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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,<br><br>Defendants. | Civil No. 2:15-cv-00828-DN-EJF<br><br>**DEFENDANTS' OBJECTION TO PLAINTIFF'S PROPOSED RECEIVERSHII ORDER**<br><br>Judge David Nuffer<br>Magistrate Judge Evelyn J. Furse |

## I. OBJECTION TO PLAINTIFF'S PROPOSED RECEIVERSHIP ORDER:

Defendants object to the overly broad, improper and overreaching proposed Receivership Order. The Order attempts to dispose of rights belonging to non-parties without any attempt to provide due process. Among other problems with the proposed Order:

### A. General Objections.

SOLCO I, LLC is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it

from ever succeeding on the merits. Among other defenses, the SOLCO I, LLC sale was a commercial sale to a commercial buyer who did not claim any tax benefit and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

XSun Energy, LLC is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, the XSun Energy, LLC sale was a commercial sale to a commercial buyer who did not claim any tax benefit and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

Cobblestone Centre, LC is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, Cobblestone Centre, LC has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of Cobblestone Centre, LC and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

DCL-16A, Inc. is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, DCL-16A, Inc. has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

DCL16BLT, Inc. is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, DCL16BLT, Inc. has not sold any

lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

LTB O&M, LLC is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, TB O&M, LLC has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

N.P. Johnson Family Limited Partnership is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, N.P. Johnson Family Limited Partnership has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity.

Shepard Energy Partnership is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Plaintiff knew of its existence during discovery in this case and was not joined as a party by the Plaintiff. Plaintiff should not be able to add Shepard Energy as a party to a receivership perfunctorily and without ever providing it notice and an opportunity to be heard in court.

Shepard Global, Inc. is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against

it from ever succeeding on the merits. Plaintiff knew of its existence during discovery in this case and was not joined as a party by the Plaintiff. Plaintiff should not be able to add Shepard Global as a party to a receivership perfunctorily and without ever providing it notice and an opportunity to be heard in court.

Solstice Enterprises is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, Solstice Enterprises has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity. It does not do business in Utah nor in the United States, and it is unlikely this court can exercise jurisdiction over it.

Black Night Enterprises is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, Black Night Enterprises has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the Treasury" involving this entity. It does not do business in Utah nor in the United States, and it is unlikely this court can exercise jurisdiction over it.

Starlight Enterprises is not a Defendant in this case, has not been served process, has not been afforded an opportunity to be heard, and has defenses that would prevent any claim against it from ever succeeding on the merits. Among other defenses, Starlight Enterprises has not sold any lenses to any party and therefore no claim of any tax benefit has been made by any taxpayer because of it and therefore there is no basis for any claim, disgorgement, or "harm to the

Treasury" involving this entity. It does not do business in Utah nor in the United States, and it is unlikely this court can exercise jurisdiction over it.

Each of these entities listed by the Plaintiff in paragraph 1 of the Proposed Order were known to Plaintiff prior to the trial of this matter. Plaintiff had every opportunity to include them as party defendants in this action.[1] They were deliberately not included, and therefore deliberately deprived of any opportunity to appear and be heard, and therefore no judgment can enter against them. To impose relief and include them now in any Order by this Court violates each of their due process rights. For the same reasons identified above, to enforce the asset freeze against any of them would violate their constitutional rights. This Court has received no evidence to determine how the affiliates are related to any of the Defendant parties, whether there is any interest owned by any Defendant in these nonparties, what limited interest any given Defendant might have in an affiliate, and what participation any of the affiliates may have had with the solar energy lens sales. For most of these entities there is simply no connection to lens sales, tax benefits claimed, or "harm to the Treasury." There is nothing to show what, if any, interest a named party may have with these entities. They were organized years before this litigation were filed, and have conducted business completely unrelated to lens sales. There is no justification for entering any order affecting these entities. If the Plaintiff wants relief against them, then the proper way for the Plaintiff to proceed is to file a Complaint against them and prove a case.

The Government seeks to expedite their agenda with blatant disregard to both due process and Rule 65(d) by grafting non-parties in the proposed order to freeze non-party assets. Under

[1] *See United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) ("Had the Court determined that the Government established a reasonable approximation of the amount subject to disgorgement, the Court questions whether it would have had jurisdiction to order disgorgement of revenue obtained by Mesadieu's companies—entities that are not before the Court.")

