

MICHAEL F. SKOLNICK - #4671
mfskolnick@kipbandchristian.com
JEREMY R. SPECKHALS - #16381
jspeckhals@kipbandchristian.com
KIPP AND CHRISTIAN, P.C.
10 Exchange Place, Fourth Floor
Salt Lake City, Utah 84111
(801) 521-3773
Attorneys for Intervenor Nelson, Snuffer, Dahle & Poulsen, P.C.

**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, and NELDON JOHNSON,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>MOTION TO INTERVENE</p> <p>Judge David Nuffer</p>
---	---

Nelson, Snuffer, Dahle & Poulsen, P.C. (“NSDP”), by and through counsel and pursuant to Federal Rule of Procedure 24, moves to intervene for the limited purpose of responding to the Receiver’s Ex Parte Affidavit of Non-Compliance against NSDP. (*See generally* Doc. No. 812).

INTRODUCTION

This case is about whether Neldon Johnson, R. Gregory Shepard, Roger Freeborn, and several entities associated with those individuals were involved in an illegal tax scheme.

Following trial in these proceedings, NSDP has represented two entities (among others): XSun

Energy, and SOLCO I. To provide funding for an appeal in the case, those entities deposited a retainer with NSDP (the “Retainer”). It comprises funds that are not property of the Receivership Defendants. Thus, NSDP is entitled to those funds free and clear from the Receiver’s claims. Despite NSDP’s entitlement to the Retainer, the Receiver has filed an Affidavit of Non-Compliance, asking the Court to enter a writ of possession against NSDP for the amount of the Retainer, executable by the United States Marshal or any federal or state law enforcement officer without further process. NSDP is not a party to this action, and therefore cannot properly respond to the Receiver’s ex parte request without the Court’s permission to intervene. For the reasons set forth below, the Court should permit intervention.

BACKGROUND

1. On June 25, 2018, XSun Energy and SOLCO I provided a retainer for deposit in NSDP’s client trust account in the amount of \$1,168,000.
2. This case was tried to the Court in April and June 2018, and the Court entered Findings of Fact and Conclusions of Law on October 4, 2018. (*See* Doc. No. 467). In that ruling, the Court found in favor of the United States against Neldon Johnson; International Automated Systems, Inc.; RaPower-3, LLC; LTB1, LLC; and R. Gregory Shepard. The Court did not, however, enter any orders against XSun Energy, and SOLCO I. Indeed, the Court specifically referred to both XSun Energy and SOLCO I as “non-defendants.” (*See id.* p. 20, ¶¶ 83, 84).
3. The Court’s October 4, 2018 Findings of Fact and Conclusions of Law is currently on appeal before the Tenth Circuit in Case Nos. 18-4150 and 18-4119.
4. Consistent with the Court’s October 4, 2018 Findings of Fact and Conclusions of Law, the Court froze the assets of the Receivership Defendants on November 1, 2018 in the

Court's Corrected Receivership Order. (*See* Doc. No. 491). The Corrected Receivership Order specifically states that:

This Court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of Defendants RaPower-3 LLC, Neldon Johnson, International Automated Systems, Inc. ("IAS"), LTB1 LLC, and R. Gregory Shepard (collectively, the "Receivership Defendants"), *together with assets proven to be proceeds of activities of Receivership Defendants in possession of any and all subsidiaries and affiliated entities including [both XSun Energy and SOLCO I.]*

(*See* Doc. No. 491, ¶ 2 (emphasis added)).

5. The Order further provided that "[p]ayment for any attorneys' fees, expenses, or other costs of such court filings or submissions shall be made from property that is not Receivership Property." (*Id.* ¶ 10).

6. The Corrected Receivership Order states, at paragraph 43:

In the event any person fails to deliver or transfer any Receivership Property or otherwise fails to comply with any provision of Section H of this Order, the Receiver may file ex parte an "Affidavit of Non-Compliance" regarding the failure, provided, however, *if such an affidavit is directed to a Receivership Defendant, such Receivership Defendant shall be entitled to ten days' notice thereof (unless shortened by an order of this Court) and an opportunity to be heard.* Except as set forth above, upon the filing of the affidavit, the Court may authorize, *without additional process or demand,* writs of possession or sequestration or other equitable writs requested by the Receiver. The writ shall authorize and direct the United States Marshal or any federal or state law enforcement officer to seize the Receivership Property, document, or other thing, and to deliver it to the Receiver.

(Doc. No. 491, ¶ 43 (emphasis added)).

7. At the time the Court entered the Corrected Receivership Order, neither XSun Energy nor SOLCO I were "Receivership Defendants," but their assets were nonetheless frozen.

8. Because neither XSun Energy nor SOLCO I were Receivership Defendants, they moved to lift the asset freeze. (*See* Doc. No. 509).

9. The Court denied the motion, concluding “RaPower and Solco have failed to show that the so-called ‘non-refundable’ retainer in the amount of \$735,202.22, which is currently in Nelson Snuffer Dahle & Paulsen’s trust account, is *not* property of the receivership estate, the full balance of that retainer will remain subject to the Asset Freeze at this time.” (Doc. No. 550, p. 2 (emphasis in original)).

10. The Court later entered an order including XSun Energy and SOLCO I as Receivership Defendants on May 3, 2019. (Doc. No. 636).

11. That order, (Doc. No. 636), is on appeal before the Tenth Circuit in Case No. 19-4089.

12. The Receiver filed a lawsuit against NSDP on October 31, 2019, (Case No. 2:19-cv-00851-DN), seeking the return of the same \$735,202.22 Retainer held in NSDP’s client trust account. (*See* Doc. No. 2 in Case No. 2:19-cv-00851-DN ¶¶ 31-37; 45-48).

13. Citing paragraph 43 of the Corrected Receivership Order (Doc. No. 491), the Receiver filed an ex parte affidavit over a month later with the Court on December 4, 2019, seeking a writ of possession against NSDP for the Retainer. (Doc. No. 812 ¶ 25).

14. The Receiver is pursuing the same Retainer, first through his separate suit of October 31, 2019 against NSDP in Case No. 2:19-cv-008510-DN, and subsequently through his Ex Parte Affidavit of Non-Compliance of December 4, 2019.

ARGUMENT

There are at least four separate proceedings which might have an effect on the Retainer XSun Energy and SOLCO I paid to NSDP. These four matters, in chronological order, are: (1) the appeal of the Court's Findings of Fact and Conclusion of Law, (Doc. No. 567), in Tenth Circuit Case Nos. 18-4150 and 18-4119; (2) the appeal of the Affiliate Entities Order, (Doc. No. 636), in Tenth Circuit Case No. 19-4089; (3) the Receiver's separate, direct proceeding against NSDP; and (4) the Receiver's Affidavit of Non-Compliance, pursuant to paragraph 43 of the Corrected Receivership Order, (Doc. Nos. 491; 812). NSDP has taken steps to protect its rights to the Retainer in three of those four proceedings. In the various appeals, NSDP has asserted on behalf of its clients that the Court's orders should be reversed. If successful, those appeals would likely provide a pathway for NSDP to access the Retainer free and clear from any claim by the Receiver. Likewise, NSDP has answered the Receiver's direct case, and plans to vigorously defend itself. However, NSDP is not a party to this proceeding, and under the status quo cannot assert any defense against the Receiver's Affidavit of Non-Compliance and accompanying request for a writ of possession. Accordingly, in order to protect its rights in this case, NSDP respectfully moves the Court to allow it to intervene.

“On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interests, unless existing parties adequately represent that interest.” Fed. R. Civ. P. 24(a)(2). “Under Rule 24(a), an applicant may intervene as a matter of right if (1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of

the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *Elliot Indus. Ltd. P'Ship v. BP Am. Production Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). "The Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a)." *Id.*

All four elements are present in this case. First, the Receiver filed his Affidavit of Non-Compliance on December 4, 2019. Thus, this motion is timely. Second, NSDP has a property interest in the Retainer, and therefore possesses an interest in "the subject of the action."

