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

R. WAYNE KLEIN, Plaintiff, vs. LAGRAND T. JOHNSON, an individual, and trustee of the Yotsuya Family Trust, Defendant.	**DEFENDANT'S MOTION TO STAY PROCEEDINGS** **Case No. 19-cv-00534** **ORAL ARGUMENT REQUESTED**

Defendant LaGrand T. Johnson moves this court for an order staying proceedings pending the outcome of the appeal filed and argued before the 10th Circuit Court of Appeals in the matter of United States of America v. RaPower-3, LLC, et al (Civil No. 15-828-DN). The appeal was argued on September 24, 2019, and good reason appears, based on the content of the oral arguments, that the Court of Appeals may reverse the Judgment entered by the district court. A reversal of the Judgment would necessarily suspend the receiver's collection efforts, including this case.

As such, a stay of proceedings in this case and other collection cases is justified until a decision is made as to the status of the Judgment by the 10th Circuit Court of Appeals.

ARGUMENT

The Federal Rules of Civil Procedure do not expressly provide for a stay of proceedings; however, "Rule 26(c) does permit the court to make any order which justice requires to protect a party… from annoyance, embarrassment, oppression, or undue burden or expense."[1] A court evaluating a motion to stay must weigh the following interests: (1) plaintiff's interests in proceeding expeditiously with the civil action and the potential prejudice to plaintiff of a delay; (2) the burden on the defendants; (3) the convenience to the court; (4) the interests of persons not parties to the civil litigation; and (5) the public interest.[2]

Furthermore, a district court has broad discretion to stay proceedings as incidental to its power to control its own docket.[3]

The substance of the issues on appeal[4] are that the trial court erred in finding a tax scheme; the $50,000,000.00 Judgment entered by this court is not supported by the evidence; Plaintiff's evidence of damages should not have been allowed; and the trial court erred in denying Defendants' the right to a jury given the punitive nature of the evidence and resulting Judgment.[5]

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[1] *String Cheese Incident, Ltd. Liab. Co. v. Stylus Shows, Inc.*, Civil Action No. 05-cv-01934-LTB-PAC, 2006 U.S. Dist. LEXIS 97388, at *4 (D. Colo. Mar. 30, 2006) (finding that subjecting a party to discovery when a motion to dismiss for lack of personal jurisdiction is pending may subject a litigant to undue burden or expense, particularly if the motion to dismiss is granted).

[2] *Id.* (citing *Federal Deposit Ins. Corp. v. Renda*, No. 85-2216-0, 1987 U.S. Dist. LEXIS 8305, 1987 WL 348635, at *2 (D.Kan. 1987) (unpublished disposition).

[3] *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); see also *CMAS, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (district courts possess "inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel, and for litigants.").

[4] United States of America v. RaPower-3, LLC, et al, Nos. 18-4119 and 18-4150

[5] See Table of Contents of Appellants' Reply Brief filed on May 10, 2019. Exhibit 1 hereto.

The appeal was argued by counsel and submitted to the Court of Appeals for decision on September 24, 2019.[6] An audio recording of the oral argument is available thought the Court's website: https://www.ca10.uscourts.gov/clerk/oral-argument-recordings?page=1 with date of September 25, 2019, Courtroom IV, and is available for download at https://www.ca10.uscourts.gov/oralarguments/18/18-4119.MP3

The Court of Appeals is clearly concerned about the evidentiary basis for the Judgment. Defendant believes the oral argument before the Court of Appeals demonstrates a strong likelihood that the Judgment in the underlying case will be reversed.

In addition to the appeal issue, Defendant in this matter has a strong likelihood of succeeding against the specific claims made by the receiver against him. The receiver's claims are for return of fraudulent conveyances received by Defendant. The exhibit attached to Plaintiff's Complaint sets out eight (8) pages of transactions over the course of 13 years that the receiver will attempt to demonstrate that each one was made with a nefarious purpose at a time when the transferor of each transaction was insolvent or intended to defraud its creditors. The receiver is expecting this court will make certain assumptions in the receiver's favor along the way to proving the transfers are voidable, but Defendant need only show that he gave "reasonably equivalent value" for each of those transactions. A review of the transactions suggests that most were payment of wages. Defendant worked full time for the companies that paid him. Whether that was IAS or RaPower or Cobblestone, Defendant will be able to demonstrate that he provided services to those entities, was on the payroll for those entities, and the money he received from those entities were payment for wages and services and constituted fair compensation for his labor.

[6] Exhibit 2 hereto.

Other payments received by Defendant were made out to "cash" or were reimbursement of money that Defendant expended on behalf of the businesses. The burden is on the receiver to demonstrate that the transaction was a "transfer" made to Defendant and what it was purportedly for. In each of the transactions that are for "cash" or for a reimbursement, Defendant will argue reasonably equivalent value was provided to his employer whenever he used his personal funds to pay a business expense and was subsequently reimbursed for using his personal funds. That cannot be a fraudulent conveyance.

Defendant now respectfully moves this court to stay this litigation until such time as the Court of Appeals has ruled on the pending appeal. The receiver's authority to pursue this collection case is dependent upon the case on appeal to the 10th Circuit Court. If the Judgment in the underlying case is reversed or modified on appeal, the actions by the receiver will have to be set aside and un-done to the extent possible. Under the elements set forth in *String Cheese*, above, good cause exists to stay these proceedings pending the outcome of the appeal.

1. Plaintiff's Interests in Proceeding Expeditiously with the Civil Action and the Potential Prejudice to Plaintiff of a Delay.

The risk of prejudice or other irreparable injury to the receiver is only the passage of time. Understandably, the receiver needed to file his claims before the expiration of statutes of limitation. However, now that he has preserved that right to pursue claims, there is no urgency to prosecute those claims. The receiver can demonstrate no prejudice if the present matter is stayed.

The receiver has a monumental task to demonstrate that the funds transferred to Defendant listed in the Exhibit to the Complaint are voidable and returnable to the receivership estate. Even if the 10th Circuit Court does not reverse the underlying case, there is a very strong likelihood Defendant will prevail on the claims of preferential or fraudulent transfers. As such, a stay is justified.

Defendant does not believe a stay will affect the receiver's claims in any material way. The only impact on the receiver is the passage of time. The receiver has possession of all the evidence on which he has relied to assert the claims of fraudulent conveyances, so there is no risk of dissipation of evidence. A stay would maintain the status quo of the parties, so there is no harm to the receiver, neither is he prejudiced in his ability to prove his losses or recover in the event of success. His claims depend on historical data and calculations, not on the preservation of current information.

Filing the collection lawsuits has preserved Plaintiff's claims. He can show no other prejudice beyond the passage of time the stay would cause.

2. The Burden on Defendant.

The burden on Defendant if the stay is not granted is the unnecessary and disproportionate expense of time and money to defend the receiver's claims, as well as the risk of entry of judgment and collection actions by the receiver that would be eliminated by a modification or reversal of the Judgment against RaPower on appeal. Given the magnitude of the receiver's claims against Defendant, the expense in time and money in discovery and to defend the receiver's claims will be significant. Furthermore, the receiver is claiming recovery of $2,388,527.84 as fraudulent conveyances. In the event this matter proceeds to judgment, Plaintiff has demonstrated a tenacity in pursuing collection that demonstrates he will clearly not slow the process for any reason. Yet, if the Court of Appeals reverses, the entire basis for the receiver's lawsuit evaporates. The balance of whether there is irreparable injury clearly weighs in favor of a stay.

3. The Convenience to the Court.

The receiver has filed more than 40 collection cases similar to this one. Most of the pleadings are identical, with only slight variations to the names and the amount the receiver is

trying to collect. It would be far easier for the court to manage each individual case and discovery once the Court of Appeals has issued a ruling. The judicial resources and time consumed in discovery motions, pretrial preparation and the potential of more than 40 jury trials can reasonably be avoided over the generally short period of time that Court of Appeals will likely take to decide the appeal.

4. The Interests of Persons not Parties to the Civil Litigation.

Plaintiff may argue the payments received by Defendant are the fruit of a fraudulent tax scheme and he should be unrestrained in his pursuit of the payments received by this Defendant and all of the targets of his collection efforts. If the Court agrees with that view, then the system has failed each of these defendants. Because each is entitled to fair consideration of their own circumstances and their own claims and defenses to the allegations against them.

This is not a bankruptcy preference that is based on a policy of equal treatment of creditors. This is a claim of fraudulent payments made with intent to "hinder delay or defraud" or as a transfer made without consideration or "reasonably equivalent value." The public interest in this case should be elevated to assure there is fair consideration given to each defendant of their rights to be paid while employed, to contract for a commission, and to be reimbursed for money spent for the benefit of another. But as relates to the present issue, the timing of those claims, the public interest should be aligned with the question of whether the underlying claims of fraud and the Judgment being collected survive appellate review. Despite the trial court's final decision, it could be wrong. The Court of Appeals may well view the matter differently than this Court. Until that consideration has run its course, the Defendant should not be required to expend the time and effort of defending a claim that soon may be reversed.

5. The Public Interest.

The public interest lies with correctly resolving the questions of law at issue in the appeal, not a rush to recover money from third-parties. Even in light of the public interest in prompt resolution of claims, the significance of a reversal by the Court of Appeals of the Judgment (which forms the basis of Plaintiff's collection claims) outweighs the justification of speedy resolution without waiting for the Court's decision.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully request that the Court stay this litigation pending final consideration of the appeal to the 10th Circuit Court of Appeals

DATED this 23rd day of October, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul
Denver C. Snuffer, Jr.
Daniel B. Garriott
Steven R. Paul

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the court's CM/ECF filing system and that system sent notice of filing to all counsel and parties of record.

/s/ Steven R. Paul
Attorneys for Defendant