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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.	**RESPONSE TO OBJECTION TO AFFIDAVIT OF NON-COMPLIANCE AGAINST NELSON SNUFFER DAHLE & POULSEN** Civil No. 2:15-cv-00828-DN District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver ("Receiver"), hereby submits this response to objection to the Receiver's Ex-Parte Affidavit of Non-Compliance against Nelson Snuffer Dahle & Poulsen.

INTRODUCTION

As set forth in the Receiver's Ex-Parte Affidavit of Non-Compliance (the "Affidavit"), the $735,202.02 in XSun funds that was transferred to and held in Nelson Snuffer Dahle & Poulsen's ("Nelson Snuffer") client trust account are Receivership assets. Nelson Snuffer's

initial refusal to turn over the funds and its continued claim to those funds is in violation of the Corrected Receivership Order and the Memorandum Decision and Order Granting the Receiver's Motion to Include Affiliates and Subsidiaries in the Receivership ("Affiliates Order").[1] In its opposition to the Affidavit, Nelson Snuffer asserts that it has an attorneys' lien over the XSun funds and asks the Court to delay ruling on the status of the XSun funds until all appeals related to this case are resolved or to wait to issue a ruling as to the funds in the separate litigation the Receiver has brought against Nelson Snuffer to recover fraudulent transfers Nelson Snuffer received from Receivership Defendants. As shown below, none of Nelson Snuffer's positions are well taken. First, the plain language of the asset freeze prevented Nelson Snuffer from placing a valid attorneys' lien on the XSun funds. Second, as shown in prior filings with the Court, the XSun funds at issue are Receivership Property that derived from the abusive tax scheme. Third, delaying resolution as to the funds at issue would serve only to prejudice the Receivership Estate. And finally, because the $735,202.22 belongs to XSun, it must be turned over to the Receiver now without the need to litigate this issue in a separate lawsuit.

ARGUMENT

I. Nelson Snuffer Does Not Have a Valid Attorneys Lien Over Any Portion of the $735,202.22 in XSun Funds.

Nelson Snuffer claims to have an attorneys' lien over nearly all of the XSun funds from its client trust account. As set forth below, Nelson Snuffer's attorneys' lien claim is not valid and

[1] After months of numerous demands by the Receiver that Nelson Snuffer turn over the XSun funds in its client trust account, Neldon Snuffer retained outside counsel. After the Receiver filed the Affidavit, the parties stipulated that (1) Nelson Snuffer would turn over the $735, 202.22 to the Receiver; (2) Nelson Snuffer would respond to the Receiver's Affidavit; (3) the Receiver would respond to Nelson Snuffer's submission; and (4) that the Receiver would not distribute the $735,202.22 until Nelson Snuffer's claims to the XSun funds are resolved by court order or stipulation. *See* Docket No. 844, filed January 17, 2020.

is made in direct violation of this Court's orders. The following facts are relevant to Nelson Snuffer attorneys' lien claim:

1. On June 25, 2018, just three days after the close of trial and a finding from the bench that Receivership Defendants were engaged in a "massive fraud,"[2] XSun transferred $1 million to Nelson Snuffer's client trust account.[3]

2. On August 22, 2018, the Court entered the initial asset freeze "Asset Freeze."[4] All "assets of the Receivership Defendants" were frozen at that time. All persons with "control over any Receivership Property" were enjoined from any actions to impair Receivership property,[5] including attorneys for Receivership Defendants.[6]

3. On October 31, 2018, "all assets" of XSun were frozen and "all persons and entities" were "restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing" any assets of XSun.[7]

4. On November 16, 2018, Nelson Snuffer disclosed that it had received $1 million in XSun funds and had expended $264,797.78, leaving $735,202.22 in its client trust account.[8] As of the date of the asset freeze, these remaining funds had not been earned by Nelson Snuffer.[9]

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[2] Findings of Fact and Conclusions of Law, Docket No. 467.
[3] Opposition at 3.
[4] Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, Docket No. 444.
[5] *Id*. at Order, ¶ 3.
[6] *Id*. at ¶¶ 4, 5.
[7] Corrected Receivership Order, Docket No. 491, ¶ 4, 5, 8; *see also* Opposition at 5 (stating that XSun's assets were frozen by the Corrected Receivership Order).
[8] Docket No. 509 at 5.
[9] *Id*., at 5-6.

