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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

**OPPOSITION TO NELSON SNUFFER  
DAHLE & POULSEN'S MOTION TO  
INTERVENE**

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

District Judge David Nuffer

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R. Wayne Klein, the Court-Appointed Receiver ("Receiver") hereby submits this opposition to Nelson Snuffer Dahle & Poulsen's ("Nelson Snuffer") Motion to Intervene for the limited purpose of responding to the Receiver's ex-parte Affidavit of Non-Compliance.<sup>1</sup>

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<sup>1</sup> See [Docket No. 820](#), filed December 13, 2019.

### **RELEVANT BACKGROUND FACTS**<sup>2</sup>

1. On October 31, 2018, the Court extended the previously-entered asset freeze to 12 affiliates and subsidiaries of Receivership Defendants including XSun Energy, LLC (“XSun”) and Solco I, LLC (“Solco”).<sup>3</sup> The asset freeze enjoined XSun and Solco, or anyone acting on their behalf, from “directly or indirectly transferring, setting off, receiving, changing . . . or otherwise disposing of or withdrawing” XSun and Solco property.<sup>4</sup>

2. On November 16, 2018, Nelson Snuffer filed a Motion to Lift the Asset Freeze as to Solco and XSun.<sup>5</sup> In that motion, Nelson Snuffer disclosed that it was holding \$735,202.22 of XSun funds in its trust account.<sup>6</sup>

3. On December 27, 2018, the Court denied Nelson Snuffer’s motion to amend, rejecting its due process argument and finding that the motion “failed to show that the so-called ‘nonrefundable’ retainer in the amount of \$735,202.22, which is currently in Nelson Snuffer Dahle & Poulsen’s trust account, is not property of the receivership estate, [therefore] the full balance of that retainer will remain subject to the Asset Freeze at this time.”<sup>7</sup>

4. On March 1, 2019, the Receiver filed a Motion to Include Affiliates and Subsidiaries in the Receivership Estate.<sup>8</sup> In that motion, the Receiver incorporated the extensive factual findings listed in the Report and Recommendation on Inclusion of Affiliates and

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<sup>2</sup> The facts set forth in the Receiver’s Ex-Parte Declaration of Non-Compliance Against Nelson Snuffer are hereby incorporated by reference. *See* [Docket No. 812](#), filed December 4, 2019.

<sup>3</sup> Corrected Receivership Order, [Docket No. 491](#), § A. The Corrected Receivership Order, filed on November 1, 2018, corrected formatting errors of the Receivership Order, [Docket No. 490](#), which was filed on October 31, 2018.

<sup>4</sup> [Docket No. 491](#), ¶¶ 4-8.

<sup>5</sup> [Docket No. 509](#).

<sup>6</sup> *Id.*, at 5.

<sup>7</sup> [Docket No. 550](#).

<sup>8</sup> [Docket No. 582](#).

Subsidiaries in the Receivership Estate (“Report and Recommendation”).<sup>9</sup>

5. Nelson Snuffer, on behalf on XSun and Solco, filed an opposition to the Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate.<sup>10</sup> The opposition did not dispute any material facts set forth in support of the Receiver’s motion.<sup>11</sup>

6. On May 3, 2019, the Court issued the Memorandum Decision and Order Granting the Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership (“Affiliates Order”).<sup>12</sup> The Affiliates Order extended the Receivership to the 12 affiliates and subsidiaries listed in the Corrected Receivership Order, including XSun and Solco, and one additional entity (the 13 affiliates and subsidiaries are collectively referred to as “Affiliated Entities”).<sup>13</sup>

8. Under the Affiliates Order “[a]ll persons having control, custody, or possession of *any property or records of Affiliated Entities are hereby ordered to turn such property or records over to the Receiver.*”<sup>14</sup>

9. In addition to the requirements stated in the Affiliates Order, the Corrected Receivership Order was also expressly incorporated by reference, so its provisions “apply to the Affiliated Entities, as they do to the Receivership Entities, to the extent necessary and appropriate to allow the Receiver to accomplish his duties under the Corrected Receivership Order.”<sup>15</sup> The Corrected Receivership Order forbids any person from interfering with the

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<sup>9</sup> [Docket No. 581](#), filed Feb. 25, 2019.

