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

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p>UNITED STATES' RESPONSE TO MOTION TO EXTEND DEADLINE FOR PRODUCTION OF DECLARATION OF NELDON JOHNSON</p> <p>District Judge David Nuffer</p>
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On June 28, 2019, through his appointed attorney, Edwin S. Wall, Neldon Johnson moved to extend the deadline established by this Court for his long overdue compliance with the Corrected Receivership Order.¹ The United States responds to that motion as follows:

I. Facts and Procedural Posture

After the United States filed a Motion for Order to Show Cause Why Neldon Johnson, R. Gregory Shepard, Glenda Johnson, LaGrand Johnson, and Randale Johnson Should Not Be Held in Civil Contempt of Court (the “Motion”)² in January 2019, and hearings on April 26, May 3, and May 28, 2019, this Court entered an order holding Neldon Johnson and others in civil contempt for violating the Corrected Receivership Order in this matter (the “Contempt Order”).³ The Contempt Order also set forth specific deadlines by which Neldon Johnson was given additional opportunities to take certain action to come into compliance with the Corrected Receivership Order.⁴ Among them are:

- Between June 21 and July 8, 2019, Neldon Johnson was to make a rolling production of “all documents required by paragraph 24 of the Corrected Receivership Order and by paragraph 9, page 8, of the Affiliates Order,”⁵
- If he no longer possessed such documents, then by June 21, 2019, Neldon Johnson was ordered to deliver a draft declaration compliant with paragraph 24 of the Corrected Receivership Order to the Court, the Receiver, the United States (and file such draft on the docket),⁶

¹ ECF No. 706.

² ECF No. 559.

³ ECF No. 701; ECF No. 491.

⁴ ECF No. 701 at 25-27.

⁵ ECF No. 701 at 25.

⁶ ECF No. 701 at 25-26.

- Also by June 21, 2019, Neldon Johnson was ordered to deliver a draft declaration compliant with paragraph 26 of the Corrected Receivership Order to the Court, the Receiver, the United States (and file such draft on the docket),⁷ and
- By June 28, 2019, Johnson was ordered to deliver to the Receiver “the undelivered aircraft logbook(s); all issued shares of IAS that are Receivership Property or that are in his possession or control; and any unissued shares of IAS.”⁸

After the June 21 deadline for Neldon Johnson to submit his draft declarations, the United States and the Receiver were to respond with a redline draft, circulated to the Court and all counsel and filed on the docket, by June 28.⁹ Finally, Neldon Johnson is required to submit the final versions of his declarations on July 8, 2019.¹⁰

The Contempt Order has its origins in the bench order issued at the end of the May 28 hearing on this matter.¹¹ The May 28 bench order set forth the June 21 / June 28 / July 8 deadlines for Neldon Johnson’s declarations.¹² Pursuant to the same bench order, on June 10, 2019, the United States circulated a draft opinion and order on contempt to the Court and counsel for Neldon Johnson. The June 10 draft set forth all the same deadlines above.¹³ Although the Court allowed all counsel to respond or object to the June 10 draft by June 17,¹⁴ counsel for

⁷ ECF No. 701 at 25.

⁸ ECF No. 701 at 25.

⁹ ECF No. 701 at 26.

¹⁰ ECF No. 701 at 26.

¹¹ See ECF No. 692, May 28, 2019 Tr., part 2, 63:13-67:23.

¹² May 28 Tr., part 2, 67:3-13

¹³ ECF No. 691-1 at 30-32.

¹⁴ May 28 Tr., part 2, 63:13-64:2.

Neldon Johnson did not do so.¹⁵ The United States filed the final draft on June 24.¹⁶ On June 25, the Court entered the Contempt Order. It is nearly identical to the June 10 draft in all substantive respects, including the deadlines set forth above.¹⁷

But Neldon Johnson did not submit draft declarations on June 21, 2019.¹⁸ Neldon Johnson did not deliver the specified materials to the Receiver on June 28. And he has produced no documents after June 21 as part of any rolling production.

Counsel for Neldon Johnson emailed counsel for United States on June 19 informing of a possible delay in compliance, but he did not ask for consent for an extension of time to comply and he did not seek an extension of time from the Court for any deadline.¹⁹ Then on June 28, counsel for Neldon Johnson sought consent for an extension of time to file the declarations and filed a motion.²⁰

The motion proposes that Neldon Johnson circulate and file his draft declarations on July 19, 2019, and file the final versions three days later, on July 22, 2019. The motion asserts a number of reasons for the delay that are purportedly “outside of the control of Neldon Johnson,” including purported delays in getting documents and information from various sources.²¹ Neldon

¹⁵ See Docket.

