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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, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **REPLY MEMORANDUM IN SUPPORT OF MOTION TO LIFT ASSET FREEZE ORDER AS TO SOLCO I AND XSUN ENERGY** Judge David Nuffer Magistrate Judge Evelyn J. Furse

I. Argument.

A. This Court has the Authority to Grant Defendants' Motion Pursuant to Either F.R.Civ P. 59(e) or as a Motion for Reconsideration.

The effect of Rule 59(e) of the Federal Rules of Civil Procedure is to permit a court to correct an order where, as here, it needs to be clarified or modified.[1] Here, several non-parties have possibly become subject to an overly broad Receivership Order. Defendants collectively move to

[1] United States v. Municipal Auth., 181 FRD 290 (M.D. Pa. 1996).

alter or amend the Receivership Order[2] entered in this case. Non-parties Solco I and XSun Energy's assets, particularly their financial accounts, have been frozen without due process and should be released. In addition, there is a legal retainer that is not, or should not be, frozen and counsel would ask the Court to agree those funds are appropriately used for the intended purpose to defend against government claims and to comply with this Court's Orders[3] and Receiver requests.

Plaintiff argues that because the government used some evidence during the trial to show income received by Solco I and XSun Energy, that this passing reference to non-parties automatically subjects them to disgorgement of their assets. The effect of that argument would be Solco I and XSun Energy are guilty merely by governmental fiat, without any showing the frozen funds have any relationship to Defendants' ill-gotten gains. This Court has correctly refused to order their assets to be disgorged.[4] There is no judgment entered against them, no injunction entered against them, nor any other order, except that their assets are frozen for the Receiver. Ostensibly, the purpose of the freeze is to preserve an asset that may or may not belong to one of the Defendants, to allow time for the Receiver to investigate the asset and determine if there is any connection to any of the ill-gotten gains ordered to be disgorged from Defendants.

Solco 1 and XSun Energy have rights. They are entitled to due process before their money is taken. Based on his recent report filed with the Court, the Receiver has already obtained $224,358.84 of money belonging to Solco 1 and XSun Energy and moved their property into the

[2] ECF 491, Corrected Receivership Order.
[3] The Corrected Receivership Order, [3] ECF 491, requires a number of steps to be taken which require the assistance of counsel. Additionally, the Receiver has made numerous requests that have likewise required the assistance of counsel. Ongoing compliance with both the Court and the Receiver demands on Defendants requires the assistance of counsel, which cannot be provided without payment. Counsel has not been paid for work performed since September.
[4] See TR 2508:16-17; see also ECF 467 (disgorgement amount against defendants did not include amounts from Solco1 and Xsun).

receivership estate account he controls. (See ECF 526, "IV RELATED CONSIDERATIONS", ¶1, P. 6.) What process were these parties afforded before this confiscation? The government is not infallible. Already ECF Doc 536, shows the overreach by Plaintiff included in the asset freeze order property belonging to a woman named Glenda R. Johnson who is married to Howard Johnson. She and her property are completely unconnected with these proceedings.

Plaintiff was aware of both these entities before filing this action. Plaintiff used exhibits during discovery related to these both nonparty entities. Plaintiff prepared summary exhibits based upon their review of bank records for both Solco I and XSun Energy. After all this Plaintiff deliberately chose against naming either Solco I or XSun Energy as a party to this case.

No evidence was ever produced to prove funds held in Solco or XSun Energy accounts came from Neldon Johnson, International Automated Systems, Inc., or RaPower-3, LLC. There is no evidence of any transfer of funds into Solco I or XSun Energy's accounts from those entities presented at trial. Indeed, the only evidence before the court is that the Solco and XSun Energy funds are not related to any of the named Defendants. The Plaintiff prepared separate exhibits (Solco I-Exhibit 739, XSun Energy-Exhibit 741) to account for these entities' independent funds.

There was no evidence that either Solco I or XSun Energy participated in the tax scheme pursuant to which this Court entered judgment. Neither of these entities maintained a website, nor did either participate in a multi-level marketing program. These two have no burden to prove that they should be allowed to keep their property. The government has the burden to show they have the right to take their property. There is no such proof.