<sup>10</sup> [Docket No. 596](#), filed March 15, 2019.

<sup>11</sup> Memorandum Decision and Order Granting the Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership, [Docket No. 636](#) at 3, filed May 3, 2019.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, ¶ 9 (emphasis added).

<sup>15</sup> *Id.*, ¶ 12.

Receiver's efforts to take control or possession of Receivership Property including "creating or enforcing a lien upon any Receivership Property."<sup>16</sup>

10. To provide XSun and Solco an additional opportunity to be heard, the Court allowed "any person who may have an objection" to the Affiliates Order to file an objection within 21 days of receiving actual notice of the Affiliates Order.<sup>17</sup> Solco and XSun submitted objections within 21 days of the entry of the Affiliates Order.<sup>18</sup> The Court overruled XSun and Solco's objections.<sup>19</sup>

11. After multiple demands and discussions regarding turnover of the XSun funds in Nelson Snuffer's trust account, the Receiver filed the Ex-Parte Declaration of Non-Compliance Against Nelson Snuffer ("Affidavit") under paragraph 43 of the Corrected Receivership Order.<sup>20</sup>

12. In response, Nelson Snuffer filed the Motion to Intervene. Notably, Nelson Snuffer again admits that the funds in its trust account are XSun retainer funds. Nelson Snuffer also admits that the transfer of XSun funds occurred three days after the trial concluded and after Judge Nuffer issued a ruling from the bench declaring that Receivership Defendants were operating a massive tax fraud scheme.

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<sup>16</sup> [Docket No. 491](#), ¶ 35(a).

<sup>17</sup> Affiliates Order, ¶ 13.

<sup>18</sup> [Docket No. 665](#), filed May 23, 2019.

<sup>19</sup> Memorandum Decision and Order Overruling Objections Regarding Inclusion of Affiliates and Subsidiaries, [Docket No. 718](#), filed July 8, 2019.

<sup>20</sup> [Docket No. 812](#), filed December 4, 2019. A declaration has the same effect as an Affidavit under federal law. *See* [28 U.S.C. § 1746](#).

## ARGUMENT

### **I. The Motion to Intervene is Improper under Paragraph 43 of the Corrected Receivership Order.**

Nelson Snuffer's motion to intervene is improper under the Corrected Receivership Order and should be denied. Paragraph 43 allows the Receiver to file an ex-parte Affidavit of Non-Compliance "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[.]" Nelson Snuffer has failed to transfer Receivership Property to the Receiver. As set forth in the Affidavit, the property at issue—\$735,202.22 in Nelson Snuffer's trust account—is XSun property. The Affidavit simply seeks to have the Court issue a writ of possession for the property that Nelson Snuffer admits belongs to XSun yet refuses to turn over.<sup>21</sup> Allowing Nelson Snuffer to intervene runs counter to the ex-parte purpose of paragraph 43 and would serve only to perpetuate Nelson Snuffer's interference with the Receiver's duty to take control and possession of Receivership Property under the Corrected Receivership Order.

The following facts regarding the funds in Nelson Snuffer's trust account are undisputed:

- The funds were deposited in Nelson Snuffer's trust account by XSun and/or Solco on June 25, 2018, three days after the close of trial, as a retainer.<sup>22</sup> The stated purpose of the retainer was to fund Receivership Defendants' appeal and other impending matters before this Court.<sup>23</sup>
- The funds were frozen on October 31, 2018 which prevented Nelson Snuffer from "transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing" the remaining \$735,202.22 of XSun retainer funds.<sup>24</sup> The plain language of the asset freeze prevented Nelson

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<sup>21</sup> The Affidavit does not present legal argument or seek to void any transfer. Instead it submits facts that can be verified through the Receiver's citation to the docket.

