IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. SOLCO I, LLC, et al., Defendants/Appellants, and RAPOWER-3, LLC, et al., Defendants.	Appeal No. 19-4089
R. WAYNE KLEIN, Receiver/Appellee.	

On Appeal from
The United States District Court for the District of Utah
(Civil No. 2:15-cv-00828 - Judge David O. Nuffer)

BRIEF FOR THE APPELLEE

Jonathan O. Hafen (UT 8274)
Jeffery A. Balls (UT 12437)
Michael S. Lehr (UT 16496)
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, UT 84111
Telephone: (801) 532-7840
jhafen@parrbrown.com
jballs@parrbrown.com
mlehr@parrbrown.com
Attorneys for Receiver/Appellee

CORPORATE DISCLOSURE STATEMENT

Appellee R. Wayne Klein, as Receiver (the "Receiver" or "Appellee") for *inter alia* Black Night Enterprises, Inc. ("Black Night"), N.P. Johnson Family Limited Partnership ("NPJFLP"), Solco I, LLC ("Solco"), Solstice Enterprises, Inc. ("Solstice"), Starlite Holdings, Inc.[1] ("Starlite"), XSun Energy ("XSun"), International Automated Systems, Inc. ("IAS"), RaPower-3, LLC ("RaPower"), and LTB1, LLC ("LTB1"), by and through his undersigned counsel and pursuant to Fed. R. App. P. 26.1 states that the Receiver holds all powers, authorities, rights, and privileges previously possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners of the above mentioned entities pursuant to orders of the United States District Court for the District of Utah. Further, the Receiver submits that the above mentioned entities, with the exception of XSun, have no parent corporations, and no publicly held corporation owns 10% or more of their stock.

As disclosed in Appellants' corporate disclosure statement, XSun is owned by Solstice.

[1] Curiously, Appellants misspell the name of this entity.

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STATEMENT OF RELATED CASES

The following cases are prior or related appeals to this matter:

United States v. RaPower-3, LLC, et. al., U.S. Court of Appeals, Tenth Circuit, 18-4119;

United States v. RaPower-3, LLC, et. al., U.S. Court of Appeals, Tenth Circuit, 18-4150.

United States v. RaPower-3, LLC, et. al., U.S. Court of Appeals, Tenth Circuit, 19-4066.

JURISDICTIONAL STATEMENT

The United States brought this action under sections 7402 and 7408 of the Internal Revenue Code of 1986, 26 U.S.C. (I.R.C.), to enjoin the promotion of an abusive tax scheme and obtain equitable disgorgement of ill-gotten gains. The United States of America commenced this action on November 23, 2015. (Doc. 2.) The district court had jurisdiction under I.R.C. § 7402 and 28 U.S.C. §§ 1331, 1340, and 1345.

This Court lacks subject matter jurisdiction over this appeal. As explained below, the individuals and attorneys responsible for initiating this appeal on behalf of Receivership Entities Solco, XSun, Solstice, Black Night, Starlite, and the NPJFPL (collectively, "Appellants") had no authority to file this appeal or to otherwise act on behalf of Receivership Entities. As such, this Court lacks jurisdiction to hear this matter because Appellants lack standing to bring this appeal. "To establish standing, a litigant ordinarily 'must assert his own legal

rights and interests' and cannot assert the rights or interests of someone else." *SEC v. Quest Energy Mgmt. Grp., Inc.*, 768 F.3d 1106, 1108 (11th Cir. 2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Further, while this Court has jurisdiction over an appeal of an order appointing a Receiver, 28 U.S.C. § 1292(a)(2), that jurisdiction "is interpreted narrowly to permit appeals only from the three discrete categories of receivership orders specified in the statute, namely [1] orders appointing a receiver, [2] orders refusing to wind up a receivership, and [3] orders refusing to take steps to accomplish the purposes of winding up a receivership." *In re Pressman-Gutman Co.*, 459 F.3d 383, 393 (3d Cir. 2006) (quoting *SEC v. Black*, 163 F.3d 188, 195 (3d Cir. 1998)) "[G]iven the enormous potential for disruptive piecemeal appeals" a narrow interpretation of 28 U.S.C. § 1292(a)(2) "makes good sense." *FTC v. Peterson*, 3 F. App'x 780, 782 (10th Cir. 2001)[2] (unpublished) (quoting *SEC v. Am. Principals Holdings, Inc.*, 817 F.2d 1349, 1350 (9th Cir.1987)).

Here, the appeal focuses not on the order appointing the Receiver but on a later order extending the Receivership to affiliated entities. The authority of the Receiver to recommend the extension of the Receivership to these entities was expressly provided in the original Receivership Order. Because the actual order

[2] The *Peterson* court was reviewing whether it had jurisdiction over an interlocutory appeal of steps taken winding up a Receivership. The reasoning underlying the *Peterson* court's decision, however, applies here as well.

under which the Receiver was appointed is not the subject of this appeal, this Court does not have jurisdiction over this appeal under section 1292(a)(2), as discussed in greater detail below.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion in granting the Receiver's motion expanding the Receivership to include Appellants given that, *inter alia* (1) Solco, XSun, and Solstice timely opposed the motion; and (2) each Appellant filed an objection to the district court's order within 21 days.

