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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **OBJECTION TO RECEIVER'S AUTHENTICATION OF EXHIBITS IN SUPPORT OF HIS MOTION FOR ORDER DIRECTING TURNOVER AND TRANSFER OF REAL PROPERTIES TITLED IN THE NAME OF GLENDA JOHNSON AND FUNDS IN ACCOUNTS CONTROLLED BY GLENDA JOHNSON (ECF 883)** **EVIDENTIARY HEARING REQUESTED** Judge David Nuffer

COMES NOW Glenda Johnson and objects to the Receiver's attempt to authenticate[1] the exhibits on which he relies in support of his Motion for Order Directing Turnover and Transfer of

[1] ECF 883.

Real Properties Titled in the Name of Glenda Johnson and Funds in Accounts Controlled by Glenda Johnson[2].

The Receiver's effort to authenticate or lay a foundation for the exhibits is insufficient for this proceeding, in addition to other reasons discussed herein, because Glenda Johnson is not a party to this case. The Receiver relies in the majority of his argument that the exhibits are admissible as a "party-opponent admission". However, the Receiver fails to address the concern raised in opposition to the motion that Mrs. Johnson is not and has never been a party to these proceedings, has never been served, joined or added as a party and, therefore, Rule 801 upon which the Receiver relies has not been met here.

The Receiver argues the exhibits that lack foundation are grouped into two categories: real estate settlement statements and check registers. The settlement statements, he claims, all came from boxes received from Glenda Johnson. The check registers were given to him during a deposition with Mrs. Johnson. However, the Receiver admits the settlement statements bear the letterhead of different title companies[3]. He further adds that "each settlement statement *appears* to be signed by Glenda Johnson." (emphasis added). No foundation at all has been suggested for the check registers, other than Mrs. Johnson gave them to him[4]. There has been no discovery to determine any aspect of the settlement statements or whether the signatures are authentic. There is no confirmation from Glenda Johnson, nor any handwriting expert confirming the signatures.

It should be noted again, the Receiver has already filed a separate lawsuit against Glenda Johnson because he recognizes he has no right against her or her property in this case. See *Klein*

[2] ECF 757.

[3] See, ECF 883, page 2.

[4] Id. at page 5.

v. Johnson, Case No. 2:19-cv-00625 (hereafter the "Collection Case"). This matter and these claims are rightly disputed and should be resolved in the Collection Case. To hold otherwise ignores the 10th Circuit's prohibition against claim splitting.[5]

The Receiver's argument for authentication is based on conjecture and is not reliable. Both the settlement statements and the checkbook registers on which he relies were not created by him and he can only assume their meaning and purpose. The purpose for which the Receiver offers the exhibits is to reach conclusions he cannot support as the custodian or the preparer of the documents. But, in the Collection Case, he has an appropriate avenue to bring claims and a nexus between the claims and the party opponent, Mrs. Johnson.

The Receiver's dilemma can be corrected in one of two ways: either he brings the claims in the Collection Case against Glenda Johnson or he undertake discovery in this case to determine a foundation and a basis for admitting the documents into evidence. Either way, this motion is not the way to use these documents or rely on them for summary judgment against non-party Glenda Johnson.

Mrs. Johnson should not have to defend the same claims on two separate fronts. Because this court has not been asked to assert jurisdiction over Mrs. Johnson as a party defendant, she is entitled to defend herself and her ownership interests in the lawsuit filed against her. Likewise, she should be allowed to demand the Receiver follow the Rules of Evidence if he wishes to bypass the laws of due process and usurp those rights in this case. The Receiver knows this, which is why

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[5] *See* *Katz v. Gerardi*, 655 F.3d 1212, 1214 (10th Cir. 2011) ("The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By 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.") (quoting *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.* 296 F.3d 982, 985 (10th Cir. 2002)).

he is trying to short-cut the normal rights involved in litigation, including discovery, expert witness designations, reports, and a trial. This Motion is an attempt to skirt those requirements and should be denied.

Rule 56(c) of the Federal Rules of Civil Procedure requires that the Receiver support his summary judgment with admissible evidence. For documents offered against a non-party, the documents must meet one of the hearsay exceptions. This Court cannot consider hearsay to decide a motion for summary judgment.[6] The Receiver has failed to offer any basis for the settlement statements or the checkbook registers that would be an exception to the hearsay rule. The evidence he relies on is entirely inadmissible hearsay, lacking any foundation for admissibility.

Mrs. Johnson is neither a Receivership Defendant, nor a Receivership Entity. Neither the Receivership Order nor the Affiliates Order grants the Receiver any authority over her nor makes her a party for evidentiary purposes. The Receiver has sued Mrs. Johnson on the same legal theories brought in this motion. Since Mrs. Johnson is not a party opponent, the exhibits should be stricken and summary judgment denied.

DATED this 24th day of March, 2020.

NELSON SNUFFER DAHLE & POULSEN

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

[6] See *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995) ("It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment. Hearsay testimony cannot be considered because [a] third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill." (internal quotations and citations omitted)).

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.

In addition, the foregoing was mailed or emailed as indicated to the following who are not registered with CM/ECF.

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