<sup>22</sup> Motion to Intervene, [Docket No. 820](#) at 2.

<sup>23</sup> Motion to Lift Asset Freeze as to Solco and XSun, [Docket No. 509](#), at 5-6.

<sup>24</sup> See note 4, above.

Snuffer from placing a valid attorneys' lien on the \$735,202.22 after October 31, 2018.

- Under the Affiliates Order, as of May 5, 2019, all property of XSun was ordered to be turned over to the Receiver.<sup>25</sup>
- Section H of the Corrected Receivership Order, which was expressly incorporated to apply to XSun and Solco in the Affiliates Order, prohibits interfering with the Receiver's efforts to take control of Receivership property by "creating or enforcing a lien upon any Receivership Property."<sup>26</sup>
- Moreover, Section H also requires that all "persons or entities *which have possession, custody, or control of any assets or funds held by, or in the name of, or for the benefit of, directly or indirectly, the Receivership Defendants . . .* shall: . . . [n]ot exercise any form of setoff, alleged setoff, *lien*, or any form of self-help whatsoever, *or refuse to transfer any funds or assets to the Receiver's control . . .* [and shall] cooperate expeditiously in providing information and *transferring funds, assets, and accounts to the Receiver* or at the direction of the Receiver."<sup>27</sup>

By Nelson Snuffer's own admission the \$735,202.22 currently in its trust account are XSun retainer funds.<sup>28</sup> Nelson Snuffer also admitted that as of October 31, 2018—the day the asset freeze on XSun property was put in place—the \$735,202.22 remainder of the retainer was unearned and to be used to "fully fund an appeal . . . handle any remaining issues before this Court, assist in preparing the reports required by this Court, and also to defend any claims against Solco and XSun, in the event any are brought by Plaintiff."<sup>29</sup> There is no question—indeed the Court issued a separate order to clarify<sup>30</sup>—that as of October 31, 2018 the \$735,202.22 was frozen and therefore Nelson Snuffer could not set off, change, pledge, assign or

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<sup>25</sup> [Docket No. 636](#), ¶ 9.

<sup>26</sup> [Docket No. 491](#), ¶ 35(a),

<sup>27</sup> *Id.*, ¶ 36(b), (e).

<sup>28</sup> Motion to Lift Asset Freeze as to Solco and XSun, [Docket No. 509](#), at 5.

<sup>29</sup> *Id.*, at 5-6.

<sup>30</sup> Order Denying Motion to Lift Asset Freeze, [Docket No. 550](#).

otherwise dispose of the \$735,202.22. There is also no question that the Corrected Receivership Order prohibits refusing to turn over Receivership Property due to the creation or enforcement of a lien.<sup>31</sup> Accordingly, under the Affiliates Order and the Corrected Receivership Order the \$735,202.22 in Nelson Snuffer's trust account must be turned over to the Receiver. Nelson Snuffer's refusal to turn over the funds represents a direct violation of this Court's valid and existing orders.

What is more, Nelson Snuffer had multiple opportunities to be heard and present any facts as to why the \$735,202.22 is not Receivership Property or dispute the Receiver's and the Court's findings that the "whole purpose of . . . [XSun and Solco] . . . was to perpetrate a fraud to enable funding for Neldon Johnson" or that "Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an attempt to avoid creditors."<sup>32</sup> Instead of submitting any facts that could show the \$735,202.22 was not Receivership property, Nelson Snuffer has relied solely upon failed due process arguments in its filings with the Court.<sup>33</sup> The motion to intervene makes clear that if allowed to submit an opposition to the Receiver's Affidavit, Nelson Snuffer again intends to raise due process arguments, assert that it should be allowed to retain the funds until the pending appeals are final, and argue that it has an attorneys' lien on some portion of the funds.<sup>34</sup> None of these, however, is a legitimate basis for Nelson Snuffer to retain the \$735,202.22 of XSun funds in its trust account. Therefore, because the Affidavit seeks to enforce valid, current

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<sup>31</sup> See note 16, above.

<sup>32</sup> See notes 5, 10, and 18, above.

<sup>33</sup> See notes 19, and 20, above.

<sup>34</sup> See generally, [Docket No. 820](#).

orders of this Court, Nelson Snuffer should not be allowed to further interfere with the Receiver's efforts to take possession of Receivership Property.

**II. Nelson Snuffer Does Not Satisfy Fed. R. Civ. P. 24(a)(2) and Should Not be Allowed to Intervene.**

Notwithstanding that the motion to intervene is improper under paragraph 43 of the Corrected Receivership Order, the motion should be denied under Fed. R. Civ. P. 24(a)(2). Rule 24(a)(2) provides that “an applicant may intervene as 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 as a practical matter be impaired or impeded; and (4) the applicant's interest is not adequately represented by existing parties.”<sup>35</sup> While the Receiver does not dispute that Nelson Snuffer's motion was timely filed, none of the remaining requirements is met, and thus, the motion should be denied.

**A. Nelson Snuffer Does Not Have a Direct, Substantial and Legally Protectable Interest in the XSun Retainer Funds.**

The Tenth Circuit requires that to intervene under Rule 24(a)(2) Nelson Snuffer must show it has an interest that is “direct, substantial, and legally protectable.”<sup>36</sup> In the motion, Nelson Snuffer submits one conclusory sentence that it “has a property interest in the Retainer, and therefore possesses an interest in ‘the subject of the action.’” This sentence, however, does not meet Nelson Snuffer's obligation to show it has direct, substantial, and legally protectable interest in the retainer funds. In fact, nothing in the motion shows that Nelson Snuffer has a legally protectable interest in XSun's retainer funds in the trust account. The only basis put forth

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<sup>35</sup> [Coal. of Arizona/New Mexico Ctys. for Stable Econ. Growth v. Dep't of Interior](#), 100 F.3d 837, 840 (10th Cir. 1996) (quoting [Fed.R.Civ.P. 24\(a\)\(2\)](#)) (internal quotation marks and alterations omitted).

<sup>36</sup> *Id.* (quoting [Vermejo Park Corp. v. Kaiser Coal Corp.](#), 998 F.2d 783, 791 (10th Cir.1993)).

in the motion regarding an alleged interest in the retainer funds is Nelson Snuffer's claim to have an attorneys' lien over some portion of the \$735,202.22. Nelson Snuffer, however, does not state the amount of the alleged lien, when the alleged lien purportedly arose, the nature of the work performed, or for whom the work giving rise to the lien was performed.

Moreover, based on the plain language of the Corrected Receivership Order it is not possible that Nelson Snuffer has a valid attorneys' lien on any portion of the funds after October 31, 2018 when the asset freeze was extended to XSun. The Utah Rules of Professional Conduct state that "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, *to be withdrawn by the lawyer only as fees are earned or expenses incurred.*"<sup>37</sup> "A lawyer should hold property of others with the care required of a professional fiduciary" and is "not free to put monies deposited in a client trust account to its own use."<sup>38</sup> While Nelson Snuffer says that it has not withdrawn the XSun funds from its trust account, it has improperly asserted an attorneys lien over the funds after October 31, 2018 in violation of the Corrected Receivership Order and the Affiliates Order.

As shown above, as of October 31, 2018—the day the assets of XSun were frozen—the balance of XSun's retainer was \$735,202.22. Under the asset freeze, all persons with direct or indirect control over XSun's assets were restrained and enjoined "from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing" such assets. Therefore, any lien placed on the XSun

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<sup>37</sup> [UT R RPC Rule 1.15\(c\)](#).

<sup>38</sup> [Timothy v. Pia, Anderson, Dorius, Reynard & Moss LLC, 2018 UT App 31, ¶ 26, 424 P.3d 937](#), vacated on other grounds, [2019 UT 70](#) (internal citations omitted).

funds in Nelson Snuffer's trust account after October 31, 2018 was done in violation of the Corrected Receivership Order.<sup>39</sup>

Next, on May 5, 2019, the Affiliates Order released all attorneys from acting on behalf of XSun and required all XSun property be turn over to the Receiver.<sup>40</sup> To the extent Nelson Snuffer has continued to assert an attorneys' lien on the XSun funds in its trust account after the entry of the Affiliates Order, such conduct represents a violation of this Court's orders and the Utah Rules of Professional Conduct. Accordingly, it is not possible for Nelson Snuffer to have a valid attorneys' lien over any portion of the XSun retainer funds after October 31, 2018 and therefore does not have a legally protectable interest in the XSun funds as required under Fed. R. Civ. P. 24(a)(2).

**B. Because the Affidavit only Requests Possession of the Funds, It does not Impair Nelson Snuffer's Ability to Assert a Lien.**

To satisfy the second element of Fed. R. Civ. P. 24(a)(2), Nelson Snuffer must show that "the disposition of the [Affidavit of Non-Compliance] . . . may as a practical matter impair or impede [its] ability to protect [its] interest."<sup>41</sup> The Affidavit only asks for a writ of possession, not a finding as to whether Nelson Snuffer's lien is valid, although it is not. A writ of possession under the Corrected Receivership Order would only recognize what Nelson Snuffer has already admitted: that the \$735,202.22 in its trust account belongs to XSun.

In fact, if Nelson Snuffer believes it has a legitimate claim to the XSun funds and wishes to present argument to the Court regarding as to why it believes it is entitled to a portion of the

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<sup>39</sup> See note 4, above.

<sup>40</sup> See note 14, above.

<sup>41</sup> [Coal. of Arizona, 100 F.3d at 844 \(10th Cir. 1996\)](#).

XSun funds in its trust account, the Receiver does not object to the Court allowing such argument after the funds are turned over. The Corrected Receivership Order is clear, however, that a mere claim on some portion of funds belonging to the Receivership Estate is not a proper basis for refusing to turn the funds over to the Receiver.

**C. Nelson Snuffer Failed to Show that Representation by Existing Parties is Inadequate.**

Under the final element of Fed. R. Civ. P. 24(a)(2), Nelson Snuffer must show that the representation by the existing parties may be inadequate.<sup>42</sup> Here, Nelson Snuffer summarily states that the existing parties cannot advance its interest before confusingly arguing that it plans to assert a defense to the Receiver's Affidavit under the Utah Uniform Voidable Transactions Act. The Affidavit, however, does not claim that the transfer of the XSun funds to Nelson Snuffer's trust account in June of 2018 is voidable under Uniform Voidable Transactions Act.<sup>43</sup> Instead, the Affidavit sets forth facts that show the funds in the trust account are XSun funds that must be turned over. Accordingly, Nelson Snuffer has failed to meet its burden under Fed. R. Civ. P. 24(a)(2).

**CONCLUSION**

For the foregoing reasons the motion to intervene should be denied. The United States has authorized the Receiver to indicate that it supports the position taken by the Receiver.

DATED this 27<sup>th</sup> day of December, 2019.

**PARR BROWN GEE & LOVELESS, P.C.**

/s/ Michael S. Lehr

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<sup>42</sup> *Id.*

<sup>43</sup> Although the transfer is likely voidable due to the numerous badges of fraud present at the time of the transfer. *See Utah Code § 25-6-202.*

Jonathan O. Hafen  
Michael Lehr  
*Attorneys for R. Wayne Klein, Receiver*

**CERTIFICATE OF SERVICE**

I hereby certify that the above **OPPOSITION TO NELSON SNUFFER DAHLE & POULSEN'S MOTION TO INTERVENE** was filed with the Court on this 27th day of December, 2019, and served via ECF on all parties who have requested notice in this case.

*/s/ Michael S. Lehr*