Rule 65(d) of the Federal Rules of Civil Procedure, a non-party cannot be bound by the terms of an injunction unless the non-party is found to be acting "in active concert or participation" with the party against whom relief is sought.[2] Glaringly absent from the Plaintiff's proposed findings of facts is even passing mention of most of these non-parties, much less a finding that they are each in "active concert or participation" with the party Defendants, nor is there any meaningful analysis to support that these non-party entities are alter egos of any of the Defendants. The majority of these non-parties have no mention at all in this case. Yet they now appear in a proposed Order freezing their assets! The Court must curb the Plaintiff's enthusiasm and not join in this folly and exuberance. They didn't fairly disclose during discovery nor adequately prove during trial their case against the named Defendants. Now they hope to parlay their extraordinary windfall into an even broader bundle of gifts from the Court. Defendants would ask the Court to stop short of being Santa Claus.

There is currently pending a Rule 62(c) motion (ECF Doc. 448) which has not been resolved and which challenges the propriety of appointing a receiver at present. There is no controlling decision that has defined the appropriate standard for issuing injunctive relief under Section 7402, particularly one that abandons the four-part test to merit an injunction applied in the 10th Circuit. The authority upon which the Court relied is both factually and procedurally inapposite to the facts of this case. *United States v. Latney's Funeral Home* involved appointment of a receiver as a remedy in a civil contempt, not a violation of 26 USC § 6700, and only after the defendant had failed repeatedly to comply with an injunction issued in that case.[3] *United States v. Bartle*,[4] also a civil contempt case, appointed a receiver only after the defendant had failed

[2] FRCP 65(d) (2018).
[3] *United States v. Latney's Funeral Home, Inc*., 41 F. Supp. 3d 24, 37 (D.D.C. 2014).
[4] *United States v. Bartle*, 159 F. App'x 723, 725 (7th Cir. 2005).

numerous times to comply with court orders and voluntarily make payment. *Florida v. United States* appointed a receiver only after the record showed that a substantial tax liability probably existed and that the Government's collection of the tax may be jeopardized if a receiver was not appointed.[5] Notably, they largely dealt with civil contempt, where a litigant's non-compliance with court orders was properly before the court. In sum, none of these cases outright relied solely on a statutory grant of authority, but instead considered factors included in or factors analogous to the four-part tests applied in the 10th Circuit.

It is worth noting that in Plaintiff's Proposed Findings the government admits that the Defendants have complied with post-trial court orders (i.e., tax information remained on the internet "until this court ordered them to remove it"). This post-trial compliance is in stark contrast to the conduct of defendants in the above-cited cases where a receiver was found to be necessary and appropriate.

**B. Objections to Specific Paragraphs.**

**Paragraph 1.** Defendants object to the terms of proposed paragraph 1 and an overly broad grant of power to the Receiver over property and assets of non-party individuals and entities. The paragraph is premature and should be removed in favor of Paragraph 3 or the proposed order, which properly authorizes the Receiver to "investigate" and "determine whether the assets, property . . . derive from the abusive solar energy scheme". Until a determination has been made that the entities and assets described in paragraph 1 derive from the conduct enjoined, the Receiver should not be taking possession over any such assets.

**Paragraph 12.h and 12.n.** Defendants object to the terms of proposed paragraph 12.h and 12.n. to the extent the powers infringe on the attorney-client privilege during the proceedings

[5] *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

before the Court and which paragraphs seem to allow the Receiver to waive the attorney client privilege, particularly where there remain ongoing litigation issues pending in this Court, a pending appeal in the 10th Circuit, and the certainty of additional appeals in this matter. It would be unethical for legal counsel to share information with a Receiver whose interests are openly hostile to the other parties represented by counsel, and where Plaintiff requests that the Receiver report to it with its findings.

**Paragraphs 15 and 16.** Defendants object to the terms of proposed paragraphs 15 and 16 to the extent the obligation to deliver records to the Receiver is fails to provide that ***copies*** should be provided to the Receiver or at a minimum that such parties are entitled to retain a copy of any such record for their files and past, present or future needs.

**Paragraph 17.** Defendants object to the terms of proposed paragraph 17 to the extent the Receiver can take possession of all personal property of Defendants. Under the Title 11 of the United States Code, certain exemptions should apply to personal property held by Defendants such as: homestead exemptions, personal property exemptions, motor vehicle exemptions, wages, pensions, benefits, tools, etc.

