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

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 **OPPOSITION TO RECEIVER'S MOTION FOR AN ORDER CANCELING SHARES OF INTERNATIONAL AUTOMATED SYSTEMS, INC. (ECF 682)** **EVIDENTIARY HEARING REQUESTED** Judge David Nuffer

COMES NOW International Automated Systems, Inc. ("IAS") and hereby requests an evidentiary hearing and objects to the Receiver's Motion for an Order Canceling Shares of International Automated Systems, Inc. as follows:

IAS is represented by the undersigned counsel in a currently pending appeal before the 10th Circuit Court of Appeals, and this motion affects that representation. In recent statements made by the Receiver, the Receiver is not representing the interests of IAS or its shareholders, and therefore the Receiver agreed Neldon Johnson could arrange to do so. Because we are appeal

counsel for IAS, and canceling the shares of our client will adversely affect the party we represent in the pending appeal, we appear to respond to Mr. Johnson's request and for the purpose of filing this opposition.

IAS is not a reporting company. It was never under the obligation to file, much less under any obligation to keep its filings current. Although it had no obligation to file, IAS did so, and had audited financial information available for its stockholders prepared by independent Certified Public Accountants. These steps were taken in anticipation of one day becoming a reporting company.

The Receiver's criticism that no quarterly or annual reports have been filed since June 2016 are, therefore, meaningless. These filings were voluntary to begin with. And when the Receiver assumed control, the Receiver cancelled the preparation of annual reports for 2017 and 2018. Essentially the Receiver prevented these voluntary reports from being completed, and therefore if criticism is warranted it ought to be directed at the Receiver for terminating the work to file these reports.

I. IAS Has Operations Unrelated to the Solar Operation

The Receiver claims that IAS engaged is no legitimate business operations and IAS has no future prospects for business operations as rationales to summarily cancel IAS shares.[1] These rationales are demonstrably false. For example, IAS has licensed the use of the Johnson Turbine, and Johnson heat exchangers / condensers for use in a 100 KW Water and Energy and Recovery System to Wisdom Farms Technology Development, LLC.[2] The use of this technology is unrelated

[1] ECF 682 at pg. 6-7.

[2] Commercialization Status Report "100 kW Water and Energy Recovery or WER System pgs. 1-2, Attached as Exhibit A.

to the solar systems at issue in this case, and at a minimum present future prospect for business operations. The licensing agreement includes a royalty to be paid by Wisdom Farms to Johnson and IAS.[3]

IAS further requests an evidentiary hearing to determine the demonstrate the falsity of the Receiver's claims is prepared to call as witnesses Paul Freeman, Johnny Kraczek, Neldon Johnson, and others, to provide such evidence. These witnesses will testify to the legitimacy of IAS business operations that are entirely unrelated to the solar system at issue in this case. These witnesses will testify to IAS's future prospects for business operations. IAS also intends to call the Wayne Klein for the purpose of cross-examination, to demonstrate the shortcomings in his investigation and the falsity of his conclusory statements that IAS has no legitimate business or prospects for future business.

II. The Receiver's Request is an Unlawful Taking.

IAS has shareholders whose ownership of stock represents property having value. To condemn that property as the Receiver requests, represents a taking without compensation. The Receiver admits the shareholders were provided the Judgement and Findings of Fact and Conclusions of Law when they were made public. Also, the Receiver posted an 8-K report disclosing the asset freeze. Still the stock remains trading among the shareholders. Even with the full knowledge of this Court's proceedings, stockholders continue to value, purchase and sell their shares.

There is a pending appeal before the 10th Circuit Court which will determine the finality of this Court's decision on this matter. If the decision is reversed, then the stockholders will be vindicated in their continued patience with their stock ownership. Yet the Receiver is asking this

[3] Id. at pg. 6.

Court to not allow the market to decide value, to ignore the SEC's refusal, and to disregard the FINRA decision to decline to act, and to judicially destroy the owner's property without compensation. Like the other regulatory bodies, this Court should also decline.

When the act of this Court destroys all property value, it is a taking.[4] Here, the Receiver is opposed to the stock retaining any value because of his fear of abuse. However, there can be no abuse when the owners are fully apprised of the state of this dispute, and they choose to continue to value their property.

This is not taking "one 'strand' of a bundle of rights."[5] The Receiver is asking the Court to cancel all the issued and outstanding shares of IAS. It is a complete destruction of this property.

Several of the stock owners are foreign entities. For them, if this Court were to destroy the stock value it would constitute an improper expropriation of property for which they would have rights against the United States under the ICSID and other treaties and conventions. Therefore, if this Court were to grant the relief requested by the Receiver, it would likely spawn additional litigation both within and outside the United States by the affected shareholders.

"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."[6] 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."[7]

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[4] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). See also *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of all beneficial use of his property requires compensation).

[5] *Doland v. City of Tigard*, 512 U.S. 374, 410 (1994), citing *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978).

[6] 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.)

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

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."[8] 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.[9]

> 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

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[8] Id.

[9]

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.[10]

In past briefings, Plaintiff has argued that because Defendants have argued other similarly situated Receivership entities should not be subject to the asset freeze, that it has fully received all required due process.

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."[11] 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."[12] But the Government did not join the companies as a defendant."[13] 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 the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.[14]

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[10] *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).

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

[12] Id.

[13] Id.

[14] ECF 467 at pg. 149.

Without due process a claim should not proceed against any non-party, including shareholders of IAS. 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."[15] No such hearing has ever taken place in this case as to the shareholders of IAS.

III. The SEC got it Right

Without notice to the Court or the Defendants, the Receiver requested the SEC cancel the IAS shares. The SEC declined. Then again, without notice to the Court or the Defendants, the Receiver requested FINRA cancel the shares. FINRA declined. Both of these efforts were unopposed (because no one was alerted that the Receiver was making these attempts) and both failed. They failed for good reason. This Court should also deny the motion.

DATED this 6th day of June, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Daniel B. Garriott
Steven R. Paul
Attorneys for Defendant International Automated Systems

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

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