5. On December 27, 2018 the Court denied Nelson Snuffer's motion to lift the asset freeze as to XSun and confirmed that the "full balance of that retainer [the $735,202.22] will remain subject to the Asset Freeze at this time."[10]

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").[11] The Affiliates Order extended the Receivership Estate to XSun and 12 additional affiliates and subsidiaries (the 13 affiliates and subsidiaries are collectively referred to as "Affiliated Entities").[12]

7. The Affiliates Order ordered that "this court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities [including XSun]."[13]

8. Under the Affiliates Order "[a]ll persons having control, custody, or possession of any property or records of Affiliated Entities [including XSun] are ***hereby ordered to turn such property or records over to the Receiver***."[14]

As the above facts show—and by Nelson Snuffer's own admission—the $735,202.22 at issue in Nelson Snuffer's client trust are XSun funds.[15] Nelson Snuffer also admits that as of October 31, 2018, the $735,202.22 remainder of the retainer was ***unearned*** and to be used to

[10] Memorandum Decision and Order Denying Motion to Lift Asset Freeze as to Solco I and XSun Energy, Docket No. 550 at 2.
[11] Docket No. 636.
[12] *Id*.
[13] *Id*., ¶ 1.
[14] *Id*., ¶ 9 (emphasis added).
[15] Opposition at 3; Motion to Lift Asset Freeze as to Solco and XSun, Docket No. 509 at 5.

"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."[16] There is no question—indeed the Court issued a separate order to clarify[17]—that as of October 31, 2018 the $735,202.22 was frozen and therefore Nelson Snuffer could not set off, change, pledge, assign or otherwise dispose of the $735,202.22.[18] There is also no question that the plain language of the Affiliates Order required Nelson Snuffer to turn the funds over to the Receiver.[19]

Based on the express language of this Court's orders, Nelson Snuffer cannot assert that it has a valid attorneys' lien on any portion of the funds after October 31, 2018—when the asset freeze was extended to XSun's assets, including the $735,202.22 from Nelson Snuffer's client trust account. Moreover, the Utah Rules of Professional Conduct define when retainer funds might be subject to lien: "[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***."[20] It is axiomatic that "a retainer paid as an advancement for future services is not earned by the attorney until services have been performed, and '***remains the client's money***' until then."[21] Accordingly, when XSun's assets were frozen, the $735,202.22 in XSun funds in Nelson Snuffer's client trust account were necessarily frozen and "all persons and entities"—including Nelson Snuffer—were enjoined from "transferring, setting off, receiving,

[16] Docket No. 509 at 5-6.
[17] Order Denying Motion to Lift Asset Freeze, Docket No. 550.
[18] Corrected Receivership Order, Docket No. 491 ¶¶ 4-8.
[19] Docket No. 636, ¶ 10.
[20] UT R RPC Rule 1.15(c) (emphasis added).
[21] *In re Wagers*, 514 F.3d 1021, 1028 (10th Cir. 2007) (emphasis added); *see also S.E.C. v. Princeton Econ. Int'l Ltd.*, 84 F. Supp. 2d 443, 446 (S.D.N.Y. 2000).

changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing" the XSun retainer funds.[22]

Recognizing that funds from its client trust accounts are property of the client, Nelson Snuffer cites two cases that fully support the Receiver's position that the asset freeze applied to the XSun funds in its trust account. These cases both stand for the proposition that "any funds that were still held in the client trust accounts 'at the hour of the signing of the freeze order' were still owned by the client company, rather than by the law firms, and therefore were subject to the freeze order."[23]

Nelson Snuffer attempts to distinguish the current situation from these cases by stating that the asset freeze "did not directly implicate XSun" and that "[u]ntil the Court entered the [May 3, 2019] Affiliate Entities Order, XSun and SOLCO I were entitled to pay the attorneys of their choice . . . ."[24] These assertions, however, are belied by the express terms of the October 31, 2018 asset freeze which extended the freeze to include all assets of "the subsidiaries and affiliated entities of the Receivership Defendants" specifically listing "XSun Energy, LLC" as a subsidiary or affiliated entity of Receivership Defendants.[25] Nelson Snuffer fails to support its claim that that (somehow) the asset freeze did not directly implicate XSun when the asset freeze