STATEMENT OF THE CASE

A. Pre-Receivership Proceedings and Findings.

This case arises from the fraudulent promotion of an abusive tax scheme centered on purported solar energy technology. For more than a decade, Receivership Defendants and affiliated entities sold "solar lenses" to the public with false assurances that purchasers were entitled to claim solar energy tax credits and depreciation deductions far exceeding the purchase price. Through those sales, Receivership Defendants, family members, insiders, and affiliated entities received tens of millions of dollars at the expense of the United States Treasury and by deceiving and defrauding purchasers of solar lenses. The United States brought this action to enjoin the unlawful promotion of the fraudulent scheme and to obtain disgorgement of ill-gotten gains.

After a 12-day trial, the district court ruled from the bench that Receivership Defendants had engaged in a "massive fraud," "a hoax funded by the American taxpayer through defendants' deceptive advocacy of abuse of the tax laws." On October 4, 2018, the district court entered a judgment for the Government that permanently enjoined defendants from promoting the abusive tax scheme and ordered the disgorgement of more than $50 million in ill-gotten gains.[3] In the 144 pages of written findings and conclusions issued the same day, the district court stated, among other things, that:

- "Defendants' solar energy scheme is clearly a complete sham. Defendants knew it was not generating income for customers for more than *ten years*." (emphasis in original) (S.A.100 (Doc. 467).)[4]
- "[T]he United States showed that Defendants 'sold' at least 49,415 lenses. If all customers paid the $1,050 down payment required under the terms of Defendants' own transaction documents, Defendants' gross receipts were $51,885,750." (S.A.131.)

[3] An amended and restated judgment was entered on November 13, 2018 (Doc. 507.) The amended judgment restated this judgment amount.

[4] "S.A." references are to Appellee's supplemental appendix accompanying this brief. "A." References are to Appellants' appendix. "Doc." References are to the numbered entries on the district court docket.

- Receivership Entity bank accounts were frequently used to make payments to Neldon Johnson's family members and to pay his personal expenses. (S.A.133.)
- "[T]he whole purpose of RaPower-3 was to perpetrate a fraud to enable funding of the unsubstantiated, irrational dream of Neldon Johnson. The same is true for the other entities Johnson established and used including IAS, SOLCO I, XSun Energy, Cobblestone, and the LTB entities." (S.A.133.)

B. Receivership Order and Report and Recommendation Regarding Affiliated Entities.

On October 31, 2018, the district entered the Receivership Order, which was replaced the next day by the Corrected Receivership Order.[5] (A.092 (Doc. 491).) The Corrected Receivership Order took exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of Receivership Defendants and assets proven to be proceeds of activities of Receivership Defendants in possession of the affiliated Receivership Entities including:

- Black Night Enterprises, Inc.;
- N.P. Johnson Family Limited Partnership;

[5] The Corrected Receivership Order fixed formatting errors in the original Receivership Order.

- Solco I, LLC;
- Solstice Enterprises, Inc.;
- Starlite Holdings, Inc.;[6] and
- XSun Energy. (A.093-94 (Doc. 491).)

The Corrected Receivership Order also placed an asset freeze on all of the affiliated entities "for the purpose of permitting the Receiver to investigate the assets, property, property rights, and interests of the subsidiaries and affiliated entities." (A.094-95.)

The district court, through the Corrected Receivership Order, directed the Receiver to investigate all the affiliated Receivership 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." (A.094-95.) The Corrected Receiver Order also required that once the Receiver's investigation into the affiliated entities was complete, that the Receiver recommend to the court "whether the Receivership should extend to any of the investigated subsidiaries or affiliated entities or specific property of those entities." (*Id*.)

On February 25, 2019, the Receiver filed his *Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate* ("R&R")

[6] The Corrected Receivership Order identified this entity as "Starlight Enterprises."

recommending that all the affiliated entities plus an additional entity, U-Check, Inc., be included in the Receivership. (S.A.145 (Doc. 581).) In the 53-page report, the Receiver found that the operations of the affiliated entities were all related to the fraudulent tax scheme, that the affiliated entities each had close associations with Receivership Defendants including common owners and managers, that assets were frequently transferred from Receivership Defendants to the affiliated entities that—in many instances—the only assets many of the affiliated entities had were transferred from Receivership Defendants for no consideration, and that foreign entities, such as Black Night and Starlite, were likely created for the purpose of placing assets out of reach of the government and the courts. (*Id*.) As part of his investigation the Receiver found the following regarding the Appellants:

- Solco
    - Solco's only business was marketing lenses on behalf of IAS; Solco's initial members were Neldon Johnson's family members; Neldon Johnson signed many documents on behalf of Solco; and Neldon Johnson previously testified that Solco sold tens of millions of dollars in solar lenses.[7] (S.A.152.)
- XSun

[7] Such sales indicate that this affiliate's revenue derived from the solar energy scheme.

