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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.; LTB1,
LLC; R. GREGORY SHEPARD; NELDON
JOHNSON; and ROGER FREEBORN,

Defendants.

**RECEIVER'S REPLY IN SUPPORT
OF HIS MOTION TO TRANSFER
RELATED CASES PURSUANT TO
DUCivR 83-2(g)**

Civil No. 2:15-cv-00828-DN

District Judge David Nuffer

The Receiver¹ hereby replies in support of his Motion to Transfer Related Cases Pursuant to DUCivR 83-2(g).²

INTRODUCTION

In the Order Granting Motion to Commence Legal Proceedings the Court ordered “[i]t is necessary for the efficient administration of justice that any lawsuit filed by the Receiver in the

¹ Defined terms have the meaning given in the Motion.

² [Docket No. 736](#), filed on July 31, 2019.

U.S. District Court for the District of Utah under the Corrected Receivership Order be assigned to the same judge, to the extent possible.” “Accordingly . . . the Receiver shall promptly file a motion and proposed order in this case in accordance with DUCiv83-2(g).” In other words, the Court has already found the efficient administration of justice requires the same judge be assigned to each case referenced in the Motion, to the extent possible.

In accordance with the Court’s order, after filing four lawsuits under the Corrected Receivership Order (each a “Case”, collectively the “Cases”), the Receiver filed his Motion to Transfer Related Cases Pursuant to DUCivR 83-2(g) (“Motion”), which seeks the assignment of Judge Nuffer to each of the Cases or, in the alternative, that one judge be assigned to the Cases.

Randale and LaGrand Johnson (the “Johnsons”) oppose the Motion,³ asserting not only that Judge Nuffer should not be assigned to the Cases but also that “there is no justifiable reason under [DUCivR 83-2(g)] why the cases should be should be consolidated with a single judge” The reasoning in the Johnson’s opposition, however, falls flat. Not only does it directly challenge a previous order of the Court, it also fails to recognize the overwhelming commonalities that will govern the outcome each Case. Indeed, as shown below, the same legal issues are expected to be similar in all these Cases and to directly affect what factual issues even apply. The potential factual differences pointed to by the Johnsons are either of no consequence or, at most, will only apply to potential affirmative defenses. Therefore, because the Cases (1) call for a determination of the same questions of law and fact, (2) involve substantially the same parties of property; (3) would, if assigned to multiple judges, entail duplication of labor, unnecessary court costs, and delay; (4)

³ See [Docket No. 745](#), filed August 8, 2019. The opposition is also purportedly filed “on behalf of other future defendants in action filed by Receiver Wayne Klein” The opposition, however, do not attempt set forth how Nelson Snuffer Dahle & Poulsen has standing to object to the transfer motion on behalf of future defendants.

risk inconsistent verdicts or outcomes, and (5) risk impairing Judge Nuffer's ability to effectively oversee the Receivership, the Court should grant the Motion and assign the Cases to Judge Nuffer or, in the alternative, a single judge.⁴

ARGUMENT

I. The Cases Call for a Determination of the Same or Substantially Related Questions of Law and Fact.

Contrary to the claims set forth in the opposition, each Case involves substantially the same questions of law *and fact*. The Johnsons admit that the legal issues in each Case will be the same but assert that the factual questions in each Case will be different. The Johnsons are wrong. In each Case, the most important factual questions will be the same.

Under Utah's Voidable Transactions Act, the Receiver's proof is essentially the same in all of the Cases: prove that the transferor acted with "actual intent" to defraud,⁵ or that the transferor did not receive reasonably equivalent value and that the transferor was insolvent, such that the transfer is voidable.⁶

Many of the relevant factors—or "badges of fraud"—that will be used to determine whether the transfers were made with "actual intent" will be the same in each Case and for each transfer such as if "before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;" if "the debtor removed or concealed assets;" whether "the transfer or obligation was to an insider;" or if "the debtor was insolvent or became insolvent shortly after

⁴ The Court should also deny the Johnsons' request for an evidentiary hearing. The opposition does not indicate why an evidentiary hearing is necessary. It does not identify any witnesses, the testimony sought from any witnesses, or what information could only be established through the questioning of a witness. Further, it is not obvious why, under the DUCivR 83-2(g) factors, such a hearing would be necessary.