Third, NSDP's interest may be impaired or impeded if it is not permitted to intervene. On its face, paragraph 43 of the Corrected Receivership Order permits only a "Receivership Defendant" an opportunity to be heard. (*See* Doc. No. 491, ¶ 43). Paragraph 43 further permits the Court to "authorize, *without additional process or demand*, writ of possession or sequestration or other equitable writs requested by the receiver (emphasis added)." (*Id.*). The Affidavit of Non-Compliance implicates NSDP directly. Because NSDP is not a Receivership Defendant nor a party to the case, it cannot move the Court on its own behalf. Without being permitted to intervene, NSDP has no procedurally proper way to object to the Receiver's Affidavit of Non-Compliance.

Fourth, NSDP's interests are not adequately represented by existing parties because the existing parties cannot adequately advance NSDP's positions in opposition to the Affidavit of Non-Compliance. For example, XSun Energy and SOLCO I are not well-positioned to assert NSDP's defense that the Retainer is proper under the Uniform Voidable Transactions Act, (the "Act"). *See generally* Utah Code Ann. § 25-6-101 to 25-6-502. Under the Act, a transfer or obligation incurred by a debtor is voidable under certain circumstances. *See* Utah Code Ann.

§ 25-6-202(1). However, “a transfer or obligation is not voidable under Subsection 25-6-202(1)(a) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.” *Id.* § 25-6-304(1). Thus, a transferee may avoid liability “if he or she (1) acted in good faith and (2) gave reasonably equivalent value in exchange for the transfer.” *S.E.C. v. Madison Real Estate Grp., LLC*, 647 F.Supp.2d 1271, 1279 (D. Utah 2009) (quotation simplified). This defense, which NSDP will assert if permitted to intervene, cannot be adequately advanced by XSun Energy or SOLCO I.

Further, XSun Energy and SOLCO I have not yet had an opportunity to show that the Retainer “is *not* property of the receivership estate,” as contemplated by the Court’s order denying XSun Energy and SOLCO I’s Motion to Lift Asset Freeze. (*See* Doc. No. 550). Permitting intervention will allow NSDP to adjudicate the position that the Court has expressly left open for resolution.

Finally, NSDP maintains it has a proper attorney’s lien over the Retainer. Utah Code Section 38-2-7 provides that “[a]n attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is the subject of or connected with work performed for the client, including . . . any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client.” Utah Code Ann. § 38-2-7(2)(b). Utah’s attorney’s lien statute specifically contemplates intervention in the event an attorney elects to enforce a lien, which NSDP will do, if permitted. “An attorney may enforce a lien under this section by . . . moving to intervene in a pending legal action.” *Id.* § 38-2-7(4)(a)(i). Thus, NSDP’s attorney lien over the Retainer is an additional reason why intervention is proper.

The Receiver seeks to adjudicate the issue of whether the Retainer comprises funds that are not part of the receivership estate with nothing more than an affidavit. Instead, this matter should be decided pursuant to evidentiary proceedings in the lawsuit filed by the Receiver against NSDP on October 31, 2019, (Case No. 2:19-cv-00851-DN), which lawsuit seeks return of the same \$735,202.22 Retainer held in NSDP's client trust account.

CONCLUSION

For the reasons discussed, NSDP respectfully moves the Court to allow it to intervene in this action and to file its opposition to the Receiver's Affidavit of Non-Compliance.

DATED this 13th day of December, 2019.

KIPP AND CHRISTIAN, P.C.

/s/Michael F. Skolnick

MICHAEL F. SKOLNICK

JEREMY R. SPECKHALS

Attorneys for Intervenor Nelson, Snuffer, Dahle & Poulsen, P.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2019, I served the foregoing **MOTION TO INTERVENE** on the following via ECF as follows:

Jonathan O. Hafen
Jeffery A. Balls
Michael S. Lehr
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111

/s/ Nancy Paez

Nancy Paez