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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **XSUN ENERGY, LLC'S OBJECTION TO ORDER ON MEMORANDUM AND DECISION AND ORDER ON RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECIEVERSHIP (ECF 636)** Judge David Nuffer

COMES NOW XSun Energy, LLC ("XSun") hereby objects to this Court's Order On Receiver's Motion to Include Affiliates and Subsidiaries in Receivership because the Order validates Plaintiff's willful strategy to exclude XSun as a party defendant at trial to deprive it of the opportunity to present a plenary defense based on its unique circumstances.

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

a. XSun's Activities

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

In 2011, like RaPower-3, XSun Energy had its own Zions Bank accounts (Accounts ending in 3293 and 6920).[1] By July, 2012, those accounts had more than $650,000 in them. Limited amounts of those funds were used to pay employees. $2,125,910 was *not* reported as income for Neldon and Glenda Johnson on his taxes. Indeed, XSun's 2012 tax return reported income of $18,879.[2] The funds XSun received were from the sale of lenses that XSun, not RaPower3, sold.[3]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[9] Id.

[10] Id.

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

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

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

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

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

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

[13] See XXXXX, attached as Exhibit 1.

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

[15] Id.

[16] Id.

[17] ECF 467 at pg. 149.

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

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

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

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

[18] EFC 444 at pg. 7, ¶ 15.

[19] Id. at ¶ 83.

[20] See Proposed Order at ¶ 12.

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

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

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

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

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

[23] See *infra* at II and III.

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

DATED this 23nd day of May, 2019.

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CERTIFICATE OF SERVICE

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

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