⁵ See [Utah Code § 25-6-202\(a\)](#).

⁶ *Id.* § 25-6-202(b).

the transfer was made or the obligation was incurred[.]”⁷

A determination as to any of these factual questions will apply to nearly all of the transfers in all of the Cases. For example, if the Receiver can show—as he expects to—that the Receivership Entities were insolvent at all relevant times when transfers were made, that finding would be common to each transfer and each Case during the relevant time period. Also, a finding as to whether the transfers were made after suit had been threatened or filed and whether assets were removed or concealed would be common to all relevant transfers in the Cases. As such, any findings as to “actual intent” or to the insolvency of any particular Receivership Entity will be common to each Case.

Moreover, a determination as to the Receivership Entities’ solvency will be common to all the Cases. And, because of the scope of the “massive fraud” by Receivership Entities, a finding as to whether reasonably equivalent value was received will also be common to each Case and each transfer. Specifically, the Receiver intends to argue that the fraudulent scheme operators necessarily intended to incur, or believed or reasonably should have believed that they would incur debts beyond their ability to pay as they became due, and that no reasonably equivalent value can be given when transfers are made in furtherance of the fraudulent scheme.⁸ A finding as to these issues will be common to each Case.

Additionally, other issues such as the Receiver’s standing to bring lawsuits under the Correct Receivership Order, any statute of limitations questions, and the accuracy of and weight to be given to the findings of forensic accountants will be common to each Case.

⁷ *Id.* § 25-6-202(2).

⁸ See e.g., [*In re Vaughan Co. Realtors*, 500 B.R. 778, 789-92 \(Bankr. D.N.M. 2013\)](#).

The potential factual differences the Johnsons allege, to the extent they are relevant at all, will generally only apply to affirmative defenses that the Johnsons or other defendants may choose to raise. These affirmative defenses, however, do not go to the Receiver's proof or the underlying findings of fraud by the Court.

Finally, and importantly, the Receiver has brought claims in equity against the Johnsons and other defendants. In the event there is no adequate remedy at law to recover each transfer to the Johnsons and the other defendants, the Receiver will seek to recover the fraudulently acquired funds through the court's equitable powers. The existence and scope of the "massive fraud" underlying all of the funds the Receiver seeks to recover will be the paramount factor under the Receiver's equitable claims and those facts are undoubtedly common to each Case.

II. The Cases involve Substantially the Same Parties or Property.

The majority of the parties and the property at issue in the Cases are the same. First, and most obviously, the Receiver is the common plaintiff in each Case. Additionally, the entities who were the transferors⁹—namely the Receivership Entities such as RaPower, IAS, and Shepard Global—are the same in each case. Further, the Johnson's are the sons of Receivership Defendant Neldon Johnson and were deeply connected to nearly all of the Receivership Entities. Each of the Receiver's claims involve the Johnsons' participation with the Receivership Entities and Neldon Johnson.

Next, all of the property the receiver seeks to recover are funds that were improperly transferred from Receivership Entities to Defendants. In other words, property that rightfully

⁹ The Receivership Entities are the creditors under the Voidable Transactions Act. See [Windham for Marquis Properties, LLC v. Lawson](#), No. 218CV00054JNPDBP, 2019 WL 220126, at *3 (D. Utah Jan. 16, 2019) (citing [Klein v. Cornelius](#), 786 F.3d 1310 (10th Cir. 2015)).

belongs to the Receivership Estate.

III. The Cases would Entail Substantial Duplication of Labor or Unnecessary Court Costs or Delay if heard by Different Judges.