[22] Corrected Receivership Order, Docket No. 491 ¶¶ 4-8.
[23] *S.E.C. v. Credit Bancorp, Ltd.*, 109 F. Supp. 2d 142, 144 (S.D.N.Y. 2000) (citing *Princeton Econ. Int'l Ltd.*, 84 F. Supp. 2d at 446.
[24] Nelson Snuffer repeatedly points out that on August 22, 2018 the Court stated that "[t]he appointment of a Receiver shall not, without further order, deprive any Defendant of the right to appeal orders in this case or otherwise defend this action through counsel (paid from sources other than Receivership Property) of Defendants' own choice." *See* Docket No. 444 at 28. Whatever effect this paragraph had on XSun's ability to pay Nelson Snuffer legal fees was clearly superseded by the asset freeze put in place on October 31, 2018. This fact is further confirmed by the Court's order denying Nelson Snuffer's motion to lift the asset freeze as to XSun. *See* Docket No. 550, filed on December 27, 2018.
[25] Corrected Receivership Order, Docket No. 491 ¶¶ 2-5.

order itself unambiguously states that the assets of XSun are frozen.[26] There is no plausible interpretation that would allow frozen XSun funds to be used by Nelson Snuffer to fund this litigation and the appeals when the order precludes Nelson Snuffer from "transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing" of XSun assets.[27]

Indeed, when Nelson Snuffer filed a motion asking the Court to unfreeze the XSun retainer funds in its client trust account to "fund an appeal . . . [and] handle any remaining issues before this Court" the Court ***denied*** the request and held that "the full balance of the retainer will remain subject to the Asset Freeze at this time."[28] Nelson Snuffer's attempt to characterize the asset freeze as somehow not applying to the XSun funds from its clients trust account after October 31, 2018 is not well taken and should be rejected. Accordingly, this Court should find that Nelson Snuffer does not have a valid attorneys' lien over any portion of the $735,202.22 from its client trust account.[29]

II. The Receiver Has Shown that The Funds From Nelson Snuffer's Client Trust Account are Receivership Property.

Numerous times in the opposition Nelson Snuffer states that the XSun retainer funds "are not property of the Receivership Estate" because of the attorneys' lien Nelson Snuffer has improperly asserted over the funds.[30] As shown above, as of October 31, 2018, the asset freeze

[26] *Id.*
[27] *Id*.
[28] Docket No. 550 at 2, filed December 27, 2018.
[29] [Need to provide cite to language quoted in the narrative above. The quoted language comes from their brief.] Nelson Snuffer seems to admit that after May 3, 2019 it could not assert an attorneys' lien over any unearned XSun funds in its client trust account and, in any event, does not provide any basis for entitlement to the retainer funds after May 3, 2019. Moreover, it does not provide an accounting as to the amount of the alleged attorneys' lien from totaled from October 31, 2018 to May 3, 2019. Instead, it asserts that it has an attorneys' lien in the amount of $702,172.21 at the time of it filing. *See* Opposition at 6.
[30] *See* Opposition at 2, 11, 12.

prevented the placement of an attorney's lien on the assets of XSun and there is no basis for Nelson Snuffer's claim for a lien on these funds.

By stating that the $1 million it received from XSun just days after the trial ended is not property of the Receivership Estate, Nelson Snuffer seems to be suggesting that the funds were not derived from the abusive solar energy scheme. To be clear, the Receiver has traced the funds that made up the $1 million payment from XSun to Nelson Snuffer and has determined that prior to XSun transferring the funds to Nelson Snuffer's client trust account, the funds were transferred directly from Receivership Defendant RaPower's bank account to XSun for no consideration.[31] Therefore, the entire $1 million transferred to Nelson Snuffer—including the amounts that it allegedly earned prior to October 31, 2018—is Receivership Property under this Court's orders.[32]

The Receiver's finding regarding the funds transferred from RaPower to XSun was one of the many transactions that led to the Court's decision to issue the Affiliates Order which found, among other things, that:

- "The whole purpose of RaPower, IAS, and LBT1 (collectively, the "Receivership Entities") was to perpetrate a fraud to enable funding for Neldon Johnson. The

[31] *Receiver's Report and Recommendation on Inclusion of Affiliates and Subsidiaries in the Receivership Estate*, Docket No. 581 at 8-9, filed February, 25, 2019.