The only possible connection this matter may have to any asset of Solco I or XSun Energy is to what extent bank funds held by Solco I since 2010 and held by XSun since 2011 are actually in a constructive trust as the property of one of the other Defendants. There is no such proof. The

government did not trace any funding from any Defendant into either entity. Because these are independent funds, the government prepared separate exhibits to account for Solco I ($3.4 million-Exhibit 739) and XSun Energy ($1.1 million-Exhibit 741).

This Court ordered Defendants to identify their ownership interests in these two entities, as well as all other entities identified by the order. Under penalty of perjury, they have certified that information and presented it to the Court and to the Receiver. (ECF 492, 493). Neldon Johnson, IAS, RaPower-3, and LTB1 have no interest in either of these entities. They are owned by other persons. Plaintiff failed to put forth any evidence related to the source of the Solco and XSun funds at trial. It was irrelevant to the issues and claims made at trial because these parties (Solco I and XSun Energy) were never named as Defendants. This ownership information was ordered to be produced by the Court and therefore should be considered by this Court.

To the extent the argument is made that the freeze is only for a limited time to allow the Receiver to make his investigation, that investigation was already performed before trial by the government, whose search warrant, subpoenas and copying of computer hard drives secured all of the back-up documentation for all the financial activities of the Defendants and the non-parties. It was that information that was used to prepare all the financial exhibits used by the government at trial. The government information in Plaintiff's possession has been provided to the Receiver. Plaintiff testified during the trial that it has the bank records obtained from the banks themselves, that it prepared spreadsheets from that data (which Plaintiff has refused to produce in this case and the Court would not order it be produced to Defendants). The government used that material to prepare the summary exhibits they presented at trial. That information is in the possession of the Plaintiff and was already provided to Receiver for his investigation. Therefore, there is no reason to continue the freeze to allow an investigation – if that is the only purpose for the freeze. This

argument against lifting the freeze is not justified by the circumstances. It is more calculated to interfere with the defense and with Defendants' appeal of this case, rather than to protect legitimate interests.

B. Due Process Argument.

The United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972), as relied upon by Plaintiff, provides a relevant discussion as to whether or not these parties received their 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."[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]

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." *Id*. 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. *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,

[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.)

> 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.[7]

Plaintiff argues that because Defendants have previously argued that Solco I and XSun Energy should not be subject to the asset freeze, that these non-parties have received their due process. The Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without either Solco I or XSun Energy 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. Both of these entities

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[7] *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).

were deliberately omitted from this case by the Plaintiff.[8] 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.

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.

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." *Id*. (citing Fuentes v. Shevin, 407 U.S. 67, 81-82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)). No such hearing has ever taken place in this case. The assets of these parties (and others similarly situated) were simply frozen by this Court's order and then confiscated by the Receiver without any proof justifying these draconian steps to occur. There was no due process provided these parties.

[8] *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.)

The government has not argued, nor can it, that there are exigent circumstances here. A proposed Order to Appoint a Receiver and Freeze Assets was filed months ago. It was denied by the Court, but if Solco I or XSun Energy were motivated to hide their assets in order to avoid them being taken, they would have done so long before now. They left the funds in place for months, and there is no proof they were going to hide these funds to prevent them from being taken.

The government already knows the source of the funds in the accounts that have been frozen. It examined "voluminous bank records" in order to prepare and present Trial Exhibits 739 and 741, containing a summary of the deposits into each of their account. The government knows they were not obtained as part of the Defendants tax scheme. Nor are they the assets of any of the named Defendants. Those assets should be immediately released (from the legal retainer) or returned (from the funds confiscated by the Receiver).

Plaintiff makes an argument in a footnote that perhaps the Defendants do not have standing to challenge the confiscation.[9] While neither Solco I nor XSun Energy have been named as even nominal parties to this action, they have provided support for the Defendants' appeal. Counsel for Defendants have not entered an appearance on behalf of Solco I or XSun Energy but Defendants are directly negatively affected by the overreaching asset freeze. Defendants rely upon the legal retainer paid by Solco I and XSun Energy and both Solco I and XSun Energy benefit from the appropriate resolution of the appeal. Solco I and XSun Energy have not been given a voice in this action. They have not been named as parties, nonetheless, their assets have been frozen, including a non-refundable legal retainer paid by them intended to fund the defense of this action and the prosecution of the pending appeal. The government argument that these non-parties do not have standing underscores Defendants' position that these entities have not been afforded due process.

[9] See ECF 523 pg. 4 n12.

"The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance. This inquiry involves "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise."[10] In this case, we do not focus on the constitutional minimum of standing, which flows from Article III's case-or-controversy requirement.[11] Instead, we shall assume the attorneys have satisfied Article III and address the alternative threshold question whether they have standing to raise the rights of others.[12]

We have adhered to the rule that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[13] . This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation.[14] It represents a "healthy concern that if the claim is brought by someone other than one at whom the constitutional protection is aimed,"), the courts might be "called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights."[15]

In the event that this Court finds that the parties are raising the arguments for others, the Defendants are entitled to do so. The Court has well defined the parameters of third-party standing:

> "We have not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another. But we have limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether

[10] *Warth* v. *Seldin*, 422 U.S. 490, 498, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).
[11] See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).
[12] See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585, 143 L. Ed. 2d 760, 119 S. Ct. 1563 (1999).
[13] *Warth* v. *Seldin*, *supra*, at 499, 45 L. Ed. 2d 343, 95 S. Ct. 2197
[14] Id.
[15] Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 955, n. 5, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984); *Warth* v. *Seldin*, *supra*, at 500, 45 L. Ed. 2d 343, 95 S. Ct. 2197.

> the party asserting the right has a "close" relationship with the person who possesses the right." "Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests."[16]

Here, both of these requirements have been met. Presumably, Plaintiff would admit there is a close relationship between some of these Defendants and Solco I and XSun Energy. Secondly, the very fact that despite the information Plaintiff obtained, the discovery that was accomplished relating to Solco I and XSun Energy, the evidence that was presented relating to them during trial, Plaintiff refused to name them as parties in this action. They are not parties to this action and are hindered from being able to protect their own interests. The argument regarding standing is inapplicable here.

C. The Non-refundable Retainer.

To be clear, it remains Defendants' and their legal counsel's opinion that the retainer fee paid by XSun Energy is not subject to the Receivership Order. In an abundance of caution, it has not been used since the Court entered that Order. At this point, work from September, October, November, and now December has gone unpaid. This Court has made clear that its Orders were not intended to "deprive any Defendant of the right to appeal orders in this case or otherwise defend this action through counsel (paid for from sources other than Receivership Property) of Defendant's own choice."[17] It has been made clear that the legal retainer in the Nelson, Snuffer, Dahle & Poulsen Trust account are not part of the Receivership Property. The retainer was paid by an entity in which none of the Defendants have any interest.[18] It was paid months prior to the

[16] *Kowalski v. Tesmer*, 543 U.S. 125, 128-30, 125 S. Ct. 564, 567 (2004) (citing *Powers* v. *Ohio,* 499 U.S. 400, 411, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991)).
[17] *ECF* 444.
[18] See List of Entities, provided already to Plaintiff's counsel and to Receiver and provided separately and directly to the Court.

entry of the Receivership Order.[19] The retainer amount is clearly not part of the Receivership Property, and cannot become part of the Receivership Property without a separate lawsuit brought against these two parties, and only then if the Plaintiff ultimately prevails. The retainer was intended to provide for a defense against such a claim. It would be altogether improper to deprive Solco I and XSun Energy from the right to use their own property to defend claims against them.

Although the retainer amounts are not part of the freeze order to counsel's understanding, counsel would like the Court to clarify and confirm that this is also the Court's intent and understanding.

CONCLUSION

For the reasons stated above, we request that the Corrected Receiver Order be amended or an order of this court is entered directing the release of the freeze on property belonging to non-parties Solco I and XSun Energy and to return the money wrongly taken by the Receiver. Defendants further ask the Court declare the non-refundable retainer in possession of Nelson, Snuffer, Dahle & Poulsen is not Receivership Property. Both of these parties should not have their assets frozen. In any event it is important for the freeze to exclude legal counsel's retainer, even if the Court decides to defer addressing the other funds belonging to these two until later. Counsel cannot continue representation without compensation.

Dated this 12th day of December, 2018.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
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[19] A copy of check paying retainer fee, will be provided separately and directly to the Court for inspection. Because it is a banking document with banking information, it will not be lodged with the Court to give public access to sensitive information. It was paid to the law firm in June 2018.

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO LIFT ASSET FREEZE ORDER AS TO SOLCO I AND XSUN ENERGY** was sent to counsel for the United States in the manner described below.

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