- Neldon Johnson was the manager and sole decision maker of XSun; XSun sold solar lenses; and almost all the funds in XSun's bank account were transferred from the bank account of RaPower (and subsequently a large amount of those funds were transferred to the law firm Nelson Snuffer Dahle & Poulsen ("Nelson Snuffer")). (S.A.154.)

- N.P. Johnson Family Limited Partnership
  - The stated purpose of the N.P. Johnson Family Limited Partnership was to facilitate the transfer of assets for Neldon Johnson to his family members; Neldon Johnson transferred numerous patents and shares in IAS to the NPJFLP for no consideration; and despite although Neldon Johnson having ostensibly transferred his interest in the NPJFLP to others, he continued to sign documents on behalf of NPJFLP into 2017. (S.A.164.)
- Solstice Enterprises
  - Solstice is incorporated in the country of Nevis but has a corporate address in Oasis, Utah at the same location as RaPower and IAS' corporate office; Neldon Johnson and his family are officers or employees of Solstice; Solstice is the sole owner of XSun; and

Solstice sold solar lenses; RaPower assigned 81.3% of its revenue to Solstice. (S.A.169.)

- Black Night Enterprises
    - Black Night Enterprises is incorporated in the country of Nevis; through Black Night, Neldon Johnson was to receive a 10% royalty on gross sales of solar lenses; Neldon Johnson signed documents on behalf of Black Night; patents were assigned to Black Night and then licensed back to IAS and RaPower; and the purported technology used by IAS and RaPower is owned by Black Night and Starlite. (S.A.171.)
- Starlite
    - Starlite is incorporated in the country of Nevis; through Starlite, Neldon Johnson was to receive a 10% royalty on gross sales of solar lenses; patents were assigned to Starlite and then licensed back to IAS and RaPower; the purported technology used by IAS and RaPower was owned by Black Night and Starlite. (S.A.172.)

The R&R also highlighted that Neldon Johnson previously testified that, in fact, he controls all the affiliated entities and can decide which entity to use to accomplish the goals of his enterprise. (S.A.184.)

C. Receiver's Motion to Include Affiliated Entities in the Receivership, Appellants' Opposition, and the District Court's Memorandum Decision and Order.

A few days after the Receiver filed the R&R, he filed a motion incorporating the findings in the R&R and asking the court to include the affiliated entities in the Receivership (the "Motion" or "Receiver's Motion"). (S.A.198 (Doc. 582).)

Importantly, Appellants XSun, Solco, and Solstice filed a response opposing the Receiver's motion. (S.A.205 (Doc. 596).) The response does not dispute the factual basis of the motion or R&R. Instead, the response asserts that because the affiliated entities were not defendants in the underlying lawsuit, including them in the Receivership would violate due process. (*Id*.)

In his reply brief, the Receiver pointed out that XSun, Solco, and Solstice failed to offer any evidence disputing the Receiver's findings and that due process was being afforded to them through the Receiver's Motion. (S.A.220 (Doc. 602).) Ultimately, on May 3, 2019, the district court granted the Receiver's Motion. (A.139 (Doc. 636).) In the May 3, 2019, Memorandum Decision and Order Granting the Motion (the "Affiliates Order") the court found:

- 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. (A.141.)

- In their response opposing the motion, XSun Energy, Solco, and Solstice did not raise a genuine dispute as to any material fact set forth in support of the Motion. (*Id.*)
- The whole purpose of Solco, XSun, Solstice, Black Night and Starlite was to perpetrate a fraud to enable funding for Neldon Johnson. (A.142-43.)
- Neldon Johnson commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an attempt to avoid creditors. (*Id.*)
- Each of the Affiliated Entities is a subsidiary or affiliated entity of Receivership Defendants and has close associations with the Receivership Entities. (A.143.)

As part of the Affiliates Order, the Court expressly allowed "any person who may have an objection" to the Affiliates Order to file an objection within 21 days of receiving actual notice of the memorandum decision and order. (A.146.)

D. Appellants' Objections.

As allowed by the Affiliates Order, Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP submitted objections.[8] (A.147-171 (Doc. 664-666).) The

[8] Three nearly identical objections were submitted. One by XSun, another by Solco, and finally one by Solstice, Black Night, Starlight, the NPJLP.

objections, however, merely repeated that same rejected due process arguments and did not offer any contrary evidence to the district court's findings or the Receiver's Motion. The Receiver responded to the objections (S.A.284 (Doc.687) and, ultimately, the district court overruled Appellants' objections finding—yet again—that Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP received timely and sufficient notice of the Receiver's motion and were afforded an adequate opportunity to be heard with respect to it. (A.172 (Doc. 718).) The court also found that objectors did not raise a genuine dispute regarding any material fact. (*Id*.)