¹⁶ [ECF No. 697](#).

¹⁷ [ECF No. 701 at 25-26](#); see [ECF No. 691-1 at 30-32](#).

¹⁸ See Docket.

¹⁹ Pl. Ex. 958 at 1-2, emails from Edwin Wall to Erin Healy Gallagher, et al., dated June 19, 2019.

²⁰ Pl. Ex. 958 at 1. In his motion, Neldon Johnson appears to ask to extend the deadline only for the declaration pursuant to paragraph 24, the one regarding (briefly summarized) books and records that he once had or saw, but now no longer possesses, and therefore cannot turn over to the Receiver. See [ECF No. 706](#). But we construe it as also asking to extend all deadlines for Neldon Johnson, as set out *supra*.

²¹ [ECF No. 706 at 2](#).

Johnson himself is reportedly “assisting” in gathering the undelivered airplane log book, the names of accountants, stock certificates, meeting minutes, and documents involving Robert Johnson (the recipient, immediately before trial ended, of more than \$2 million from IAS), and 10-Ks and 10-Qs.²² Last, the attorney who has done the primary work to organize and assemble Neldon Johnson’s response had a previously scheduled absence from the office planned during the holiday week of July 4.²³

II. Argument

“When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or (B) on motion made after the time has expired if the party failed to act because of excusable neglect.”²⁴ Here, Neldon Johnson has made a motion to extend time both *after* a deadline has passed (the June 21 deadline to submit draft declarations) and *before* a deadline has passed (the June 28 deadline to produce certain documents and the July 8 deadline to produce all documents and submit final declarations). A finding of excusable neglect depends on four factors: 1) whether the movant acted in good or bad faith; 2) the reason for the delay, including whether it was within the reasonable control of the movant; 3) the length of the delay and its potential impact on judicial proceedings; and 4) the

²² ECF No. 706 at 3.

²³ ECF No. 706 at 3.

²⁴ Fed. R. Civ. P. 6(b).

danger of prejudice to the non-moving party.²⁵ For the not-yet expired deadlines, courts generally grant motions to extend time in the absence of bad faith by the requesting party or prejudice to the non-moving party.²⁶ Rule 6(b), whether at issue before or after a deadline expires, “should be liberally construed to advance the goal of trying each case on the merits.”²⁷

As for Neldon Johnson’s good or bad faith and the reasons for the delay: in lieu of coercive incarceration for his continued and open defiance of the Corrected Receivership Order,²⁸ this Court set very specific deadlines for Neldon Johnson, including the drafting and response deadlines set forth above. The Court’s very specific purpose for that choice was to compel Neldon Johnson’s compliance with the Corrected Receivership Order so that the Receiver can move forward with his obligations.²⁹ The Court ordered the procedures set forth above based on deadlines either proposed or agreed to by counsel for Neldon Johnson and on the acknowledgement that Neldon Johnson was to cooperate fully, and that there was not to be any delay in the compliance counsel assured the Court he would obtain.³⁰

We have no reason to dispute that Neldon Johnson’s counsel have been working diligently and in good faith. But there is no basis to assess Neldon Johnson’s good faith articulated in the motion. The United States appreciates the challenges that counsel for Neldon

²⁵ *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1253 (10th Cir. 2017) (quotation omitted). The reason for the delay is the most important factor. *Id.*

²⁶ *United States v. Madsen*, No. 2:16-CV-00946-DN, 2017 WL 90351, at *2 (D. Utah Jan. 9, 2017) (Nuffer, J.).

²⁷ *Madsen*, 2017 WL 90351, at *2 (quoting *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016)); *see also Strong v. Cochran*, No. 2:14-CV-00788-TC-EJF, 2018 WL 4080898, at *1 (D. Utah Aug. 27, 2018) (Campbell, J.).

²⁸ May 28 Tr., part 2, 15:6-21.

²⁹ May 28 Tr., part 2, 16:16-18:8.

³⁰ May 28 Tr., part 2, 28:10-29:17; *see also id.* at 67:3-13, 70:13-18, 72:21-73:11.

Johnson face, as we have faced them throughout this litigation. Many of those challenges, having to do with sloppy or nonexistent recordkeeping, are of Neldon Johnson's own creation. Those challenges are the natural and logical result of Neldon Johnson's choices over time, as set forth in countless filings and hearings in this matter to date, made in the attempt to hide his control and ownership of various assets. Neldon Johnson chose not to timely deliver documents to the Receiver. Now, the motion states that Neldon Johnson is still "assisting" in gathering critical information that he has been on notice of for months, if not *years*.³¹ For example, SEC documents like 10-Ks and 10-Qs are available online at all times, and it is his task to collect them and turn them over. Further, the Corrected Receivership Order allowed Neldon Johnson to copy all materials before delivering them to the Receiver.³² If he did not make a copy before delivering the materials, any purported delay for lack of access to documents in the Receiver's possession, again, falls squarely back on Neldon Johnson.

