling the Settlement Fund's obligations under [Treas. Reg. § 1.468B-2](#).

L. Investigation and prosecution of claims.

59. Subject to the requirement that leave of this Court is required to commence or resume litigation, the Receiver is authorized, empowered, and directed to investigate, prosecute, defend, intervene in, or otherwise participate in, compromise, and adjust actions in any state, federal, or foreign court proceeding of any kind as may in his discretion, and after consultation with counsel for the United States, be advisable or proper to recover or conserve Receivership Property.

60. Subject to his obligation to expend receivership funds in a reasonable and cost-effective manner, the Receiver is authorized, empowered, and directed to investigate the manner in which the financial and business affairs of the Receivership Defendants were conducted and, after obtaining leave of this Court, to institute such actions and legal proceedings for the benefit, and on behalf, of the receivership estates as the Receiver deems necessary and appropriate. The Receiver may seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission, restitution, collection of debts, and such other relief from this Court as may be necessary to enforce this Order. Where appropriate, the Receiver should provide prior notice to counsel for the United States before commencing investigations or actions.

61. The Receiver hereby holds, and is therefore empowered, on seven-days notice, to waive, all privileges, including the attorney-client privilege and accountant-client privilege, held by all Entity Receivership Defendants. The Receivership Defendants' motion opposing a waiver must be filed within that seven-day period.

62. The Receiver has a continuing duty to ensure there are no conflicts of interest between the Receiver, his Retained Personnel (as defined below), and the receivership estate.

M. Bankruptcy filing.

63. The Receiver may seek authorization from this Court to file voluntary petitions for relief under Title 11 of the United States Code (the “Bankruptcy Code”) for the Receivership Defendants. If a Receivership Entity is placed in bankruptcy proceedings, the Receiver may become, and may be empowered to operate the receivership estate as, a debtor in possession. In such a situation, the Receiver shall have all the powers and duties as provided a debtor in possession under the Bankruptcy Code to the exclusion of any other person or entity.

64. The Stay of Litigation provisions, in Section I of this Order, bar any person or entity other than the Receiver from placing any of the Receivership Defendants in bankruptcy proceedings.

65. The Receiver is placed on notice that RaPower-3’s most recent bankruptcy filing (D. Utah Case No. 2:18-cv-00608-DN) was dismissed as a bad faith filing, and that RaPower-3 is barred from filing a bankruptcy petition for 180 days following the dismissal of the petition in that case.¹³ To the extent that the Receiver determines a bankruptcy petition is appropriate with respect to RaPower-3, the Receiver shall not file a bankruptcy petition for RaPower-3 until after 180 days of the dismissal of the prior bankruptcy proceeding or if the United States has no objection and the Receiver receives permission from this Court.

N. Administration of the receivership estate.

66. Until further order of this Court, the Receiver shall not be required to post bond or give undertaking of any type in connection with his fiduciary obligations in this matter.

¹³ See D. Utah Case No. 2:18-cv-00608-DN, Judgment in a Civil Case, [doc. no. 11](#), filed September 4, 2018; *id.*, Order Dismissing the Case, [doc. no. 6](#), filed August 22, 2018.

67. The Receiver is authorized to solicit persons and entities (“Retained Personnel”) to assist him in carrying out the duties and responsibilities in this Order. The Receiver shall first obtain Court approval before retaining counsel and accountants for the receivership estate.

68. The Receiver and Retained Personnel, acting within the scope of such agency, are entitled to rely on all outstanding rules of law and orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

69. Nothing contained in this Order, nor the grant or exercise of any powers provided for herein by the Receiver shall cause the Receiver to be considered a past or present owner, operator, or other potentially responsible or liable party under any provision of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),¹⁴ or the Georgia Hazardous Site Response Act (“HSRA”),¹⁵ or to incur liability based on ownership or operation of the Receivership Property under any other statutory, regulatory, common law, or strict liability theory. Furthermore, to the extent hazardous substances, wastes, or constituents are known or discovered to be present on Receivership Property, the Receiver shall not be considered to be in any direct or indirect contractual relationship with any party responsible for such substances, wastes, or constituents under CERCLA or HSRA, and shall instead be

¹⁴ 42 U.S.C. § 9601 et seq.

¹⁵ GA. CODE § 12-8-90 et seq.

considered to be acting solely in a “fiduciary capacity” with respect to the Receivership Property in accordance with § 107(n) of CERCLA¹⁶ and § 12-8-92(7) of HSRA.¹⁷

70. At the request of counsel for the United States, the Receiver shall provide counsel for the United States with any documentation or information requested that is reasonably related to the United States’ duties in connection with this section of the receivership estate or that may be necessary to meet its reporting requirements or that is otherwise necessary to further the mission of the United States Department of Justice. The Receiver may cooperate with other government agencies investigating the conduct described in the United States’ complaint in this case and share information he has learned or documents recovered through his work as Receiver.

71. The Receiver need not obtain Court approval prior to the disbursement of receivership funds for expenses in the ordinary course of the administration and operation of the receivership estate. Further, prior court approval is not required for payments of applicable federal, state, or local taxes.

72. The Receiver and Retained Personnel are entitled to reasonable compensation and expense reimbursement which shall be paid from the receivership estate upon approval of a filed motion for the payment of fees and expenses. The parties shall have 14 days to file a response to any such motion.

73. Unless otherwise ordered, within 45 days after the end of each calendar quarter, the Receiver and Retained Personnel shall apply by motion to the Court for compensation and expense reimbursement from the receivership estate (the “Quarterly Fee Motions”). At least 30 days prior to the filing of each Quarterly Fee Motion with the Court, the Receiver shall serve

¹⁶ 42 U.S.C. § 9607(n).

¹⁷ GA. CODE § 12-8-92(7).

upon counsel for the United States a complete copy of the proposed motion, together with all exhibits and relevant billing information.

74. All Quarterly Fee Motions will be interim and will be subject to cost benefit and final review at the close of the receivership. At the close of the receivership, the Receiver shall file a final fee motion, describing in detail the costs and benefits associated with all litigation and other actions pursued by the Receiver during the course of the receivership.

75. Each Quarterly Fee Motion shall:

- a. Comply with the terms of any billing instructions agreed to by the Receiver.
- b. Include a certification by the applicant that the certifying professional has read the motion and that to the best of the applicant's knowledge, information, and belief formed after reasonable inquiry, the motion and all fees and expenses therein are true and accurate.
- c. Contain representations that: (i) the fees and expenses included therein were incurred in the best interests of the receivership estate; and (ii) the Receiver has not entered into any agreement, written or oral, express or implied, with any person or entity concerning the amount of compensation paid or to be paid from the receivership estate, or any sharing thereof.
- d. Attach all exhibits and relevant billing information.

76. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based on acts or omissions committed in their representative capacities.

77. If the Receiver decides to resign, the Receiver shall first give written notice to the Court and counsel for the United States of his intention, and the resignation shall not be effective

until the Court appoints a successor. The Receiver shall then follow such instructions as the Court may provide.

O. Living expenses for Johnson and Shepard; use of receivership assets.

78. Within 30 days of the entry of this Order, the Receiver shall investigate the monthly income and living expenses of Johnson and Shepard and make a recommendation to the Court regarding whether any monthly living expenses should be paid out of the Receivership Property to Johnson or Shepard. The Receiver shall take into account whether Johnson or Shepard have any Non-Receivership Property or access to any assets or property from sources other than the Receivership Property or from assets that the Receiver decides to abandon or otherwise dispose of in the course of the receivership. The Receiver shall not pay any monthly living expenses to Johnson or Shepard in any month where there is insufficient funds in the Receivership bank accounts to pay the living expenses or in any month where Johnson or Shepard is not in substantial, good faith compliance with orders of this Court.

79. Johnson or Shepard may make application to the Receiver to use Receivership Property. Such application should include an explanation of the reasons for the request. The Receiver may consult with counsel for the United States before deciding whether to grant or deny the application. If the Receiver grants the request, the Receiver may condition the granting of the request on a reduction in the amount of monthly living expenses to be paid to the Receivership Defendant and on a finding that the Receivership Defendant is in substantial, good faith compliance with orders of this Court.

80. If Johnson or Shepard disagree with a decision by the Receiver regarding applications to use Receivership Property or payment of monthly living expenses, they may file a motion with the Court requesting an order directing the Receiver to make payments or allow use of the Receivership Property.

81. No funds belonging to the receivership estate, other than the monthly living expenses, if any, paid to Johnson and Shepard, may be used to pay legal fees for any Receivership Defendant without approval of the Receiver or order of the Court.

82. The Receiver may, in his discretion, permit Johnson and Shepard to directly withdraw the monthly living expenses from a designated bank account and require Johnson and Shepard to account for the withdrawal on a monthly basis in a form determined by the Receiver.

P. Reports and recommendations.

83. The Receiver is authorized, empowered, and directed to develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property.

84. Within 60 days from the entry of this Order, the Receiver shall file with the Court an accounting of the receivership estate reflecting (to the best of the Receiver's knowledge) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the receivership estate (the "Initial Accounting"). The Receiver shall also detail his efforts in locating Receivership Property and what, if any, additional efforts need to be undertaken to provide a full accounting of the receivership estate to this Court.

85. As part of the Initial Accounting, the Receiver is directed to investigate the publicly-traded status of IAS and provide a recommendation to the Court on whether IAS should remain a publicly traded company or should otherwise be liquidated and dissolved. The

Receiver's Initial Accounting should describe in detail his findings and recommendations and include the following:

- a. A summary of IAS's reporting and disclosures obligations, whether by the SEC or any other federal, state, or local regulatory agency, and whether IAS is current in those obligations.
- b. An estimate of how long it will take the Receiver to conduct an investigation, gather the necessary information, and file any reports or other information required by the reporting and disclosure obligations referenced in Paragraph 85(a) of this Order.
- c. A summary of the trading of IAS stock from the initiation of this lawsuit on November 23, 2015, specifically outlining the trading conducted by Johnson, Shepard, their family members, and other insiders.
- d. A summary of the shares of stock currently owned by Johnson, Shepard, and their family members, whether directly or indirectly, including through spouses and the subsidiary and affiliated entities described in Paragraph 2 of this Order.
- e. A determination by the Receiver as to whether trading of IAS stock should be suspended. The Receiver is authorized to request the appropriate entity to suspend the trading of IAS stock prior to filing the Initial Accounting, and if the Receiver does so, the Receiver shall include the details of that request in the Initial Accounting.
- f. The Receiver's plan for the future of IAS, which may include continuing any operations of the business unrelated to the solar energy scheme or liquidating the business. If the Receiver determines that there are no operations unrelated to the solar

energy scheme, then the Receiver shall propose a liquidation plan rather than sell the shell entity and its “public company” status.

86. Within a reasonable time after the end of each calendar quarter, but no later than 30 days after the end of each calendar quarter, the Receiver shall file a “Quarterly Status Report.” The Quarterly Status Report shall, for the prior calendar quarter: (a) describe significant developments in the receivership estate during the quarter; (b) describe in summary form the assets recovered and disposed of during the quarter; (c) describe the status of litigation initiated, settled, or in progress during the quarter; (d) summarize receipts and disbursements during the quarter and the general financial operations and status of the receivership estate; (e) describe the extent to which the Receivership Defendants, or others subject to the requirements of this Order, have failed to cooperate with or comply with demands from the Receiver; and (f) describe the Receiver’s plans for moving forward to accomplish the objectives of the receivership.

87. At the close of the receivership, the Receiver shall submit a final accounting in connection with a motion to close the receivership estate as well as the Receiver’s final application for compensation and expense reimbursement.

Q. Claims process and distributions.

88. If it appears to the Receiver that proceeds from liquidation of the receivership estate will exceed the costs of administering the receivership estate and the amount necessary to satisfy the obligation to the United States, the Receiver may propose to the Court a claims process to be administered by the Receiver. The United States shall not be required to submit a claim as part of any claims process proposed to the Court.

89. After payment of allowed costs of administering the receivership estate, the Receiver shall distribute proceeds from the liquidation of the receivership estate as follows:

a. FIRST PRIORITY: The United States Department of Justice, for its costs that will be awarded under 28 U.S.C. § 1920 and any other costs this Court may award. This payment shall be paid in full before any distributions to lower priority claims.

b. SECOND PRIORITY: To the United States, in the amount of \$14,207,517. This payment shall be made in full before any distributions to lower priority claims.

c. THIRD PRIORITY:

i. To a Receivership Defendants' customer who files a claim with the Receiver with sufficient evidence to show:

1. The customer's investment or payments to Receivership Defendants for "solar lenses," "alternative energy systems," or other products sold by Receivership Defendants;

2. All payments or credits from Receivership Defendants to the customer, including rental payments, bonus payments, salaries, distributions, commissions, and overrides or similar payments due to multilevel marketing;

3. A copy of any filed tax return on which the customer claimed a tax deduction or tax credit relating to Receivership Defendants' "solar lenses" or "alternative energy systems"; and

4. The resolution of all the customer's issues with the Internal Revenue Service regarding any tax deduction or tax credit relating to or arising from "solar lenses" or "alternative energy systems" or other

products purchased from Receivership Defendants. (If a customer does not have an outstanding assessment for taxes, interest, or penalties relating to Receivership Defendants’ “solar lenses” or “alternative energy systems,” or has not been required to pay back taxes, interest, or penalties because the tax deduction or tax credits relating to Receivership Defendants’ “solar lenses” or “alternative energy systems” have not been audited or disallowed by the Internal Revenue Service, then the customer shall not be entitled to compensation as a “Third Priority” claimant. If a customer has not yet resolved any outstanding tax issues relating to Receivership Defendants’ “solar lenses” or “alternative energy systems” with the Internal Revenue Service, then the customer can file a claim with the Receiver and request assistance in resolving its outstanding tax issues. For any customer that requests assistance, the Receiver shall forward a copy of all documents submitted by the customer to a designated representative of the Internal Revenue Service with a copy to counsel for the United States. If the customer can resolve its issues with the Internal Revenue Service prior to the date the Receiver distributes any assets or monies to the Third Priority claimants, the customer shall be deemed a Third Priority claimant and may be entitled to payments under this subsection.)

ii. The Receiver is authorized to set a deadline for claims to be filed, but that deadline shall be no later than nine months after the entry of this Order and the appointment of the Receiver. The Receiver is authorized to request additional information from any customer or deem a customer’s submission to be

insufficient for the purpose of determining whether the customer is a Third Priority claimant and entitled to payment under this subsection. Before any funds to customers determined to be Third Priority claimants are paid, the Receiver shall file a report with the Court showing the list of customers who filed claims with the Receiver, the Receiver's determination as to whether those customers qualify as Third Priority claimants, and the proposed amount to be paid to each customer. The parties shall have 14 days to respond or object to the payments the Receiver intends to make. Payments to claimants shall be made on a pro rata basis of the amount paid by the claimant to Receivership Defendants less all amounts received by the claimant from Receivership Defendants.

d. **FOURTH PRIORITY:** To the extent that there are any remaining assets or funds in the receivership estate that can be liquidated or distributed, the remainder shall be paid to the United States until or unless the total payments to First, Second, Third, and Fourth Priority claimants reaches \$50,025,480.

e. **FIFTH PRIORITY:** The Receiver is authorized to solicit claims from other persons who may be owed money by any Receivership Defendant, including any customers who do not otherwise qualify as Third Priority claimants. To the extent that there are any remaining assets or funds in the receivership estate that can be liquidated or distributed after the payment of expenses of administering the receivership estate and the First through Fourth Priority claimants, the Receiver has discretion to determine which, if any, additional claims should be paid from the remainder. The Receiver is authorized to solicit claims from noncustomers, including utility providers, suppliers, contractors, service providers, and other similar persons and entities within the same nine months that

it solicits claims from customers. As part of the recommendation the Receiver makes to the Court with respect to the Third Priority claimants, the Receiver shall also provide a recommendation to the Court as to whether any claims solicited from what are considered Fifth Priority claimants should be paid prior to the Third and Fourth Priority claimants. The Receiver shall include in its recommendation the name of such Fifth Priority claimants, the relationship of each such claimant to the Receivership Defendants, and a brief explanation as to why its claim should be paid before the Third and Fourth Priority claimants. As described in Paragraph 89(c) of this Order, the parties shall have 14 days to respond or object to the Receiver's recommendation.

f. RESIDUAL RECEIVERSHIP ESTATE: To the extent that there are any remaining assets or funds in the receivership estate that can be liquidated or distributed after the payment of expenses of administering the receivership estate and the First through Fifth Priority claimants, the residual shall revert to Receivership Defendants.

90. The Receiver may coordinate and share information with counsel for the United States and the Internal Revenue Service in evaluating claims submitted and making recommendations to the Court on the allowance and payment of claims.

91. The Receiver is authorized to make distributions of available funds in the receivership estate to the United States of up to \$14,207,517 without further order of this Court. The distributions need not be made in one lump sum payment but may be made over time as assets and funds become available for payment.

R. Miscellaneous provisions.

92. At the request of the Receiver, the Clerk of the Court is directed to provide certified copies of this Order or other orders of this Court to the Receiver at no cost to the Receiver.

93. If any persons subject to this Order fail to comply with the terms herein, the Receiver or counsel for the United States is permitted to initiate contempt proceedings.

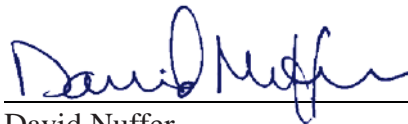
94. The Receiver and his Retained Personnel shall keep time records to support their fee applications. Time records must set forth in reasonable detail an appropriate narrative description of the services rendered along with the time spent on those services. The time records should be kept in a manner that enables the Receiver and his Retained Personnel to track time spent on specific litigation matters or other tasks related to the administering of the Receivership.

95. The Receiver shall retain all records relating to the Receivership for a period of not less than three years after the Receivership has been closed. The Receiver shall provide copies of any records, information, or documents to counsel for the United States if necessary for counsel's record-keeping obligations or other statutory and regulatory responsibilities and duties.

96. The Receiver is authorized to request a modification of this Order from this Court during the life of the receivership if the Receiver determines that a modification is necessary for the proper administration of the receivership estate.

Signed November 1, 2018.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "David Nuffer", is written over a horizontal line.

David Nuffer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.;
LTB1, LLC; R. GREGORY SHEPARD;
and NELDON JOHNSON,

Defendants.

**MEMORANDUM DECISION AND
ORDER ON RECEIVER'S MOTION
TO INCLUDE AFFILIATES AND
SUBSIDIARIES IN RECEIVERSHIP**

Case No. 2:15-cv-00828-DN

District Judge David Nuffer

R. Wayne Klein, the court-appointed receiver (“Receiver”),¹ filed a motion (the “Motion”)² to extend the receivership to thirteen entities affiliated with Defendants RaPower-3 LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”), Neldon Johnson, and R. Gregory Shepard (collectively, the “Receivership Defendants”). Specifically, the Motion seeks to extend the receivership to the following (collectively, the “Affiliated Entities”):

1. Solco I, LLC (“Solco”);
2. XSun Energy, LLC (“XSun”);
3. Cobblestone Centre, LC (“Cobblestone”);

¹ See Corrected Receivership Order, [docket no. 491](#), filed November 1, 2018.

² Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Motion”), [docket no. 582](#), filed March 1, 2019; *see* Non-Parties Solco I, XSun Energy and Glenda Johnson’s Notice of Intent to File Opposition to Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate, [docket no. 586](#), filed March 4, 2019; Response to Receiver’s Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Response”), [docket no. 596](#), filed March 15, 2019; Neldon Johnson’s Opposition to the Receiver’s Report and Motion, [docket no. 597](#), filed March 18, 2019; Receiver’s Reply in Support of Its Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Reply”), [docket no. 602](#), filed March 29, 2019.

4. LTB O&M, LLC;
5. U-Check, Inc.;
6. DCL16BLT, Inc.;
7. DCL-16A, Inc.;
8. N.P. Johnson Family Limited Partnership (“NPJFLP”);
9. Solstice Enterprises, Inc. (“Solstice”);
10. Black Night Enterprises, Inc. (“Black Night”);
11. Starlight Holdings, Inc. (“Starlight”);
12. Shepard Energy; and
13. Shepard Global, Inc.

The Motion is based, in large measure, on the Receiver’s Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate (the “R&R”).³ The R&R was required by Paragraph 5 of the Corrected Receivership Order. The assets of these entities were frozen by that same paragraph “for the purpose of permitting the Receiver to investigate the assets, property, property rights, and interests of the” Affiliated Entities “to determine whether the assets, property, property rights, or interests of the [Affiliated Entities] derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity.”⁴ In the R&R, “[t]he Receiver recommends that the 12 affiliated entities identified in the [Corrected Receivership] Order, as well as one additional entity, U-Check, Inc., be included in the Receivership Estate as Entity Receivership Defendants.”⁵

³ [Docket no. 581](#) (“R&R”), filed February 25, 2019.

⁴ Corrected Receivership Order, *supra* note 1, ¶ 5.

⁵ R&R, *supra* note 3, at 28-29, ep 31-32.

Each of the Affiliated Entities has received timely and sufficient notice of the Motion and been afforded an adequate opportunity to be heard with respect to it.⁶ Although Neldon Johnson and nonparties Glenda Johnson, XSun Energy, Solco, and Solstice filed responses opposing the Motion, they have not raised a genuine dispute as to any material fact set forth in support of the Motion.⁷ No other response has been filed in opposition to the Motion.

It is generally recognized that district courts have broad powers and wide discretion to determine relief in a receivership.⁸ “When a district court creates a receivership, its focus is to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.”⁹ To accomplish the purpose of the receivership, courts frequently include all subsidiaries and affiliates of receivership defendants in the receivership, regardless of where they may be located.¹⁰

⁶ See Reply, *supra* note 1, at 4-6.

⁷ See Response, *supra* note 2; Opposition, *supra* note 2. No other person, including R. Gregory Shepard, has filed anything in opposition to the Motion, and the time to do so has now expired.

⁸ *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

⁹ *Id.* (citation and internal quotation marks omitted).

¹⁰ See, e.g., *SEC v. Nationwide Automated Sys., Inc.*, No. CV-14-07249-SJO, 2014 WL 12599624, *5 (C.D. Cal. Nov. 10, 2014); *Orlowski v. Bates*, No. 2:11-cv-01396-JPM, 2014 WL 12771523, *1 (W.D. Tenn. July 28, 2014); *FTC v. Money Now Funding, LLC*, No. CV-13-01583-PHX, 2014 WL 11515024, *8 (D. Ariz. Apr. 28, 2014); *FTC v. Vacation Commc’ns Group, LLC*, No. 6:13-CV-789-ORL, 2013 WL 2468307, *7 (M.D. Fla. June 6, 2013); *SEC v. Small Bus. Capital Corp.*, No. 5:12-CV-03237-EJD, 2012 WL 12862153, *3 (N.D. Cal. June 26, 2012); *SEC v. Sunwest Mgmt., Inc.*, No. 09-6056-HO, 2009 WL 3245879, *2 (D. Or. Oct. 2, 2009); *FTC v. Direct Connection Consulting, Inc.*, No. 1:08-CV-1739, 2008 WL 11336186, *7 (N.D. Ga. May 14, 2008); *Commodity Futures Trading Comm’n v. Aurifex Commodities Research Co.*, No. 1:06-cv-166, 2007 WL 2481015, *1 (W.D. Mich. 2007); *Commodity Futures Trading Comm’n v. Wall Street Underground, Inc.*, No. Civ.A.03-2193-CM, 2004 WL 957852, *2 (D. Kan. Mar. 18, 2004); *FTC v. Sierra Pac. Mktg.*, No. CV-S-93-134-PMP, 1993 WL 78579, *6 (D. Nev. Feb. 22, 1993).

FACTUAL BASIS

The following facts are based on the evidence presented and existing record, including proof presented in hearings held April 26 and May 3, 2019.

1. For more than ten years, the Receivership Defendants promoted an abusive tax scheme centered on purported solar energy technology featuring “solar lenses” to customers across the United States. But the solar lenses were only the cover story for what the Receivership Defendants were really selling: unlawful tax deductions and credits. Their conduct, which is subject to penalty under the Internal Revenue Code, caused serious harm to the United States Treasury.¹¹ As a result, they have been enjoined from promoting their abusive solar energy scheme, ordered to disgorge their gross receipts, and required to turn over their assets and business operations to the Receiver.¹²

2. The whole purpose of RaPower, IAS, and LBT1 (collectively, the “Receivership Entities”) was to perpetrate a fraud to enable funding for Neldon Johnson. The same is true for other entities Johnson created, controls, and owns (either directly or indirectly), including Solco, XSun, Solstice,¹³ Cobblestone, LTB O&M, DCL16BLT, DCL-16A, NPJFLP, U-Check, Black Night, and Starlight. Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an

¹¹ Findings of Fact and Conclusions of Law, at 1, electronic page (“ep”) 6 (“FFCL”), [docket no. 467](#), filed October 4, 2018.

¹² See Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, [docket no. 444](#), filed August 22, 2018.

¹³ Solco, XSun, and Solstice have each made an affirmative appearance in this case. See Response, *supra* note 2, at 1.

attempt to avoid creditors.¹⁴ (U-Check, which is not specifically named in the Corrected Receivership Order, is in possession of a Cessna twin-engine airplane, which may have significant value, and which Neldon Johnson owned and controls.)¹⁵

3. Each of the Affiliated Entities is a subsidiary or affiliated entity of Receivership Defendants¹⁶ and has close associations with the Receivership Entities.¹⁷ In many cases, the Affiliated Entities and Receivership Entities have common officers, directors, members, and managers. Their corporate purposes are similar. And there have been numerous and substantial financial transactions between them.¹⁸

4. The failure of the Receivership Defendants and Affiliated Entities to cooperate or provide records,¹⁹ together with the evidence the Receiver has obtained from financial institutions, show that the Receivership Defendants and Affiliated Entities have engaged in transactions without objective economic justification or compliance with legal formalities, while concealing assets and withholding records from the Receiver.²⁰

¹⁴ FFCL, *supra* note 11, at 128, ep 133; *id.* ¶¶ 17 n.26, 41, 284; R&R, *supra* note 3, §§ B.4-5, B.7, B.10-13, F.4-5, F.7, F.10-13; *id.* at 20, 36-37, ep 23, 39-40. The term “Receivership Property” has the same meaning in this Memorandum Decision and Order as it does in the Corrected Receivership Order.

¹⁵ R&R, *supra* note 3, at 35, ep 38.

¹⁶ See Corrected Receivership Order, *supra* note 1, ¶¶ 2, 5.

¹⁷ R&R, *supra* note 3, at 35, ep 38.

¹⁸ *Id.*

¹⁹ *Id.* at 1-3, ep 4-6; *see also* United States’ Motion to Show Cause Why Neldon Johnson, R. Gregory Shepard, Glenda Johnson, LaGrand Johnson, and Randale Johnson Should Not Be Held in Civil Contempt of Court for Violating the Corrected Receivership Order, [docket no. 559](#), filed January 29, 2019; Receiver’s Accounting, Recommendation on Publicly-Traded Status of International Automated Systems, and Liquidation Plan, [docket no. 552](#), filed December 31, 2018; Receiver’s Initial Quarterly Status Report, [docket no. 557](#), filed January 28, 2019; Receiver’s Second Quarterly Status Report, [docket no. 608](#), filed April 15, 2019; and transcripts of proceedings April 26 and May 3, 2019.

²⁰ R&R, *supra* note 3, at 37-48, ep 40-51.

5. In many instances, the Affiliated Entities' only assets are tied to the Receivership Defendants. In each instance, the assets appear to have been transferred to the Affiliated Entities for the purpose of defrauding creditors. To prevent further dissipation of Receivership Property, it is necessary to put the Affiliated Entities under the Receiver's control.²¹

6. Based on the Receiver's investigation of the Affiliated Entities, the Receiver has recommended that the receivership be extended to include each of the Affiliated Entities.²²

7. To fulfil the purposes of the receivership, safeguard receivership assets, administer receivership property as suitable, and achieve a final and equitable distribution of receivership assets, it is necessary to extend the receivership to include the Affiliated Entities.²³

8. Although many of the Affiliated Entities are now defunct and without assets, bringing them into the receivership estate is necessary to prevent their use to perpetuate further fraud in contravention of the receivership's purposes.²⁴

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

1. This court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities.

2. The Affiliated Entities are hereby made part of the existing receivership estate, which is being administered by court-appointed receiver Wayne Klein, in accordance with the Corrected Receivership Order.

²¹ *Id.* at 35-36, ep 38-39.

²² *Id.* at 48-49, ep 51-52.

²³ See *Vescor*, 599 F.3d at 1194.

²⁴ R&R, *supra* note 3, at 36, ep 39.

3. The “Asset Freeze” set forth in the Corrected Receivership Order shall continue to include and apply to the Affiliated Entities.

4. The directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys, and other agents of the Affiliated Entities are hereby dismissed, and the powers of any general partners, directors, or managers are hereby suspended. Such persons shall have no authority with respect to the Affiliated Entities’ operations or assets, except to the extent as may hereafter by expressly granted by the Receiver or the court.

5. No person holding or claiming any position of any sort with any of the Affiliated Entities shall possess any authority to act by or on behalf of any of the Affiliated Entities.

6. The Receiver shall have all powers, authorities, rights, and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners of the Affiliated Entities under applicable state and federal law, by the governing charters, bylaws, articles, or agreements in addition to all powers and authority of a receiver at equity.

7. In carrying out his responsibilities as receiver, the Receiver shall have all control over assets, books, records, and accounts of Affiliated Entities and all powers and rights granted to the Receiver in the Corrected Receivership Order.

8. The Receivership Defendants, their subsidiaries, any affiliated entities, any affiliated individuals (including spouses and other family members), and the past and present officers, directors, agents, managers, servants, employees, attorneys, accountants, general and limited partners, trustees, and any person acting for or on behalf of the Affiliated Entities, shall cooperate with and assist the Receiver in the performance of his duties and obligations relating to

the Affiliated Entities to the same extent as required in the Corrected Receivership Order with respect to the Receivership Defendants.

9. All persons having control, custody, or possession of any property or records of Affiliated Entities are hereby ordered to turn such property or records over to the Receiver to the same extent as required by the Corrected Receivership Order with respect to Receivership Defendants.

10. As the holder of all ownership and management interests of the Affiliated Entities, the Receiver is granted power and authority to transfer all assets (including intellectual property and real estate) owned or controlled by foreign-based entities to the United States and to liquidate or abandon all foreign entities created by Receivership Defendants.

11. The stay of litigation set forth in the Corrected Receivership Order shall apply to the Affiliated Entities to the same extent as it does to the Receivership Entities.

12. All other provisions of the Corrected Receivership Order shall apply to the Affiliated Entities, as they do to the Receivership Entities, to the extent necessary and appropriate to allow the Receiver to accomplish his duties under the Corrected Receivership Order.

13. Any person who may have an objection to this Memorandum Decision and Order, whether in whole or in part, must file such objection in this case within 21 days of receiving actual notice of this Memorandum Decision and Order or else such objection shall be considered waived.

Signed May 3, 2019.

BY THE COURT:



David Nuffer
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>XSUN ENERGY, LLC’S OBJECTION TO ORDER ON MEMORANDUM AND DECISION AND ORDER ON RECEIVER’S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECIEVERSHIP (ECF 636)</p> <p>Judge David Nuffer</p>
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COMES NOW XSun Energy, LLC (“XSun”) hereby objects to this Court’s Order On Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership because the Order validates Plaintiff’s willful strategy to exclude XSun as a party defendant at trial to deprive it of the opportunity to present a plenary defense based on its unique circumstances.

I. The Court's Order Violates Due Process By Validating a Trial Strategy that Deprived XSun of a Trial on the Merits Prior to Seizure.

a. XSun's Activities

XSun is a Utah limited liability company. It was formed in April, 2011. Its sole member is Solstice Enterprises, a foreign entity. This is not merely an allegation, but the facts known to the Receiver. It sold solar lenses. The sales of those lenses occurred mainly in 2011 and 2012.

In 2011, like RaPower-3, XSun Energy had its own Zions Bank accounts (Accounts ending in 3293 and 6920).¹ By July, 2012, those accounts had more than \$650,000 in them. Limited amounts of those funds were used to pay employees. \$2,125,910 was *not* reported as income for Neldon and Glenda Johnson on his taxes. Indeed, XSun's 2012 tax return reported income of \$18,879.² The funds XSun received were from the sale of lenses that XSun, not RaPower3, sold.³

XSun retained Kenneth Birrell and provided Mr. Birrell with drafts for all the transaction documents prior to Mr. Birrell's authoring of the opinion letter.⁴ Following this email, Mr. Birrell's law firm, Kirton & McConkie sent a legal services agreement for tax planning to XSun.⁵ Kirton & McConkie then invoiced XSun for tax services rendered.⁶

Like Solco, XSun's activities have always been known to Plaintiff prior to this case commencing. Indeed, the Plaintiff relied upon opinion letters prepared for XSun by attorneys in its case against other Defendants for whom no written tax advice had been obtained. More than

¹ Despite having received bank statements for this account, for some unknown reason, the Receiver has failed to identify this to the Court.

² Its 2012 Tax Return is in the Receiver's possession.

³ See Checks written to XSun Energy, attached as Exhibit 1.

⁴ See Correspondence from Bryan Boland to Ken Birrell, sent August 15, 2018, attached as Exhibit 2.

⁵ See letter from Ken Birrell to XSun Energy, LLC, dated Aug. 24, 2012, attached as Exhibit 3.

⁶ See K&M invoices to XSun Energy LLC, attached as Exhibit 4.

half a day was spent examining Mr. Birrell, the attorney who drafted those letters. The Court received that evidence and relied upon the testimony of that witness to make its Findings of Fact and Conclusions of Law. Plaintiff deliberately chose to not name XSun as a party because XSun was differently situated from the other Defendants in this case. Judgment was not entered against XSun. XSun has never been served as a party and has never been allowed any opportunity to defend itself in this case.

XSun did not have a mass-marketing program. It did not have a website. It did not participate in the later-developed Greg Shepherd multi-level marketing program. Nor were any of the XSun purchasers examined during the trial. No facts about the purchasers were provided to this Court. Nor has any proof been introduced to determine whether XSun purchasers qualified for or ever claimed any tax benefits.

b. The Order validates the Plaintiff's unconstitutional trial strategy which deprived XSun of a trial on the merits prior to seizure of all its assets.

The Court's order ignores XSun's fundamental rights of due process, and ignores the government's strategic decision when they filed this case to exclude XSun as a defendant, despite knowing of it and using as exhibits documents written for/by it. The strategy skips any claim or finding of alter ego or subsidiary and denied it the opportunity to defend against the government's claim. The government and Receiver ask the Court to leap to the conclusion that these unnamed parties are equally liable for the judgment entered against those named. Such a leap violates due process. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."⁷ It is equally fundamental that the right to notice

⁷ Id. at 81 (citing *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385.)

and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."⁸

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for hearings "at a meaningful time."⁹ Neither the Florida nor the Pennsylvania statute provided for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.¹⁰

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." *Id.* (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552. *Stanley v. Illinois*, 405 U.S. 645, 647.)

⁸ *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552.)

⁹ *Id.*

¹⁰ *Id.*

This is not a novel principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the [Fourteenth](#) and [Fifth Amendments](#). Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.¹¹

In past briefings, Plaintiff has argued that because Defendants have previously argued that XSun Energy should not be subject to the asset freeze, that these non-parties have fully received all required due process. Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without XSun Energy having been afforded the notice of a complaint against it, an opportunity to answer or move to dismiss, discovery, motion practice, or a trial to hear the claims against it or an opportunity to prove its claimed defenses before a fact finder. This is all the more alarming because XSun was known to the Plaintiff long before this matter was filed. The Plaintiff used exhibits throughout discovery and trial written for/by XSun, but deliberately chose not to join it as party defendants in this case.

¹¹ See e.g. *Bell v. Burson*, 402 U.S. 535, 542; *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Goldberg v. Kelly*, 397 U.S. 254; *Armstrong v. Manzo*, 380 U.S., at 551; *Mullane v. Central Hanover Tr. Co.*, supra, at 313; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, supra, at 378-379 (emphasis in original).

To date, Plaintiff has yet to give an explanation on why these XSun was excluded, and the Court's order fails to address this procedural shortcoming.¹² And since no explanation was given, XSun is entitled to the benefit of an adverse inference that the Government intentionally and strategically omitted XSun to avoid facing the obvious defenses these parties would assert. XSun sought, obtained and relied on advice letters from legal counsel.¹³ Likely because the other named Defendants were not the recipients of the legal advice, Plaintiff intentionally chose to omit XSun as a party. Moreover, neither of these entities ought to be affected by orders entered against others who were afforded the opportunity to participate as parties to the case.

In *United States v. Mesadieu*, 108 F.Supp 3d. 1113 (M.D. Fla. 2016), the trial court questioned whether it had authority to disgorge revenue "obtained by Mesadieu's companies – entities that are not before the Court."¹⁴ The Government urged the trial court to include the non-parties alleging that "Mesadieu is the sole owner of the companies and uses his companies as a vehicle for fraud."¹⁵ But the Government did not join the companies as a defendant."¹⁶ Like *Mesadieu*, the Government failed to join both Solco I and XSun, yet sought disgorgement against them under the same reasoning in *Mesadieu* (i.e., alleging that the named defendants used the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.¹⁷

¹² See *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) (Because the United States failed to join defendant's companies, Court questioned whether it would have had jurisdiction to order disgorgement of revenue obtained by defendant's non-party companies and entities that were not before the court.); see also *Bolsa Res., Inc. v. AGC Res., Inc.*, 2013 U.S. Dist. LEXIS 137604, *7 (Colo.) (District court declined to order non-party corporations to disgorge stock to satisfy judgment.)

¹³ See XXXXX, attached as Exhibit 1.

¹⁴ *Mesadieu*, 180 F. Supp. 3d at 1123.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ECF [467](#) at pg. 149.

This Court's respect for due process was short-lived, however, as now the Court is validating Plaintiff's end run around affording XSun due process by trial. For example, XSun was the client referred to in the "McConkie Memorandum," placing XSun in a stronger position to claim reliance on advice of counsel as a defense. Both XSun and Solco had written legal advice and followed it. As such, XSun was situated differently than any of the party defendants.

Additionally, including XSun goes well beyond the asset freeze. Now that XSun is included as a *receivership* entity, the Receiver will take complete "custody, control, and possession of all assets, bank accounts or other financial accounts, contents of safe deposits boxes, books, records, and all other documents or instruments"¹⁸ allowing the receiver to "direct and develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property"¹⁹ **without a showing that the property belonging to XSun are ill-gotten gains subject to disgorgement.** Indeed, the Receiver's proposed order states the following:

All other provisions of the Corrected Receivership Order shall apply to the Affiliate Receivership Entities to the same extent as Receivership Entities as necessary and appropriate to allow the Receiver to accomplish the duties required of him in the Corrected Receivership Order.²⁰

This vitiates any right XSun has to a fair, impartial and complete opportunity to defend itself. Finally, XSun's attorneys will be immediately terminated, leaving XSun without legal counsel to contest the Receivership's authority to include it in the Receivership Estate, including,

¹⁸ EFC [444](#) at pg. 7, ¶ 15.

¹⁹ Id. at ¶ 83.

²⁰ See Proposed Order at ¶ 12.

but not limited to asserting a claim of laches against the Government's effort through the receiver to include it now, rather than affording it a trial on the merits of its available defenses.^{21 22 23}

In sum, without due process, a claim should not proceed against XSun. In *United States v. 51 Pieces of Real Property Rosell*, N.M., 17 F.3d 1306 (10th Cir. 1994), relied upon by Plaintiff, an action was initiated, the complaining party was named as a defendant, and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id.* Although proceeding under a federal forfeiture statute which was specifically void of any due process requirements, the Court recognized that “due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest.”²⁴ No such hearing has ever taken place in this case.

XSun's assets (and others similarly situated) have already been frozen by this Court's order and then confiscated by the Receiver without any proof justifying these draconian steps to occur. Now, the Court is taking the further leap in finding XSun's assets to be the same as the party Defendants – essentially making it liable for another entity's actions. The Receiver's request goes too far.

²¹ *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001) “[I]n order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by the delay.” *Id.* (emphasis added).

²² Further, assuming there is a reason to allow even temporarily some freeze, it should not in any event affect a legal retainer required to pay legal counsel to defend these entities and the Defendants for which they intended to provide assistance. If Defendants succeed on appeal, both Solco I and XSun Energy can never face a claim against them. Therefore, they are the direct beneficiaries of the prophylactic effect of Defendants' successful appeal.

²³ See *infra* at II and III.

²⁴ *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)).

DATED this 23rd day of May, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly filed with the court using the court's CM/ECF filing service. I further certify that a true and correct copy of the foregoing was sent via email to the following pro se parties as indicated.

Neldon Johnson glendaejohnson@hotmail.com

R. Gregory Shepard greg@rapower3.com

/s/ Steven R. Paul
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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF SOLCO I, LLC'S OBJECTION TO ORDER ON MEMORANDUM AND DECISION AND ORDER ON RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECIEVERSHIP (ECF 636) Judge David Nuffer
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COMES NOW Solco I, LLC ("Solco") hereby objects to this Court's Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership because the Order validates Plaintiff's willful avoidance of including Solco as a party defendant at trial to deprive it of the opportunity to present a plenary defense based on its unique circumstances.

I. The Court's Order Violates Due Process by Validating a Trial Strategy that Deprived Solco I of a Trial on the Merits Prior to Seizure.

a. Solco's Activities

Solco is a Utah limited liability company. It was organized on December 13, 2010. Its status became delinquent in January of this year because its assets are frozen. Solco did business

selling lenses prior to 2016. All of its sales occurred prior to the trial of this case, and a great majority of them occurred prior to the filing of the Complaint in this case.

Solco's activities were known to Plaintiff well before the time of trial. Indeed, the Plaintiff relied upon opinion letters prepared for Solco by attorneys in its presentation of its case.¹ More than half a day was spent examining Kenneth Birrell, the attorney who drafted those opinion letters. The Court received that evidence and relied upon the testimony of that witness to make its Findings of Fact and Conclusions of Law. Moreover, Solco relied on the documents Mr. Birrell authored for Solco's benefit.² Importantly, the purchase agreement attached hereto was between Solco and a business entity incorporated as a C-corporation, to which was the very type of business entity Birrell counselled that the tax advice provided applied.³ This transaction alone accounted for \$1,000,000 in sales.⁴

Yet Plaintiff tactically chose to exclude Solco as a party. Judgment was not entered against Solco. Solco has never been served as a party and has never been allowed any opportunity to defend itself in this case. The Court has not established jurisdiction over Solco. Nonetheless, the Court has extended jurisdiction, without even the allegation, let alone proof, of a claim of alter ego or subsidiary-status to freeze the assets of this company. Now, the Court has validated Plaintiff's unconstitutional trial strategy by including Solco at this post-trial juncture as though it were a Defendant all along in this case. In doing so, the Receiver sheds his responsibility to collect on

¹ See Opinion Letter, attached as Exhibit 1.

² See Email from K. Birrell dated January 14, 2013 RE: Generlized [sic] Documents, attached as Exhibit 2.

³ See Escrow Agreement, attached as Exhibit 3.

⁴ *Id.*

the judgment entered against the named Defendants, and advocates for the Plaintiff against an entity it deliberately chose not to name as a party.

b. The Order validates the Plaintiff's unconstitutional trial strategy which deprived Solco of a trial on the merits prior to seizure of all its assets.

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."⁵ It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."⁶ The Court's order ignores Solco's the fundamental rights of due process, and ignores the government's decision when they elected to not include Solco as a defendant despite knowing of it and using as exhibits documents written for/by it, skip any claim or finding of alter ego or subsidiary or otherwise give it the opportunity to defend against that claim, and leap to the conclusion that these unnamed parties are equally liable for the judgment entered against those named. Such a leap violates due process.

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for hearings "at a meaningful time."⁷ Neither the Florida nor the Pennsylvania statute provided for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.⁸

⁵ *Id.* at 81 (citing *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385.)

⁶ *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552.)

⁷ *Id.*

⁸ *Id.*

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." *Id.* (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552. *Stanley v. Illinois*, 405 U.S. 645, 647.)

This is not a novel principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the [Fourteenth](#) and [Fifth Amendments](#). Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.⁹

⁹ See e.g. *Bell v. Burson*, 402 U.S. 535, 542; *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Goldberg v. Kelly*, 397 U.S. 254; *Armstrong v. Manzo*, 380 U.S., at 551; *Mullane v. Central Hanover Tr. Co.*, supra, at 313; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, supra, at 378-379 (emphasis in original).

In past briefings, Plaintiff has argued that because Defendants have argued Solco should not be subject to the asset freeze, that it has fully received all required due process. The Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without Solco having been afforded the notice of a complaint against it, an opportunity to answer or move to dismiss, discovery, motion practice, or a trial to hear the claims against it or an opportunity to prove its claimed defenses before a fact finder. This is all the more alarming because Solco was known to the Plaintiff long before this matter was filed. The Plaintiff used exhibits throughout discovery and trial written for/by Solco, but deliberately chose not to join it as a defendant in this case.

To date, Plaintiff has yet to give an explanation why Solco was excluded, and the Court's order fails to address this procedural shortcoming.¹⁰ Since no explanation was given, Solco is entitled to the benefit of an adverse inference that the Government intentionally and strategically omitted Solco to avoid facing the obvious defenses it would assert. Solco sought, obtained and relied on advice letters from legal counsel.¹¹ Likely because the other named Defendants were not the recipients of the legal advice, the Plaintiff intentionally chose to omit Solco as a party defendant in its case-in-chief.

In *United States v. Mesadieu*, 108 F.Supp 3d. 1113 (M.D. Fla. 2016), the trial court questioned whether it had authority to disgorge revenue "obtained by Mesadieu's companies – entities that are not before the Court."¹² The Government urged the trial court to include the non-

¹⁰ See *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) (Because the United States failed to join defendant's companies, Court questioned whether it would have had jurisdiction to order disgorgement of revenue obtained by defendant's non-party companies and entities that were not before the court.); see also *Bolsa Res., Inc. v. AGC Res., Inc.*, 2013 U.S. Dist. LEXIS 137604, *7 (Colo.) (District court declined to order non-party corporations to disgorge stock to satisfy judgment.)

¹¹ See XXXXX, attached as Exhibit 1.

¹² *Mesadieu*, 180 F. Supp. 3d at 1123.

parties alleging that “Mesadieu is the sole owner of the companies and uses his companies as a vehicle for fraud.”¹³ But the Government did not join the companies as a defendant.”¹⁴ Like *Mesadieu*, the Government failed to join non-entities Solco I and XSun, yet sought disgorgement against it under the same reasoning in *Mesadieu* (i.e., alleging that the named defendants used the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.¹⁵

That respect for due process was short-lived, however, as now the Court is validating Plaintiff’s unconstitutional trial strategy by depriving Solco due process by trial. For example, Solco was the client referred to in the “McConkie Memorandum,” placing Solco in a stronger position to assert a reliance of counsel defense. This entity had written legal advice and followed it. Accordingly, Solco was situated differently than any of the party defendants.

Additionally, inclusion of Solco goes well beyond the asset freeze. Now that Solco is to be included as a receivership entity, the Receiver will take complete “custody, control, and possession of all assets, bank accounts or other financial accounts, contents of safe deposits boxes, books, records, and all other documents or instruments”¹⁶ allowing the receiver to “direct and develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property”¹⁷ **without a showing that the property belonging to Solco are ill-gotten gains subject to disgorgement.** Indeed, the Receiver’s proposed order states the following:

¹³ Id.

¹⁴ Id.

¹⁵ ECF [467](#) at pg. 149.

¹⁶ EFC [444](#) at pg. 7, ¶ 15.

¹⁷ Id. at ¶ 83.

All other provisions of the Corrected Receivership Order shall apply to the Affiliate Receivership Entities to the same extent as Receivership Entities as necessary and appropriate to allow the Receiver to accomplish the duties required of him in the Corrected Receivership Order.¹⁸

Finally, Solco's attorneys will be immediately terminated, leaving Solco without legal counsel to contest the Receivership's authority to include it in the Receivership Estate, including, but not limited to asserting a claim of laches against the Government's effort through the receiver to now include it rather than affording it a trial on the merits of Solco's claimed defenses.^{19 20 21}

In sum, without due process, a claim should not proceed against Solco. In *United States v. 51 Pieces of Real Property Rosell*, N.M., 17 F.3d 1306 (10th Cir. 1994), relied upon by Plaintiff, an action was initiated, the complaining party was named as a defendant and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id.* Although proceeding under a federal forfeiture statute which was specifically void of any due process requirements, the Court recognized that "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest."²² No such hearing has ever taken place in this case.

Solco's assets (and others similarly situated) have already been frozen by this Court's order and then confiscated by the Receiver without any proof justifying these draconian steps to occur. Now, the Court is taking the further leap in finding Solco's assets to be the same as the party

¹⁸ See Proposed Order at ¶ 12.

¹⁹ *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001) "[I]n order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by the delay." *Id.* (emphasis added).

²⁰ Further, assuming there is a reason to allow even temporarily some freeze, it should not in any event affect a legal retainer required to pay legal counsel to defend these entities and the Defendants for which they intended to provide assistance. If Defendants succeed on appeal, both Solco I and XSun Energy can never face a claim against them. Therefore, they are the direct beneficiaries of the prophylactic effect of Defendants' successful appeal.

²¹ See *infra* at II and III.

²² *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)).

Defendants – essentially making it liable for another entity’s actions. The Receiver’s request goes too far.

DATED this 23nd day of May, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Solco I, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was duly filed with the court using the court’s CM/ECF filing service. I further certify that a true and correct copy of the foregoing was sent via email to the following pro se parties as indicated.

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF SOLSTICE ENTERPRISES, INC., BLACK NIGHT ENTERPRISES, INC., STARLIGHT HOLDINGS, INC., N.P. JOHNSON FAMILY LIMITED PARTNERSHIP'S OBJECTION TO ORDER ON MEMORANDUM AND DECISION AND ORDER ON RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECIEVERSHIP (ECF 636) Judge David Nuffer
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COME NOW Solstice Enterprises, Inc., Inc., Black Night Enterprises, Inc., Starlight Holdings, Inc., and N.P. Johnson Family Limited Partnership ("Solstice, et. al.") and hereby object to this Court's Order On Receiver's Motion to Include Affiliates and Subsidiaries in Receivership because the Order deprives them of the opportunity to present a plenary defense based on their unique circumstances.

I. The Court's Order Violates Due Process.

Solstice, et. al. are foreign entities organized in another country, none of which were or are under the control or ownership of Neldon P. Johnson. The only exception is the N.P. Johnson Family Limited Partnership, in which the minor beneficial interest Neldon Johnson once had was transferred many years ago in connection with a bankruptcy filing, and his beneficial interest was lost. None of these entities have funds that originated with RaPower-3 or any of the other Defendants. If the Receiver were able to show that something was transferred to them by RaPower-3, they should be given the opportunity to return whatever was transferred, rather than to be taken wholesale into a Receivership without any opportunity to defend. Neldon Johnson did and does not own or control these entities. Any failure or refusal by Neldon Johnson is not the failure or refusal of these other parties.

"Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified."¹ It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."² The Court's order ignores Solstice, et. al.'s fundamental rights of due process, skips any claim or finding of alter ego or opportunity to defend against that claim, and leaps to the conclusion that these unnamed parties are equally liable for the judgment entered against those named. Such a leap violates due process.

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for

¹ Id. at 81 (citing *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385.)

² Id. (citing *Armstrong v. Manzo*, 380 U.S. 545, 552.)

hearings "at a meaningful time."³ Neither the Florida nor the Pennsylvania statute provided for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.⁴

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not ... embraced the general proposition that a wrong may be done if it can be undone." *Id.* (citing *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552. *Stanley v. Illinois*, 405 U.S. 645, 647.)

This is not a novel principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the [Fourteenth](#) and [Fifth Amendments](#). Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if

³ *Id.*

⁴ *Id.*

any]," *Boddie v. Connecticut*, 401 U.S. 371, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.⁵

In past briefings, Plaintiff has argued that because Defendants have argued Solstice, et. al. should not be subject to the asset freeze, that it has fully received all required due process. The Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without Solstice, et. al. having been afforded the notice of a complaint against them, an opportunity to answer or move to dismiss, discovery, motion practice, or a trial to hear the claims against them or an opportunity to prove their claimed defenses before a fact finder.