This factor weighs strongly in favor of transfer to Judge Nuffer. Judge Nuffer has presided over the underlying case since 2015, including a multiple week trial. He has authored numerous memorandum decisions and orders and other substantial documents, including the 144-page Finding of Fact and Conclusions of Law which makes extensive findings regarding the conduct of Receivership Defendants and the underlying fraud,¹⁰ and a 28-page Memorandum Decision and Order Freezing Assets and Appointing a Receiver which granted the injunctive relief requested by the United States following trial.¹¹

Case assignments to other judges would entail significant duplication of labor and unnecessary court costs for all parties as each judge gets up to speed on the relevant legal and factual situation. At a minimum, if Judge Nuffer is not assigned to each Case, a single judge should be assigned to prevent any additional duplication of labor or unnecessary court costs.

IV. There is a Risk of Inconsistent Verdicts if the Cases are Assigned to Different Judges.

Because the key issues in each Case will apply across the spectrum of the Cases, there is a risk of inconsistent verdicts if the Cases are assigned to different judges. The same factual and legal questions that are common to each Case are also the areas where the risk of inconsistent verdicts is greatest. These areas include: the Receiver's standing, statute of limitations defenses, actual fraud, insolvency, and the accuracy of and weight to be given to the findings of forensic

¹⁰ See [Docket No. 467](#), filed October 4, 2018.

¹¹ See [Docket No. 444](#), filed August 22, 2018.

accountants.

V. Judge Nuffer is Not Biased, and Can—and Should—be Assigned the Cases.

The Johnsons’ allegation that Judge Nuffer has been anything other than fair to Receivership Defendants is improper and should not be considered by the Court. Moreover, Judge Nuffer’s detailed findings and orders in this action speak for themselves.

The Receiver does note, however, that a motion seeking to disqualify Judge Nuffer has already been denied in this case. There, the Court stated:

“Judges are required to hear evidence and assess. This may lead to conclusions a litigant does not like. But even though a judge ‘may, upon completion of the evidence, be exceedingly ill disposed towards the defendant,’ ‘the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes . . . necessary to completion of the judge’s task.’¹²

Although Judge Nuffer is now based in St George, Utah, he is not precluded from assignment of civil cases in the Central Division of the District of Utah. Indeed, the information page of the Courts website shows that he is still assigned cases “having SLC designation” and has staff and chambers in the federal court house at 351 South West Temple, Salt Lake City, Utah.¹³ Thus, Judge Nuffer can—and should—be assigned to the Cases.

Finally, the answers and counterclaims filed by the Johnsons on August 19, 2019 point to the value of Judge Nuffer being assigned the Cases as a means of protecting his ability to oversee the Receivership Estate, ensure the Receiver is able to perform his responsibilities, and enforce orders previously entered by the Court. For example, the Johnsons assert counterclaims against

¹² Docket No. 499, filed November 5, 2018 (citing *Liteky v. United States*, 510 U.S. 540, 550 (1994)).

¹³ See Judge David Nuffer, United States District of Utah, <https://www.utd.uscourts.gov/judge-david-nuffer> (last visited August 20, 2019).

the Receiver personally, despite the Receiver having acted only after obtaining orders from the Court. Such counterclaims may violate provisions of the Corrected Receivership Order. Judge Nuffer is best positioned to determine whether certain conduct violates previous orders and whether defendants in the Cases are improperly impairing the work of the Receiver.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and assign Judge Nuffer to the Cases, or in the alternative, assign a single judge to the Cases.

DATED this 21th day of August, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr _____

Jonathan O. Hafen

Michael Lehr

Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S REPLY IN SUPPORT OF HIS MOTION TO TRANSER RELATED CASES PURSUANT TO DUCivR 83-2(g)** was filed with the Court on this 21th day of August, 2019, and served via ECF on all parties who have requested notice in this case.

I also certify that, on the same date, by U.S. Mail, first-class, postage pre-paid, I caused to be served the same documents upon the following persons:

R. Gregory Shepard
858 Clover Meadow Dr.
Murray, Utah 84123

Pro se Defendant

/s/ Michael S. Lehr