With respect to the length of the delay, its impact on judicial proceedings, and the prejudice to the United States: the new deadlines proposed would initiate the Court-established compliance process *four weeks* after they were supposed to have begun – and more than six months after Neldon Johnson should have filed the declarations in the first instance. Further, the new proposed deadlines leave the United States and the Receiver only three calendar days, two of which are weekend days, to review both declarations and offer the kind of substantive response that this Court directed in its effort to obtain compliance. That is unreasonable.

³¹ See ECF No. 701 at 24 n.114.

³² ECF No. 491 ¶¶ 15-16.

This newest delay only compounds the months and months of delay to date. Every additional week that goes by without the Receiver having the roadmap to the financial and business transactions conducted by IAS, RaPower-3, Neldon Johnson, and the Affiliated Entities, and the documents to show them, is another week less in the dwindling one-year time period that the Receiver has to file lawsuits to gather assets that rightfully belong in the receivership.³³ The experienced Receiver in this matter is working diligently to meet his obligations under the Corrected Receivership Order. This additional delay only makes his job more difficult and time-constrained. That heightened difficulty also increases the cost of the Receivership which, in turn, decreases the amount that will be available to pay the United States Treasury.

The tension on this motion, as it was on May 28, is that Neldon Johnson has not timely complied with orders of this Court. His continued delay prejudices the United States by prejudicing the Receivership remedy this Court imposed as a result of his proven past defiance of the laws of the United States. Yet his compliance is crucial to fully effect that very remedy. For this reason, this Court has already, repeatedly, warned Neldon Johnson of the consequences of continued failures to comply. On April 26:

Let me make clear what happens in a contempt proceeding because apparently none of you care enough to do the work. If I have to coerce you to comply with my orders, I will put you in jail to do that. I've held people in jail for months, so don't make me do that. I'm seeing repeated noncompliance and apparent lack of attention to what the order clearly says and what orders clearly require. So I encourage you to take this seriously and elevate it on your list of

³³ See, e.g., *Klein v. Cornelius*, 786 F.3d 1310, 1321-22 (10th Cir. 2015) (regarding the one-year period after appointment in which a receiver may file an action to avoid a fraudulent transfer in which statute of limitations defenses are not available).

concerns.³⁴

On May 28, the Court told counsel, with Neldon Johnson present:

. . . I'm going to find your client in contempt. I'm not going to incarcerate him right now, but I'm clearly going to find him in contempt. There's no other way to describe it. It's stunning contempt

But I'm interested in having this receivership go forward, and I don't want to punish Mr. Johnson unnecessarily. But if you get the resources and you've got the time and it's still nonresponsive and insufficient, he is going to be incarcerated. I think you know that, and that's why you're laying out the plan that you have, because I have to have a solution and he's the guy. And if he's not going to guide me, then I'm going to make him guide me.³⁵

. . . .

I found the defendants and respondents in contempt. That's purposeful. I've not ordered incarceration of anyone because it's my great hope that this process will work.³⁶

Neldon Johnson has had the time and resources his counsel asked for and this Court gave him. He has had countless opportunities to comply with this Court's Corrected Receivership Order since it was entered. Based on this Court's prior rulings and statements from the bench, the governing legal authorities, and Neldon Johnson's demonstrated record of defiance, this Court would be well within its authority to order coercive incarceration for Neldon Johnson immediately.³⁷ And, if this Court grants the motion to extend time in the interests of achieving a resolution on the merits, it should be Neldon Johnson's last chance. Coercive incarceration is the only remaining option.

³⁴ April 26 Tr. 108:13-21.

³⁵ May 28 Tr. 28:15-29:10.

³⁶ May 28 Tr. 70:14-18.

³⁷ See *United States v. Ford*, 514 F.3d 1047, 1052-53 (10th Cir. 2008); ECF No. 701 at 25.

Dated: July 5, 2019

Respectfully submitted,

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**ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2019, the foregoing UNITED STATES' RESPONSE TO MOTION TO EXTEND DEADLINE FOR PRODUCTION OF DECLARATION OF NELDON JOHNSON, along with its supporting documents, was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

I also certify that, on the same date and consistent with his written consent, I served the same documents by email upon:

R. Gregory Shepard
greg@rapower3.com.

Defendant and respondent pro se

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney