Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (15593) Joshua.d.egan@gmail.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960
Attorneys for Glenda Johnson

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 **SOLSTICE ENTERPRISES, INC., BLACK NIGHT ENTERPRISES, INC., STARLIGHT HOLDINGS, INC., N.P. JOHNSON FAMILY LIMITED PARTNERSHIP'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

COME NOW Solstice Enterprises, Inc., Inc., Black Night Enterprises, Inc., Starlight Holdings, Inc., and N.P. Johnson Family Limited Partnership ("Solstice, et. al.") and hereby object to this Court's Order On Receiver's Motion to Include Affiliates and Subsidiaries in Receivership because the Order deprives them of the opportunity to present a plenary defense based on their unique circumstances.

I. The Court's Order Violates Due Process.

Solstice, et. al. are foreign entities organized in another country, none of which were or are under the control or ownership of Neldon P. Johnson. The only exception is the N.P. Johnson Family Limited Partnership, in which the minor beneficial interest Neldon Johnson once had was transferred many years ago in connection with a bankruptcy filing, and his beneficial interest was lost. None of these entities have funds that originated with RaPower-3 or any of the other Defendants. If the Receiver were able to show that something was transferred to them by RaPower-3, they should be given the opportunity to return whatever was transferred, rather than to be taken wholesale into a Receivership without any opportunity to defend. Neldon Johnson did and does not own or control these entities. Any failure or refusal by Neldon Johnson is not the failure or refusal of these other parties.

"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."[1] 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."[2] The Court's order ignores Solstice, et. al.'s fundamental rights of due process, skips any claim or finding of alter ego or opportunity to defend against that claim, and leaps 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

[1] 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.)

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

hearings "at a meaningful time."[3] 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.[4]

> 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

[3] Id.

[4] Id.

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.[5]

In past briefings, Plaintiff has argued that because Defendants have argued Solstice, et. al. 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 Solstice, et. al. 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 before a fact finder.

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."[6] 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."[7] But the Government did not join the companies as a defendant."[8] Like *Mesadieu*, the Government failed to join non-entities Solstice, et. al. yet sought disgorgement against them under the same reasoning in *Mesadieu* (i.e., alleging that the named defendants used

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[5] *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).

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

[7] Id.

[8] Id.

the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.[9]

That respect for due process was short-lived, however, as now the Court is validating Plaintiff's unconstitutional strategy by depriving Solstice, et. al. due process by trial. The failure, if there was one, of Mr. Johnson to provide documents for non-parties over which he had no control should not result in any "negative inference" against companies who are owned and controlled by others.

Additionally, inclusion of Solstice, et. al. goes well beyond the asset freeze. If Solstice, et. al. are to be included as receivership entities, 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"[10] 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"[11] **without a showing that the property belonging to Solstice, et. al. 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.[12]

Finally, Solstice, et. al.'s attorneys will be immediately terminated, leaving them without legal counsel to contest the Receivership's authority to include them in the Receivership Estate,

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[9] ECF 467 at pg. 149.

[10] EFC 444 at pg. 7, ¶ 15.

[11] Id. at ¶ 83.

[12] See Proposed Order at ¶ 12.

including, but not limited to asserting a claim of laches against the Government's effort through the receiver to now include them rather than affording them a trial on the merits of their defenses.[13] [14] [15]

In sum, 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."[16] No such hearing has ever taken place in this case.

Solstice, et. al.'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 Solstice, et. al.'s assets to be the same as the party Defendants – essentially making them liable for another entity's actions. The Receiver's request goes too far and the Court's Order should be modified to exclude these parties.

[13] *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).

[14] 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.

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

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

DATED this 23rd day of May, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **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)**was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
__X__ Electronic Service via Utah Court's e-filing program

Wayne Klein, Receiver
P.O. Box 1836
Salt Lake City, Utah 84110

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: wklein@kleinutah.com
__X__ Electronic Service via Utah Court's e-filing program

Jonathan O. Hafen
Joseph M.R. Covey
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Attorneys for Receiver

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: jhafen@parrbrown.com
jcovey@parrbrown.com
__X__ Electronic Service via Utah Court's e-filing program

/s/ Steven R. Paul
Attorneys for Defendants