**Paragraph 19.** Defendants object to the terms of proposed paragraph 19. Plaintiff proposes to take possession of any and all real property in any conceivable way affiliated with any Receivership Defendants -- even if title to the property is in the name of another, such as a spouse or an affiliated entity, or a family limited partnership. Plaintiff has knowledge as to the ownership of each property it lists in paragraphs 19.a. through 19.ee. Property that is and has been owned by another for many years prior to the events involved in this case, and who have not been named as a Defendant in this action, should not be interfered with by the Receiver. The Receiver's ability to possess property of a non-party must be confined to what the Receivership Defendants' interest

is in that property. Until and unless it can be proven Defendants have an interest or the property was purchased by ill-gotten gains or is somehow part of the tax scheme, then the order granting possession of such property in the Receiver is overreaching and unenforceable. Even where it might be found that a Defendant has an interest in the identified property, the Receiver's interest must be limited to the interest that Defendant has/had. To allow more invades the interests of persons and entities who are not parties to this litigation. The Receiver should investigate and report to the court whether the mentioned properties should become part of the Receivership Estate before it can take possession of the same.

**Paragraph 24.** Defendants objection to the requirement to provide the information requested in paragraph 24 within 10 days. The enormous amount of information cannot reasonably be obtained and prepared within that amount of time. Defendants should be allowed a reasonable amount of time to prepare that information and hereby requests at least 60 days from entry of the order to comply with this provision.

**Paragraph 25.** Defendants object to the requirements of paragraph 25. The paragraph requires the production of information beginning in 2005. That information is long beyond the amount of time any record is required to be maintained, long before any sale of a lens, and long before any encouragement was made to investigate or use tax credits in association with the sale/purchase of those lenses. The government raided several locations associated with RaPower, Johnson and Shepard in 2012, wherein it removed much, if not all, of the files and electronic data stored from before that date. Plaintiff is already in possession of everything that existed prior to 2012. The government did not return working hard drives and much of the prior information, if it exists at all, is in the government's possession and lost to the Defendants. The time period should be limited to a reasonable time and reasonable scope as related to the issues in this matter.

Furthermore, it is unreasonable for Defendants to obtain and provide that information within 30 days and they request 60 days to comply. To gather the information required by 31.g and 31.h for the past 13 years is unreasonable and overly burdensome.

**Section VII.** Defendants object to Section VII. The proposed order requires Defendants to repatriate assets that may exist outside of the United States. No Defendant owns a majority interest in any foreign entity. Therefore, should this part of the order remain, it will involve a minority interest holder attempting to accomplish something involving foreign ownership in entities controlled by laws of other nations. This portion of the proposed order ignores potential challenges for compliance under applicable foreign laws, the conflict of a minority owner attempting to control ownership rights of those who have majority interests, and assumes that Defendants have any ability to change or void foreign agreements and obligations unilaterally. Any attempt by a Defendant to do so will force them to engage in foreign legal proceedings requiring both time and significant expense. This Court has no proof before it to conclude Defendants have any such interest or authority. The Defendants will lose the ability to comply if a receiver is appointed, and therefore cannot engage in the attempt without finding themselves in contempt. This part of the order should be eliminated or a good deal more fashioning of the language to fit the objective needs to be undertaken.

**Paragraph 40.** Defendants object to paragraph 40. It requires Defendants' attorneys, accountants and auditors to provide the Receiver the contents of their files relating to those representations and to waive the attorney-client or accountant-client privilege. This requirement ignores privileged communications protected under a joint defense or joint interest privilege

recognized in the 10th Circuit.[6] To provide this information would violate ethical obligations for legal counsel and could not be done without risking professional discipline.[7] Counsel owes independent duties to the clients they represent and will continue to represent in an appeal. The receiver's appointment is one of the issues being appealed. Therefore, the receiver's interests and Defendants' interests are adverse, and waiving the attorney-client privilege while these interests remain in conflict cannot be done ethically by counsel, even if ordered by the Court. This Court has already carved out the right for Defendants to continue to be represented in this case by counsel, and to be represented in appellate matters. Defendants' attorneys cannot reasonably be expected to provide an adequate defense or prosecution of an appeal, especially given the magnitude of the information in this case, if Defendants' files are taken and the attorney-client privilege waived. Nor should the receiver be able to invade attorney-client communications while an appeal adverse to the receiver is underway.

**Paragraph 44-46.** Defendants object to the terms of proposed paragraphs 44-46 to the extent the stay of litigation affects this action and related appeals. The parenthetical "(excluding this action)" in paragraph 44 should be expanded to include: "(excluding this action and related appeals)" and be inserted following the defined term "Ancillary Proceedings" in paragraphs 44, 45 and 46.

**Paragraph 60.** Defendants object to the requirement to waive the attorney-client privilege in paragraph 60 for the same reasons stated above objecting to waiver of the attorney client privilege. In addition to the objections specified above, Defendants object to paragraph 60 because

[6] *Stoller v. Funk*, No. CIV-11-1144-C, 2013 U.S. Dist. LEXIS 141249, at *9 (W.D. Okla. Oct. 1, 2013) (quoting *In re Grand Jury Proceedings*, 156 F.3d 1038, 1043 (10th Cir. 1998) ("In order to establish the joint defense relationship, Defendant must show that '(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort.'")

[7] R. 1.6 of Utah Rules of Professional Responsibility.

it does not even allow Defendants' attorneys to produce a privilege log as required under the Rule 26(a)(5); rather, it is a blanket judicial command that Defendants' attorneys refuse to assert the privilege.

**Paragraph 64.** Paragraph 64 misstates the facts leading to the bankruptcy dismissal. It was dismissed voluntarily after an agreement was reached with the government to permit the debtor to appeal the decision against them in this matter. This was disclosed to the Court prior to dismissal. Subsequently this Court ordered that there would be no interference with Defendants' right to appeal this case by any Receiver subsequently appointed. (ECF 444, p. 28, ¶8.) Only following this agreement and its disclosure was the bankruptcy dismissed. It is true, however, that dicta in the dismissal states it was "bad faith" but that gratuitous statement was made following the Defendant RaPower's agreement to have the bankruptcy voluntarily dismissed.

**Paragraphs 88-90.** Defendants object to the amounts required to be paid under this proposed order, as outlined in paragraph 88, 90. Plaintiff has not yet proven a reasonable approximation for the amounts Defendants obtained from the sales of lenses and the language "up to $14,207,517" confirms the uncertain and speculative nature of the Plaintiff's disgorgement calculation. This admission against interest bears on the impropriety of any amount being awarded to Plaintiff because of the clear failure to provide a calculation, supported by competent expert testimony, of an actual amount of Defendants' alleged gain. Plaintiff's case remains with only a "range" or possible numbers and no calculation. This issue remains pending before the Court and has more fully been discussed in pending motions and objections. (ECF 448, 451, and Objection to Proposed Findings of Fact and Conclusions of Law, attached as Exhibit 1—which was previously sent directly to the Court.)

Further, there have been no claims from customers that are pending or threatened. The government is apparently hoping to stir up claims, but many of them are time-barred or without merit because all lens sales were made with the buyer obligated to determine what, if any, tax benefits were/are available for their purchase of the lenses. The government ignores that customers have been aware of the IRS position, have not sought refunds, and even if they determine in the future to assert a claim there are contractual and legal bars to customer refunds.

**Missing:** The proposed order is also missing some important requirements. One of the proposed receivership parties, Defendant IAS, is a publicly trading company regulated by the Securities and Exchange Commission (SEC). Because it is a publicly trading company the receiver will be required to comply with SEC filings. There are numerous shareholders who have a right to have their property protected by continuing SEC compliance. Nothing in the proposed order mentions this obligation, and any order should include instructions that the receiver comply fully with any SEC obligations related to IAS.

The three proposed receivers will need to know they are assuming responsibility to comply with SEC filings and will owe duties to approximately 3,000 shareholders. The CV information provided does not allow Defendants to reach any conclusion about the ability of any of these proposed receivers to manage a public company. It is unclear what, if any, SEC experience Peggy Hunt may have, but she appears to be otherwise the best suited to serve as receiver for this case. It is also unknown whether any of these three were asked specifically about whether they believed themselves qualified and if they were willing to undertake responsibility for receivership for a publicly trading company. The Court may want to inquire further about this before making an appointment.

Again, Defendants have suggested a Special Master to monitor the Defendants rather than a receiver. If the Court would consider a Special Master, it appears that all three of these proposed individuals would be qualified to serve in that role.

Dated this 28th day of September, 2018.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **OBJECTION RE: PROPOSED RECEIVERSHIP ORDER** was sent to counsel for the United States in the manner described below.

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