In *United States v. Mesadieu*, 108 F.Supp 3d. 1113 (M.D. Fla. 2016), the trial court questioned whether it had authority to disgorge revenue "obtained by Mesadieu's companies – entities that are not before the Court."⁶ The Government urged the trial court to include the non-parties alleging that "Mesadieu is the sole owner of the companies and uses his companies as a vehicle for fraud."⁷ But the Government did not join the companies as a defendant."⁸ Like *Mesadieu*, the Government failed to join non-entities Solstice, et. al. yet sought disgorgement against them under the same reasoning in *Mesadieu* (i.e., alleging that the named defendants used

⁵ See e.g. *Bell v. Burson*, 402 U.S. 535, 542; *Wisconsin v. Constantineau*, 400 U.S. 433, 437; *Goldberg v. Kelly*, 397 U.S. 254; *Armstrong v. Manzo*, 380 U.S., at 551; *Mullane v. Central Hanover Tr. Co.*, supra, at 313; *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 152-153; *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner v. City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, supra, at 378-379 (emphasis in original).

⁶ *Mesadieu*, 180 F. Supp. 3d at 1123.

⁷ Id.

⁸ Id.

the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.⁹

That respect for due process was short-lived, however, as now the Court is validating Plaintiff's unconstitutional strategy by depriving Solstice, et. al. due process by trial. The failure, if there was one, of Mr. Johnson to provide documents for non-parties over which he had no control should not result in any "negative inference" against companies who are owned and controlled by others.

Additionally, inclusion of Solstice, et. al. goes well beyond the asset freeze. If Solstice, et. al. are to be included as receivership entities, the Receiver will take complete "custody, control, and possession of all assets, bank accounts or other financial accounts, contents of safe deposits boxes, books, records, and all other documents or instruments"¹⁰ allowing the receiver to "direct and develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property"¹¹ **without a showing that the property belonging to Solstice, et. al. are ill-gotten gains subject to disgorgement.** Indeed, the Receiver's proposed order states the following:

All other provisions of the Corrected Receivership Order shall apply to the Affiliate Receivership Entities to the same extent as Receivership Entities as necessary and appropriate to allow the Receiver to accomplish the duties required of him in the Corrected Receivership Order.¹²

Finally, Solstice, et. al.'s attorneys will be immediately terminated, leaving them without legal counsel to contest the Receivership's authority to include them in the Receivership Estate,

⁹ ECF [467](#) at pg. 149.

¹⁰ EFC [444](#) at pg. 7, ¶ 15.

¹¹ Id. at ¶ 83.

¹² See Proposed Order at ¶ 12.

including, but not limited to asserting a claim of laches against the Government's effort through the receiver to now include them rather than affording them a trial on the merits of their defenses.¹³

14 15

In sum, without due process, a claim should not proceed against them. In *United States v. 51 Pieces of Real Property Rosell*, N.M., 17 F.3d 1306 (10th Cir. 1994), relied upon by Plaintiff, an action was initiated, the complaining party was named as a defendant, and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id.* Although proceeding under a federal forfeiture statute which was specifically void of any due process requirements, the Court recognized that "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest."¹⁶ No such hearing has ever taken place in this case.

Solstice, et. al.'s assets (and others similarly situated) have already been frozen by this Court's order and then confiscated by the Receiver without any proof justifying these draconian steps to occur. Now, the Court is taking the further leap in finding Solstice, et. al.'s assets to be the same as the party Defendants – essentially making them liable for another entity's actions. The Receiver's request goes too far and the Court's Order should be modified to exclude these parties.

¹³ *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001) "[I]n order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by the delay." *Id.* (emphasis added).

¹⁴ Further, assuming there is a reason to allow even temporarily some freeze, it should not in any event affect a legal retainer required to pay legal counsel to defend these entities and the Defendants for which they intended to provide assistance. If Defendants succeed on appeal, both Solco I and XSun Energy can never face a claim against them. Therefore, they are the direct beneficiaries of the prophylactic effect of Defendants' successful appeal.

¹⁵ See *infra* at II and III.

¹⁶ *Id.* (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)).

DATED this 23rd day of May, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **SOLCO I, LLC'S OBJECTION TO ORDER ON MEMORANDUM AND DECISION AND ORDER ON RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECIEVERSHIP (ECF 636)** was sent to counsel for the United States in the manner described below.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.;
LTB1, LLC; R. GREGORY SHEPARD;
and NELDON JOHNSON,

Defendants.

**MEMORANDUM DECISION AND
ORDER OVERRULING OBJECTIONS
REGARDING INCLUSION OF
AFFILIATES AND SUBSIDIARIES**

Case No. 2:15-cv-00828-DN

District Judge David Nuffer

The Memorandum Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership ("Affiliates Order") states that "[a]ny person who may have an objection to" the Affiliates Order, "whether in whole or in part, must file such objection in this case within 21 days of receiving actual notice of" the Affiliates Order "or else such objection shall be considered waived."¹ Since then, XSun Energy LLC has filed a timely objection to the Affiliates Order;² Solco I LLC has filed a timely objection to the Affiliates Order;³ and Solstice Enterprises Inc., Black Night Enterprises Inc., Starlite Holdings Inc., and N.P. Johnson Family Limited Partnership have filed a timely objection to the Affiliates Order.⁴ All three objections

¹ [Docket no. 636](#) ("Affiliates Order"), filed May 3, 2019.

² XSun Energy LLC's Objection to Order on Memorandum and Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 664](#), filed May 23, 2019; *see* Receiver's Response to Objections to Memorandum Decision and Order Including Affiliates and Subsidiaries in Receivership Estate ("Response"), [docket no. 687](#), filed June 6, 2019.

³ Solco I LLC's Objection to Order on Memorandum and Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 665](#), filed May 23, 2019; *see* Response, *supra* note 2.

⁴ Solstice Enterprises Inc., Black Night Enterprises Inc., Starlight Holdings Inc., N.P. Johnson Family Limited Partnership's Objection to Order on Memorandum and Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 675](#), filed May 24, 2019; *see* Response, *supra* note 2; *see also*

(collectively, the “Objections”) are essentially identical and argue the same thing: that the Affiliates Order violates the objectors’ procedural due process rights.

XSun Energy LLC, Solco I LLC, and Solstice LLC previously made this same argument (nearly verbatim), and it was rejected.⁵ For the same reasons as before, it is rejected again today.

It has already been established that each of the objectors “received timely and sufficient notice of the” Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate⁶ and was “afforded an adequate opportunity to be heard with respect to it.”⁷ The Objections do not raise a genuine dispute regarding this issue or as to any other material fact stated in the Affiliates Order. As a result, the objectors were afforded due process prior to issuance of the Affiliates Order, and, by allowing them to raise further objections after that order was entered, they were afforded additional due process.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Objections⁸ are OVERRULED.

Signed July 8, 2019.

BY THE COURT:



David Nuffer
United States District Judge

Solstice Enterprises Inc., Black Night Enterprises Inc., Starlight Holdings Inc., N.P. Johnson Family Limited Partnership’s Objection to Order on Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 666](#), filed May 23, 2019; Notice of Deficiency, [docket no. 667](#), filed May 23, 2019.

⁵ Response to Receiver’s Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate, [docket no. 596](#), filed March 15, 2019; *see* Affiliates Order, *supra* note 1.

⁶ [Docket no. 582](#), filed March 1, 2019.

⁷ Affiliates Order, *supra* note 1, at 3.

⁸ [Docket no. 664](#), filed May 23, 2019; [Docket no. 665](#), filed May 23, 2019; [Docket no. 675](#), filed May 24, 2019.