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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 **SOLCO I, 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 Solco I, LLC ("Solco") 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 avoidance of including Solco 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 Solco I of a Trial on the Merits Prior to Seizure.

a. Solco's Activities

Solco is a Utah limited liability company. It was organized on December 13, 2010. Its status became delinquent in January of this year because its assets are frozen. Solco did business

selling lenses prior to 2016. All of its sales occurred prior to the trial of this case, and a great majority of them occurred prior to the filing of the Complaint in this case.

Solco's activities were known to Plaintiff well before the time of trial. Indeed, the Plaintiff relied upon opinion letters prepared for Solco by attorneys in its presentation of its case.[1] More than half a day was spent examining Kenneth Birrell, the attorney who drafted those opinion letters. The Court received that evidence and relied upon the testimony of that witness to make its Findings of Fact and Conclusions of Law. Moreover, Solco relied on the documents Mr. Birrell authored for Solco's benefit.[2] Importantly, the purchase agreement attached hereto was between Solco and a business entity incorporated as a C-corporation, to which was the very type of business entity Birrell counselled that the tax advice provided applied.[3] This transaction alone accounted for $1,000,000 in sales.[4]

Yet Plaintiff tactically chose to exclude Solco as a party. Judgment was not entered against Solco. Solco has never been served as a party and has never been allowed any opportunity to defend itself in this case. The Court has not established jurisdiction over Solco. Nonetheless, the Court has extended jurisdiction, without even the allegation, let alone proof, of a claim of alter ego or subsidiary-status to freeze the assets of this company. Now, the Court has validated Plaintiff's unconstitutional trial strategy by including Solco at this post-trial juncture as though it were a Defendant all along in this case. In doing so, the Receiver sheds his responsibility to collect on

[1] See Opinion Letter, attached as Exhibit 1.

[2] See Email from K. Birrell dated January 14, 2013 RE: Generlized [sic] Documents, attached as Exhibit 2.

[3] See Escrow Agreement, attached as Exhibit 3.

[4] *Id*.

the judgment entered against the named Defendants, and advocates for the Plaintiff against an entity it deliberately chose not to name as a party.

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

"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] The Court's order ignores Solco's the fundamental rights of due process, and ignores the government's decision when they elected to not include Solco as a defendant despite knowing of it and using as exhibits documents written for/by it, skip any claim or finding of alter ego or subsidiary or otherwise give it the opportunity to defend against that claim, and leap to the conclusion that these unnamed parties are equally liable for the judgment entered against those named. Such a leap violates due process.

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."[7] 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.[8]

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[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.)

[7] Id.

[8] 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, 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.[9]

[9] *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).

In past briefings, Plaintiff has argued that because Defendants have argued Solco should not be subject to the asset freeze, that it has fully received all required due process. The Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without Solco 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 Solco was known to the Plaintiff long before this matter was filed. The Plaintiff used exhibits throughout discovery and trial written for/by Solco, but deliberately chose not to join it as a defendant in this case.

To date, Plaintiff has yet to give an explanation why Solco was excluded, and the Court's order fails to address this procedural shortcoming.[10] Since no explanation was given, Solco is entitled to the benefit of an adverse inference that the Government intentionally and strategically omitted Solco to avoid facing the obvious defenses it would assert. Solco sought, obtained and relied on advice letters from legal counsel.[11] Likely because the other named Defendants were not the recipients of the legal advice, the Plaintiff intentionally chose to omit Solco as a party defendant in its case-in-chief.

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."[12] The Government urged the trial court to include the non-

[10] *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.)

[11] See XXXXX, attached as Exhibit 1.

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

parties alleging that "Mesadieu is the sole owner of the companies and uses his companies as a vehicle for fraud."[13] But the Government did not join the companies as a defendant."[14] Like *Mesadieu*, the Government failed to join non-entities Solco I and XSun, yet sought disgorgement against it 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.[15]

That respect for due process was short-lived, however, as now the Court is validating Plaintiff's unconstitutional trial strategy by depriving Solco due process by trial. For example, Solco was the client referred to in the "McConkie Memorandum," placing Solco in a stronger position to assert a reliance of counsel defense. This entity had written legal advice and followed it. Accordingly, Solco was situated differently than any of the party defendants.

Additionally, inclusion of Solco goes well beyond the asset freeze. Now that Solco is to be 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"[16] 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"[17] **without a showing that the property belonging to** Solco **are ill-gotten gains subject to disgorgement.** Indeed, the Receiver's proposed order states the following:

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[13] Id.

[14] Id.

[15] ECF 467 at pg. 149.

[16] EFC 444 at pg. 7, ¶ 15.

[17] Id. at ¶ 83.

> 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.[18]

Finally, Solco's attorneys will be immediately terminated, leaving Solco without legal counsel to contest the Receivership's authority to include it in the Receivership Estate, including, but not limited to asserting a claim of laches against the Government's effort through the receiver to now include it rather than affording it a trial on the merits of Solco's claimed defenses.[19] [20] [21]

In sum, without due process, a claim should not proceed against Solco. 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."[22] No such hearing has ever taken place in this case.

Solco'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 Solco's assets to be the same as the party

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[18] See Proposed Order at ¶ 12.

[19] *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).

[20] 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.

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

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

Defendants – essentially making it liable for another entity's actions. The Receiver's request goes too far.

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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