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' REPLY BRIEF

Respectfully submitted,

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I. Jurisdiction: Appellants Have Standing to Appeal Order 636 and the Appeal is Properly Before this Court Under U.S.C. 1292(a)(2)

A. The Corrected Receivership Order Grants Entity Receivership Defendants Right to File Appeals of Orders in Trial Court.

Appellee incorrectly asserts this Court lacks jurisdiction to hear this appeal because Appellants lack standing by virtue of the very order they challenge on appeal. (Appellee's Brief at pg. 20). This argument illustrates the receiver's denial of due process in the claims he is prosecuting against these Appellants. More importantly, however, this argument ignores the carveout of authority granted to all of the receivership entities to file appeals of orders of the trial court. The Corrected Receivership Order, entered on November 1, 2019, provided the following:

> "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."*

Corrected Receivership Order, Doc. 491 at ¶ 10.

In this case, Appellants – who are not defendants, but have all now wrongly become receivership entities – are invoking the authority granted in the Corrected Receivership Order to appeal an order in this case. By Appellee's own admission, Order 636 "extended the Receivership over the affiliated entities for the reasons and purposes laid out in the Corrected Receivership Order." Appellee's Brief at pg. 24.

Therefore, Appellants have standing to raise arguments on their behalf through their attorneys of record.

Accordingly, the facts from the case relied on by Appellee, *United States SEC v. Quest Energy Mgmt. Grp.* 768 F.3d 1106 (11th Cir. 2014), are inapposite to the facts of this case. In *Quest Energy*, the 11th Circuit held the appellants lacked standing to file an appeal on behalf of the corporate entity. The court cited the order expanding the receivership to include the corporate entity, stating, "When the district court expanded the receivership to include Quest, it forbade the Downeys from taking any action on behalf of Quest and instead vested the legal rights and interests of Quest in the receiver." *Id.* at 1109. In this case, however, Appellants were given authority to appeal and challenge the appointment of the receiver over them in paragraph 10 of the CRO. Consequently, Appellants have standing to challenge the CRO.

Under Utah law (applicable here) the appointment of a receiver to manage the LLC does not affect the right of the owners to file a direct action to protect their rights. The Courts in Utah allow direct actions, which Appellee ignores. *See Banyan Investment Co., LLC v. Evans*, 292 P.3d 698 (Utah Ct. App. 2012). The Court in *Banyan* extended the policy allowing direct actions between shareholders of closely held corporations by applying the closely-held corporation exception to LLCs. See, *Aurora Credit Services, Inc. v. Liberty West Development, Inc.*, 970 P.2d 1273 (Utah

1998). Therefore, the Receiver may have the right to manage these LLCs, but the owners have the right to sue to protect their interests and, by extension, the right to challenge the order sweeping them into a receivership.

B. Order 636 Appointed a Receiver over Appellants.

Appellees contend that Appellants have improperly invoked U.S.C. 1292(a)(2) because Order 636 does not appoint a receiver, but merely expands the receivership to include affiliate entities. Appellee Brief at pg. 24. This argument, however, attempts to put form over substance. Prior to May 3, 2019, the receiver had no authority over Appellants. The May 3, 2019, Order allowed the receiver to exercise control of the Appellant Entities.

Wisely, U.S.C. 1292(a)(2) recognizes the necessity "to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." *Gardner v. Westinghouse Broad. Co.*, 559 F.2d 209, 212 (3d Cir. 1977) (*quoting Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 99 L. Ed. 233, 75 S. Ct. 249 (1955)). To permit otherwise would undermine the very purpose the Congress intended, because a receiver, once appointed, has powers that if not checked could cause serious and irreparable consequence. This is particularly true where a receiver's purpose is not to act in the best interest of the company he now controls, and instead acts only to liquidate, unwind, and dismantle.

In this case, the receiver has no other purpose other than to liquidate, unwind, and dismantle the Appellants. He has already succeeded at cancelling the stock of a receivership entity that was a publicly traded company. (See "Order Cancelling International Automated System Inc.'s Shares", ECF 719) He has auctioned or sold six (6) real estate properties that were owned by IAS. (See "Receiver's Fourth Quarterly Status Report", ECF 794, pp. 3-6). However, he has done nothing for the benefit of the entities that have come under his control. The purpose of U.S.C. 1292(a)(2) is entirely meaningless if an entity cannot in these circumstances ask for appellate review before there is nothing left to protect.

II. Due Process.

Appellee's assert that due process was satisfied because appellants received adequate notice and had ample opportunity to be heard. (Appellee's Brief at pgs. 29-31.) Appellee states Appellants Solstice, Solco and XSun filed an opposition to the Receiver's motion, yet nowhere is the argument asserted that the other entities swept into the receivership (including Appellants Black Night Enterprises, Inc., NP Johnson Family LP, Starlite Holdings, Inc.,) had notice of or filed any objection to either the receiver's motion or the court's order expanding the receivership to include Appellant entities and the "affiliated entities." But the crux of Appellants' arguments (which was highlighted in both the Appellants' responses to the receiver's motion and objection to Order 636) was that the due process the trial court afforded

appellants was constitutionally deficient. This minimal objection prevented any waiver, but an objection is not the same as the opportunity to present a plenary defense.

This Court is asked to decide if the requirements of Due Process have been met for Appellants. In this case, Appellants have been summarily swept into a receivership in which all their assets have been taken as a result of an underlying case involving claims that other parties misrepresented tax benefits. The underlying case decided that the tax representations, not the sale of lenses themselves, justified the decision to find a "tax scheme." As to these Appellants, the following have been denied to them:

- No discovery has been allowed to Appellants. Because there was no discovery;
- No proof has been provided about ownership and control, and in fact the defendants in the underlying case do not own any interest in Appellants.
- No proof exists that any of these Appellants made any representation concerning tax benefits;
- No proof exists that any of Appellants' purchasers claimed any tax benefits.
- No proof exists that any of the Appellants participated in the multi-level marketing program;

- No proof exists that any of the Appellants maintained a website containing tax representations;
- Several Appellants did not sell any Fresnel lenses to any purchaser; and
- Two of the Appellants had legal opinions and lawyer-prepared transaction documents for their limited involvement, which is why the government chose not to name them in the underlying case. The government presumably feared an "advice of counsel" defense and so decided to omit them from the case.

And ultimately, at the end of trial, the trial court refused to enter any judgment against any of the Appellants, despite the government's request to do so. (See App. Appendix at 155).

In sum, if these safeguards against errors do not need to be respected, and property can be summarily swept into a receivership, then the Court ought to clearly establish how little is required to satisfy the requirements for Due Process.

CONCLUSION

For the reasons stated above, Appellants request that Order 636, dated May 3, 2019, be vacated and this matter be remanded to the district court for formal proceedings to afford and ensure Appellants and other "affiliated entities" the opportunity to defend against the government's claims, conduct discovery and present evidence at a trial to defend the claims against them.

Respectfully Submitted,

By: /s/ Denver C. Snuffer, Jr.
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Certificate of Compliance

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By: /s/ Denver C. Snuffer, Jr.

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CERTIFICATE OF SERVICE

I, Denver C. Snuffer, Jr. hereby certify that on the 6th day of December, 2019, I served a copy of the foregoing **APPELLANTS' REPLY BRIEF,** to the following in manner indicated:

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