E. Post-"Affiliates Order" Contempt Finding.

Subsequent to the district court entering the Affiliates Order, the court also entered an order holding Neldon Johnson, Glenda Johnson, LaGrand Johnson, and Randale Johnson in civil contempt of court for their "stubborn refusal to comply" with the Receivership Order in an attempt to avoid full enforcement of the disgorgement order against them. (S.A299 (Doc. 701).) There, the court found—after three days of evidentiary hearings—that Neldon Johnson, Glenda Johnson, LaGrand Johnson, and Randale Johnson were all in positions of ownership and/or authority in the affiliated entities and failed to comply with the Corrected Receivership Order's requirements that they turnover and identify documents related to Receivership Defendants and the affiliated entities. (*Id*.) The court

declared that Neldon Johnson, Glenda Johnson, LaGrand Johnson, and Randale Johnson were in contempt of court, required them to produce all documents as required under the Corrected Receivership Order, and awarded fees and costs to the United States and the Receiver for their efforts enforcing the Corrected Receivership Order. (*Id*.)

As of the date of this filing, the Johnsons' are still in contempt of court, have not provided all information related to Receivership Entities to the Receiver, and owe the United States and Receiver more than $50,000 in fees and costs. The United States has filed another motion against the Johnsons for additional sanctions for their continued defiance of valid court orders.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to hear this appeal. Although the appeal was purportedly brought by Solco, XSun, Solstice, Black Night, Starlight, and the NPJLP, the individuals who brought this appeal lacked standing to assert claims of behalf of these entities. Moreover, this Court lacks jurisdiction to hear this appeal under 28 U.S.C. § 1292(a)(2) because the Affiliates Order is not an order appointing a receiver.

The crux of Appellants brief is that they believe the district court abused its discretion by including them in the Receivership without the filing of a separate lawsuit against them. Appellants are wrong. The procedures used by the district

court were well-within the "broad powers and wide discretion" afforded to district courts in receiverships. *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). Moreover, the facts of this case show that the due process requirements of notice and an opportunity to be heard were more than satisfied and, indeed, the court went out its way to ensure that Appellants—or any other person—had an opportunity to present evidence and be heard regarding the inclusion of the affiliated entities in the Receivership estate.

ARGUMENT

I. This Court Lacks Jurisdiction to Hear the Appeal.

A. Appellants Lack Standing.

This appeal was purportedly brought by Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP. The individuals who filed this appeal, however, were not authorized to file on behalf of Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP. Because Appellants lack standing to bring this appeal, this Court lacks jurisdiction to hear this matter.

"Standing is the threshold question in every federal case, determining the power of the court to entertain the suit." *SEC v. Quest Energy Mgmt. Grp., Inc.*, 768 F.3d 1106, 1108 (11th Cir. 2014) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims, and the court is powerless to

continue." *CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1269 (11th Cir. 2006) (citation and internal quotation marks omitted). "To establish standing, a litigant ordinarily 'must assert his own legal rights and interests' and cannot assert the rights or interests of someone else." *Quest Energy*, 768 F.3d at 1108 (quoting *Warth*, 422 U.S. at 499, 95 S.Ct. at 2205.)

Federal Rule of Appellate Procedure 3 provides that the notice of appeal must "specify the party or parties taking the appeal by naming each one in the caption or body of the notice." Fed. R. App. P. 3(c)(1)(A). "Neither may we look beyond the notice of appeal and scour the record to figure out who does and doesn't wish to appeal. Rule 3(c) expressly requires that a party's intent to participate in the appeal be objectively clear '*from the notice*' itself." *Raley v. Hyundai Motor Co.*, 642 F.3d 1271, 1277 (10th Cir. 2011) (emphasis in original). "[T]he failure to name the proper party taking the appeal . . . can and will result in the dismissal of an appeal for lack of appellate jurisdiction." *Id*. at 1274-75 (quoting *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1149 (10th Cir.1991). "[T]he party claiming appellate jurisdiction bears the burden of establishing . . . subject-matter jurisdiction." *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1143 (10th Cir. 2004). "Without jurisdiction [a] court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the

cause." *Id*. (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

The Affiliates Order—which expanded the Receivership estate to include 13 entities affiliated with Receivership Defendants—dismissed all "directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys, and other agents" of the affiliated entities, including each officer or agent of Appellants. (A.145 (Doc. 636).) Absent an express grant of authority from the Receiver, the Affiliates Order removed the authority of any person, other than the Receiver, over the affiliated entities, stating "[n]o 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." (*Id*.) The Affiliates Order also applied all the provisions of the Receivership Order to the affiliated entities, including the provision requiring that the "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." (A.146, A.097.) It also required that any court filling or submission "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." (A.097.)

When Nelson Snuffer filed the notice of appeal and its opening brief on behalf of Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP, it violated the Affiliates Order and the Corrected Receivership Order. The Receiver did not give Nelson Snuffer or anyone else the authority—express or otherwise—to file the appeal on behalf Solco, XSun, Solstice, Black Night, Starlite, or the NPJFLP. Moreover, nowhere in the notice of appeal or the opening brief is there a statement identifying the source of the funds used for the appeal. Notably, the Receiver has informed Nelson Snuffer and its clients numerous times that its filings on behalf of Receivership Defendants or affiliated entities were in violation of the Corrected Receivership Order. (*See* Doc. 602 at fn. 6; Doc. 659 at 7; Doc. 687 at 6; Doc. 696 at 3.) Nevertheless, Nelson Snuffer has continued to make submissions on behalf of entities without the authority to do so. Because the parties who filed this appeal on behalf of Solco, XSun, Solstice, Black Night, Starlite, or the NPJFLP did not have the authority to make such filing, Appellants lack standing and this Court does not have jurisdiction over this appeal.

In a case directly on point, the Eleventh Circuit held that former officers of a company placed into receivership who were enjoined from taking action on behalf of that company *could not* appeal that injunction in the name of the company. *See Quest Energy*, 768 F.3d 1106. There, the court found that "[w]hen the district court expanded the receivership to include [the company], it forbade the [former

officers] from taking any action on behalf of [the company] and instead vested the legal rights and interests of [the company] in the receiver. Based on the plain language of that order, the [former officers] lack standing to appeal in the name of [the company]." *Id*. at 1109. The same is true in the instant case. The plain language of the Affiliates Order and the Corrected Receivership Order prohibit any former officers, directors, managers, or attorneys from acting on behalf of Solco, XSun, Solstice, Black Night, Starlite, or the NPJFLP.

The *Quest Energy* court addressed other paths that the former officers could have taken to pursue an appeal that did not violate court orders. Their options included moving the district court for leave to appeal the order, asking for a stay pending an appeal, or appealing the order in their individual capacities. *Id*. These options were available to Nelson Snuffer and its clients as well. Indeed, the district court has previously allowed Nelson Snuffer and its clients to pursue an appeal on behalf of Receivership Defendants upon meeting certain conditions.[9] Here, however, no such authority was sought or granted by the district court, the Tenth Circuit, or the Receiver. Therefore, because Nelson Snuffer and its clients do not have any authority to act on behalf of the Appellants, this Court lacks jurisdiction to hear this appeal and it must be dismissed. "[J]urisdictional rules are just that.

[9] *See United States v. RaPower-3, LLC, et. al.*, U.S. Court of Appeals, Tenth Circuit, 18-4119; *United States v. RaPower-3, LLC, et. al.*, U.S. Court of Appeals, Tenth Circuit, 18-4150.

The failure to abide them can, and in this case does, mean that we cannot reach the merits, however unfortunate that may be." *Raley*, 642 F.3d at 1278 (10th Cir. 2011).

B. This Court Does Not Have Jurisdiction Under Section 1292(a)(2).

28 U.S.C. § 1292(a)(2) provides that courts of appeals have jurisdiction from "[i]nterlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." Courts have "adopted a policy of strict construction that has confined appeals to the three categories *clearly specified* in the statute." *Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 841 (9th Cir. 2009) (citations and quotations omitted) (emphasis added); *see also F.T.C. v. Peterson*, 3 F. App'x 780, 782 (10th Cir. 2001) (unpublished); *In re Pressman-Gutman Co.*, 459 F.3d 383, 393 (3d Cir. 2006). In this case, because the Affiliates Order did not appoint the Receiver, the Court does not have jurisdiction under section 1292(a)(2).

The Corrected Receivership Order appointed the Receiver to take control and possession over the assets, property and operations of Receivership Defendants. (A.092 (Doc. 491).) The Corrected Receivership Order also froze all of Appellants' assets, directed the Receiver to investigate Appellants, and required the Receiver to recommend whether "the Receivership should extend to"

Appellants and other affiliated entities. (A.93-95.) Importantly, the district court made clear that purpose of the Receiver's investigation into the Appellants and other affiliated entities was 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 case or from an unrelated business activity." (A.094-95.)

What the Receiver found was that each affiliated entity's business activities, assets, and property nearly exclusively derived from the abusive solar energy scheme. (S.A.145-97 (Doc. 581).) He also found that the affiliated entities had nearly all the same owners, officers, directors, and attorneys as Receivership Defendants. (*Id*.) As such, he recommended and moved to include the affiliated entities in the Receivership estate. Accordingly, the basis for the Receiver's Motion and the May 3, 2019 Affiliates Order was the October 31, 2018 Corrected Receivership Order. That order, *not* the Affiliates Order at issue in this appeal, appointed the Receiver. The Affiliates Order only extended the Receivership over the affiliated entities for the reasons and purposes laid out in the Corrected Receivership Order. Indeed, nowhere in the Affiliates Order does the district court state that it is appointing a receiver. Instead, the Affiliates Order is clear that it is making the Affiliated Entities "part of the existing receivership estate, which is

being administered by court-appointed receiver Wayne Klein, in accordance with the Corrected Receivership Order." (A.144.)

Allowing Appellants to appeal the Affiliates Order in this situation would give them a second chance to appeal the appointment of the Receiver.[10] This appeal—which was filed by the same officers, directors, and attorneys as Receivership Defendants—is a disruptive piecemeal appeal and the reason why courts interpret section 1292(a)(2) narrowly to allow jurisdiction only over orders "appointing a receiver." Because the Affiliates Order only acted to bring Appellants into the pre-existing receivership estate the Affiliates Order does not grant jurisdiction under 28 U.S.C. 1292(a)(2) and is not properly in front of the Court.

II. Appellants' Due Process Rights Were Satisfied.

A. Standard of Review.

"It is generally recognized that the district court has broad powers and wide discretion to determine relief in an equity receivership." *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010). "A district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *Broadbent v. Advantage*

[10] *See United States v. RaPower-3, LLC, et. al.*, U.S. Court of Appeals, Tenth Circuit, 18-4119; *United States v. RaPower-3, LLC, et. al.*, U.S. Court of Appeals, Tenth Circuit, 18-4150.

Software, Inc., 415 F. App'x 73, 78 (10th Cir. 2011) (unpublished) (quoting *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986)). "The basis for broad deference to the district court's supervisory role in equity receiverships arises out of the fact that most receiverships involve multiple parties and complex transactions" and because a "primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of the creditors." *Id*. (quotations omitted).

"We review the District Court's application of law with regard to the equitable receivership *de novo*, and its decisions relating to procedures it will follow in connection with the receivership proceedings for abuse of discretion." *SEC v. Black*, 163 F.3d 188, 195 (3d Cir. 1998).

B. Summary of Filings Related to the Affiliates Order.

At the outset, it is important to clarify the sequence of filings related to the Affiliates Order at issue in this appeal.

(1) On February 25, 2019, the Receiver filed his 53-page R&R regarding operations of the affiliated entities (S.A.145 (Doc. 581);

(2) On March 1, 2019, the Receiver filed his Motion to include the Affiliated Entities in the Receivership (S.A.198 (Doc. 582);

(3) On March 15, 2019, Solco, XSun, Solstice, and Glenda Johnson filed an opposition to the Receiver's Motion (S.A.205 (Doc. 596);

(4) On March 29, 2019, the Receiver filed a reply in support of the Motion (S.A.220 (Doc. 602);

(5) On May 3, 2019, the district court entered the Affiliates Order including 13 affiliated entities in the Receivership (A.139 (Doc. 636));

(6) On May 23, 2019, Solco, XSun, Solstice, Black Night, Starlite, and the NPJFLP filed objections to the Affiliates Order (A.147-171 (Doc. 664-666)); and

(7) On July 8, 2019, the district court overruled the objections. (A.172 (Doc. 718).)

C. Appellants Received Due Process.

While Appellants summarily claim that the Affiliates Order "is not grounded in any proof" and is based only on an "adverse inference" they fail to develop this argument and it is not clear what they mean. A review of the Affiliates Order shows that the district court clearly set forth the factual basis for the order with extensive citations to the record. Next, a review of notice of adverse inferences cited by Appellants as a basis for Affiliates Order shows that the adverse inferences notice relates solely to the contempt proceedings against Neldon Johnson, Glenda Johnson, Randale Johnson, and LaGrand Johnson and *not* to the Affiliates Order. (S.A.281 (Doc. 638).) In fact, the notice was entered *after* the Affiliates Order and plainly states that adverse inferences may be drawn *in the*

future if the Johnsons continue to disobey court orders. (*Id*.) Finally, while Appellants state that they did not have an "opportunity to defend" against the Receiver's motion, they fail to disclose that they filed opposition to the Receiver's Motion.

These facts, by themselves, belie Appellants claims of lack of an opportunity to defend or present evidence and a lack of factual basis underlying the Affiliates Order. Appellants must know that these claims do not survive scrutiny because the argument section of their brief does not refer at all to the findings made by the court or the actual process they received.

i. Authority: Due Process Inquiry.

In determining whether procedural due process rights were violated, courts engage in a two-step inquiry: "(1) Did the individual possess a protected property interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?" *Camuglia v. The City of Albuquerque*, 448 F.3d 1214, 1219 (10th Cir. 2006) (quoting *Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir.1999)). On this appeal, the Receiver concedes that due process protection was applicable to the property that was put in the Receiver's control.

As for the second step, the general rule is that, "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a

property interest." *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994) (citing *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)). While it is clear that notice and an opportunity for a hearing are generally required, what process is due is "flexible and calls only for such procedural protections as the particular situation demands." *Camuglia*, 448 F.3d at 1220 (internal brackets omitted) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)). In our case, Appellants received both actual notice and an opportunity to be heard before the affiliated entities were included in the Receivership Estate. Indeed, Appellants' submitted an opposition to the Receiver's motion and objected to the Affiliates Order within the 21 days expressly allowed by the district court. This more than satisfied the requirements of due process.

ii. Appellants Received Adequate Notice.

Due process requires that property owners receive notice. Actual notice, however, is not necessary. *Dusenbery v. United States*, 534 U.S. 161, 170-71 (2002). "Instead, notice satisfies due process where it either 1) is in itself reasonably certain to inform those affected or 2) where conditions to not reasonably permit such notice, the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146 (4th Cir. 2014) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)).

It is somewhat unclear what Appellants' claim regarding the notice they did or did not receive. Early in their brief they assert that "they were not given notice of the motion [to include affiliate entities]." The sole substantive argument regarding notice, however, seems to admit they had notice but that due process requires that the Receiver file a lawsuit and serve them with a summons. In any event, the facts are clear that each Appellant had actual notice the Receiver's Motion and the Affiliates Order.[11]

First, notice is shown by Solstice, Solco, and XSun filing an opposition to the Receiver's Motion. (S.A. 205 (Doc. 596).) Appellants plainly could not have filed such an opposition without notice of the Motion. Second, Appellants' corporate disclosure statement shows that LaGrand Johnson and Randale Johnson are owners or managers of Black Night, the NPJFLP, Solco, Starlite, and XSun. LaGrand Johnson and Randale Johnson received a copy of the Receiver's Motion—along with other documents indicating that the affiliate entities may be included in the Receivership—through the district court's CM/ECF system. This satisfies the notice requirement, as knowledge of an artificial entity's agent is imputed to the principal. *See Lane v. Provo Rehab. & Nursing*, 2018 UT App 10, ¶ 27, 414 P.3d 991. Finally, each Appellant filed an objection to the Affiliates Order

[11] Actual notice has been equated with "receipt of notice." *See Dusenbery*, 534 U.S. 161, 170 fn. 5, 122 S. Ct. 694, 701, 151 L. Ed. 2d 597 (2002).

within the 21 day time period allowed by the district court. Accordingly, Appellants received adequate notice.

iii. Appellants Had Ample Opportunity to be Heard.

"The Due Process Clause requires provision of a hearing 'at a meaningful time.'" *Columbian Fin. Corp. v. Stork*, 811 F.3d 390, 401 (10th Cir. 2016) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 534 (1985)); *see also Mathews v. Eldridge*, 429 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."). A predeprivation hearing is, classically, sufficient to satisfy due process. *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 18 (1979).

Confusingly, Appellants state that they "were never afforded a hearing of any kind." This statement is disproved by a review of the district court's docket which shows that Solstice, Solco, and XSun filed an opposition to the Receiver's motion. (S.A.205 (Doc. 596).) Appellants Black Night, Starlite, and the NPJFLP, who also had notice of the Receiver's Motion, had the same opportunity to oppose the Motion but chose not to. The predeprivation opportunity that Appellants had—and took—in filing their opposition to the inclusion of the affiliated entities in the Receivership satisfied due process.

The crux of Appellants' due process argument is that they believe their due process rights were violated because "they were deprived of the benefit of . . .

confronting or cross-examining witnesses and challenging the Receiver's characterization of the evidence through witnesses of their own. They were not afforded the opportunity to conduct any discovery." Due process, however, does not require the Receiver to file a lawsuit against Appellants. As noted above, due process is "flexible and calls only for such procedural protections as the particular situation demands." *Camuglia*, 448 F.3d at 1220 (internal brackets omitted) (quoting *Eldridge*, 424 U.S. at 334). When Appellants did not dispute any material fact raised in the Receiver's Motion or point to any potential benefit additional procedures could have provided, the district court correctly determined that no further process was necessary. When—as here—there is no factual dispute where a hearing or additional process could be useful, no hearing or further process is required to satisfy due process. *See Codd v. Velger*, 429 U.S. 624 (1977) (per curiam); *see also Rector v. City & Cty. of Denver*, 348 F.3d 935, 944 (10th Cir. 2003) (citing *Codd* for the proposition that failure to provide a hearing does not violate due process so long as the claimant does not contest the factual legitimacy of the underlying deprivation).

Although no further opportunity was required, the district court expressly allowed "any person who may have an objection to" the Affiliates Order to "file such objection in this case within 21 days of receiving actual notice of" the Affiliates Order. (A.146.) Appellants availed themselves of this additional process

and filed three separate objections. (A.147-171 (Doc. 664-666).) This further opportunity also satisfied due process because it was available at a meaningful time promptly after the Affiliates Order was issued. *See Columbian Fin. Corp.*, 811 F.3d at 401. The timing was meaningful because if material factual issues were raised that called into question whether the affiliated entities should have been included in the Receivership, the district could have promptly addressed those issues without damage to the affiliated entities. Instead, yet again, Appellants' submissions did not dispute any material facts and the court, correctly, overruled their objections.

iv. Summary Proceedings are Proper in Receiverships.

Despite these multiple opportunities to be to heard regarding the inclusion of the affiliated entities in the Receivership Estate, Appellants assert that "[t]hey were unable to offer a defense to protect their interests" and that only after they are given an opportunity to call witnesses, conduct discovery, and hire experts "will due process be satisfied in this matter." As shown above, Appellants are wrong. Due process does not require plenary proceedings. Further, Appellants have not—and cannot—show that they were prejudiced by the procedures used by the district court here.

It is well established that it is appropriate for district courts to use summary proceedings when fashioning relief in receiverships. *See e.g., SEC v. Elliott*, 953

F.2d 1560, 1566–67 (11th Cir. 1992). It is also well established that summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard. *See CFTC v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1113 (9th Cir.2000) ("summary proceedings satisfy due process so long as there is adequate notice and opportunity to be heard."); *SEC v. Basic Energy & Affiliated Res.*, 273 F.3d 657, 668 (6th Cir.2001); *SEC v. Sharp Capital, Inc.*, 315 F.3d 541, 546 (5th Cir. 2003); *Smith v. Am. Indus. Research Corp.*, 665 F.2d 397, 399 (1st Cir.1981) (use of single receivership proceeding best serves the parties' and the government's interest in judicial efficiency); *see also SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir.2010) (district courts have "broad powers and wide discretion to determine relief in an equity receivership.").

Summary proceedings are an important tool used by district courts in receiverships because they reduce the time necessary to settle disputes, decrease litigation costs, and prevent dissipation of receivership assets. *Elliott*, 953 F.2d at 1566 (citing *SEC v. Wencke*, 783 F.2d 829, 837 (9th Cir.1986)). "While the term 'summary' connotes that the procedure was abbreviated . . . . [courts] look at the actual substance, not the name or form, of the procedure to see if the claimants' interests were adequately safeguarded." Importantly, the burden is on appellants to "show how they were prejudiced by the summary proceedings" and how the

district court abused its discretion by using summary proceedings. *Id*. (citing *SEC v. Universal Financial*, 760 F.2d 1034, 1037 (9th Cir.1985)).

In this appeal, Appellants do not make any showing of how they were prejudiced by the use of summary proceedings. Instead, they rely on ambiguous references to calling witnesses and conducting discovery. This simply does not meet their burden of showing an abuse of discretion especially when, as here, Appellants failed to present any material facts to the district court.

D. Appellants' Assertion that the District Court Did Not Have Personal Jurisdiction Over Them is Waived.

Appellants argue—for the first time—that because they were not each served a summons, the district court lacked personal jurisdiction over them and thus the Affiliates Order "is of no force or effect." This argument was not presented to the district court and is therefore waived on appeal.

For preservation purposes, "an issue must be presented to, considered and decided by the trial court before it can be raised on appeal." *Tele-Commc'ns, Inc. v. Comm'r*, 104 F.3d 1229, 1233 (10th Cir. 1997) (internal quotations omitted). "The touchstone on this issue is that vague, arguable references to a point in the district court proceedings do not preserve the issue on appeal." *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993) (internal quotations and alterations

omitted). This Court has consistently turned down the argument that raising a related theory is sufficient to preserve an argument. *Id*.

Here, although Appellants filed an opposition to the Receiver's Motion and filed three separate objections to the Affiliates Order, they did not raise the issue of service of a summons under Rule 4 of the Federal Rules of Civil Procedure to the district court. Accordingly, the issue was not properly preserved and is waived.

To be sure, Appellants did assert that they were not "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." (S.A.207 (Doc. 596).) Simply raising that there was no complaint filed against them, however, is not the same as asserting that the district court did not have personal jurisdiction over Appellants because they were not served a summons under Rule 4. Indeed, Rule 4 was never even cited in any of Appellants' four submissions to the district court. At best, Appellants' argument that no complaint was filed against them is a "vague, arguable reference" to the summons issue, which is not sufficient to preserve an argument on appeal. *See Lyons*, 994 F.2d at 721.

Next, even assuming (somehow) that Appellants' argument under Rule 4 of the Federal Rules of Civil Procedure was preserved, Appellants failed to challenge the district court's personal jurisdiction over them and actively participated in the

case. Accordingly, Appellants consented to personal jurisdiction of the district court and cannot now challenge such jurisdiction.

"Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). It is axiomatic that "an individual may submit to the jurisdiction of the court by appearance, and voluntary use of certain court procedures may constitute constructive consent to the personal jurisdiction of the court." *Hopper v. Wyant*, 502 F. App'x 790, 792 (10th Cir. 2012) (unpublished) (quoting *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Specifically, continued participation in litigation, without challenging the personal jurisdiction of the court, is inconsistent with a lack personal jurisdiction. *Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co.*, 203 F.3d 835 (10th Cir. 2000). In our case, Appellants did not challenge the district court's exercise of personal jurisdiction over them and, indeed, participated in the case by voluntarily entering an appearance and making multiple filings with the court.[12] Therefore, any challenge to personal jurisdiction has been waived.

[12] *See Motion to Lift Asset Freeze as to Solco and XSun*, Doc. 509; *Response to Receiver's Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate*, Doc. 596; *Opposition to Motion for Leave to Commence Legal Proceedings*, Doc. 643; Objections to Affiliates Order, Doc. 664, Doc. 665, Doc. 666.

CONCLUSION

For the foregoing reasons, the Affiliates Order of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Receiver does not believe oral argument would materially assist the Court in deciding the issues presented above.

CERTIFICATE OF COMPLIANCE

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DATED this 13th day of November 2019.

PARR BROWN GEE & LOVELESS

/s/ Michael S. Lehr
Jonathan O. Hafen
Jeffery A. Balls
Michael S. Lehr
Attorneys for the Receiver/Appellee

CERTIFICATE OF SERVICE

I, Michael S. Lehr, hereby certify that on the 13th day of November, 2019, the foregoing was filed with the Court using its authorized electronic case filling portal and a copy of the foregoing was served to the following counsel of record via separate email:

Clint A. Carpenter clint.a.carpenter@usdoj.gov
Joan I. Oppenheimer joan.i.oppenheimer@usdoj.gov
Attorneys for USA

Denver C. Snuffer denversnuffer@gmail.com
Steven R. Paul spaul@nsdplaw.com
Attorneys for Appellants

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Date: November 13, 2019

/s/ *Michael S. Lehr*