[32] *See* Corrected Receivership Order, Docket No. 491 ¶ 2 ("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, together with assets proven to be proceeds of activities of Receivership Defendants . . . ."; Memorandum Decision and Order Freezing Assets and To Appoint a Receiver, Docket No. 444 at 22 (defining Receivership Property as property interests "or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly").

same is true for other entities Johnson created, controls, and owns (either directly or indirectly), ***including Solco, [and] XSun*** . . ."[33]

- "[Neldon] Johnson has commingled funds between these entities [including XSun], used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an attempt to avoid creditors."[34]
- "In many cases, the Affiliated Entities and Receivership Entities have common officers, directors, members, and managers. Their corporate purposes are similar. And there have been numerous and substantial financial transactions between them."[35]
- "In many instances, the Affiliated Entities' only assets are tied to the Receivership Defendants. In each instance, the assets appear to have been transferred to the Affiliated Entities for the purpose of defrauding creditors. To prevent further dissipation of Receivership Property, it is necessary to put the Affiliated Entities under the Receiver's control."[36]

XSun and Nelson Snuffer had numerous opportunities to challenge the Receiver's and the Court's findings regarding the source of the funds and XSun's connection to the Receivership Defendants. Despite submitting multiple filings objecting to the process used by the Receiver and the Court to include the Affiliated Entities in the Receivership Estate, XSun never "raised a genuine dispute as to any material fact set forth [by the Receiver in support of the Affiliates

[33] Affiliates Order, Docket No. 636 at 4.
[34] *Id*., at 4-5.
[35] *Id*., at 5.
[36] *Id*., at 6.

Order]."[37]

Here, yet again, Nelson Snuffer fails to set forth any facts that could support that the $1 million transferred to it from XSun was not derived from the abusive solar scheme or was not Receivership Property. Instead, as the Receiver has shown, the $1 million ***was*** derived from the abusive solar scheme and was transferred directly from RaPower to XSun prior to being transferred to Nelson Snuffer's client trust account.[38] Accordingly, there is no basis for Nelson Snuffer's claim that the funds from the trust account are not Receivership Property.[39]

III. Denying the Receiver's Affidavit Due to Pending Appeals is Improper.

Next, Nelson Snuffer asks the Court to deny the Receiver's Affidavit without prejudice pending the resolution of the appeals filed in this case in the Tenth Circuit Court of Appeals because "[p]ermitting further litigation in this matter will potentially lead to inconsistent ruling and might potentially waste resources of the Parties and the Court."[40] This, however, is an improper basis for Nelson Snuffer to ask the Court to deny the Receiver's Affidavit. As the Court found in multiple orders denying motions to stay proceedings in litigation related to this Receivership, "the mere possibility of the Tenth Circuit reversing the Underlying Civil Enforcement Action's judgment is not a sufficient basis to obtain a stay. It is speculative to

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[37] *Id*., at 3.
[38] *See* Note 31, above.
[39] Nelson Snuffer goes beyond the relief sought by the Receiver in the Affidavit and invites the Court to find that it is entitled to the "Earned Funds"—the $264,797.78 of the $1 million transferred to its client trust account—with no limitations attached. As discussed in more detail below, the reason the Receiver only sought to recover the $735,202.22 through the Affidavit, as opposed to the entire $1 million transferred from XSun to Nelson Snuffer, is because XSun is the current owner of the funds from Nelson Snuffer's client trust account and Nelson Snuffer is in direct violation of court orders by refusing to turn the funds over to the Receiver. The ownership of the "Earned Funds" was transferred to Nelson Snuffer before the asset freeze. Therefore, while the Receiver is confident that most—if not all—the Earned Funds constitute voidable transfers under Utah law, Nelson Snuffer's claim to the Earned Funds is not a direct violation of the Corrected Receivership Order.
[40] Opposition at 7.

assume that a likelihood of reversal exists."[41] "It is no more efficient to delay this case by entering a stay, than it is to allow the case to proceed as scheduled. Therefore, neither judicial economy, the potential for confusion and inconsistent results, nor the impact to the court causes the balance of interests to tip in favor of a stay in this case."[42] The same is true here. Speculation regarding the potential outcome of appeals is not sufficient reason to deny relief and only serves to prejudice the Receivership Estate by creating the potential for dissipation of evidence and the assets and monies the Receiver seeks to recover.[43]

IV. The Claim-Splitting Doctrine is Not Applicable Here Because The Corrected Receivership Order Requires the Turn Over of The XSun Funds.

Finally, citing the claim-splitting doctrine, Nelson Snuffer asks the Court to deny the Receiver's Affidavit in favor of the parties litigating this issue in a separate lawsuit the Receiver filed against Nelson Snuffer. In support of this argument, Nelson Snuffer points out that the Receiver's complaint includes allegations regarding the $1 million transferred from XSun to Nelson Snuffer's client trust account.[44] As shown above, however, what makes the $735,202.22 from Nelson Snuffer's client trust account different from the rest of the $1 million transferred from XSun is that the funds from the trust account are currently XSun property, not property of Nelson Snuffer. When the asset freeze was put in place on October 31, 2018, Nelson Snuffer was prevented from placing a lien or otherwise disposing of the remaining $735,202.22 in XSun funds in the client trust account. Nelson Snuffer has no legitimate ownership claim over the $735,202.22 from its client trust account and thus the funds must be deemed Receivership

[41] *See e.g.*, Memorandum Decision and Order Denying Motion to Stay Proceedings, Docket No. 19 at 2, *Klein v. Shepard*, case number 2:19-cv-00695-DN-PK.
[42] *Id*.
[43] This should be particularly true where Receivership Defendants did not receive (or even seek) a stay pending appeal.
[44] Opposition at 8.

Property under the Affiliates Order, the Asset Freeze Order, and the Corrected Receivership Order. The very reason the Receiver filed the Affidavit is because in refusing to turn over the XSun property in its possession, Nelson Snuffer was violating multiple provisions of the Court's orders including to "[c]ooperate expeditiously in providing information and transferring funds, assets, and accounts to the Receiver."[45] By means of the Affidavit, the Receiver is obeying the Court's directive to "promptly notify the Court and counsel for the United States of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order"[46] and using procedures set by the Court to efficiently and effectively ensure the XSun funds are turned over to the Receiver.[47]

This is fundamentally different from the balance of the $1 million transferred from XSun to Nelson Snuffer because the ownership of those funds has been transferred to Nelson Snuffer for work performed before the asset freeze was put in place. Therefore, for the Receiver to recover those rest of the $1 million ($264,797.78) he must show that the transfer of ownership to Nelson Snuffer was a fraudulent or voidable transfer under Utah law.

Because Nelson Snuffer's failure to turn over funds belonging to XSun constitutes a direct violation of the Court's orders, the claim-splitting doctrine is not applicable to the Receiver's Affidavit. Although courts generally disfavor claim splitting because "[b]y spreading claims around in multiple lawsuits in other courts or before other judges, parties waste 'scarce judicial resources' and undermine 'the efficient and comprehensive disposition of cases'" that is

[45] Corrected Receivership Order, Docket No. 491 ¶ 36(e); *see also* Affiliates Order, Docket No. 636, ¶ 9.
[46] *Id.*, ¶ 42.
[47] *Id.*, ¶ 43.

not the case here.[48] Instead, the Receiver filed the Affidavit to both to inform the Court of Nelson Snuffer's violation of court orders and to ensure that the XSun funds were turned over to the Receiver (without encumbrance) in an efficient manner.

Finally, it is improper for Nelson Snuffer to seek aid from the equitable doctrine of claim splitting under the unclean hands doctrine. "[E]quity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable."[49] As shown above, Nelson Snuffer's refusal to turn over the XSun funds to the Receiver is in violation of the Court's orders. Thus, an equitable doctrine such as claim splitting should not be allowed to prevent Nelson Snuffer from turning over the funds to the Receiver.

CONCLUSION

For the foregoing reasons the Court should enter an order finding that the $735,202.22 in XSun funds are Receivership Property and that Nelson Snuffer does not have a valid attorneys' lien on any portion of the $735.202.22.

DATED this 23rd day of March, 2020.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr
Jonathan O. Hafen
Michael Lehr
Attorneys for R. Wayne Klein, Receiver

[48] *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011) (quoting *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir.2002)).
[49] *Houston Oilers, Inc. v. Neely*, 361 F.2d 36, 42 (10th Cir. 1966).

CERTIFICATE OF SERVICE

I hereby certify that the above **RESPONSE TO OBJECTION TO AFFIDAVIT OF NON-COMPLANCE AGAINST NELSON SNUFFER DAHLE & POULSEN** was filed with the Court on this 23rd day of March, 2020, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr