IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	**ORDER ON RECEIVER'S EX PARTE DECLARATION OF NON-COMPLIANCE AGAINST NELSON SNUFFER DAHLE & POULSEN, PC** Case No. 2:15-cv-00828-DN-DAO District Judge David Nuffer Magistrate Judge Daphne A. Oberg

Receiver Wayne Klein filed Receiver's Ex Parte Declaration of Non-Compliance Against Nelson Snuffer Dahle & Poulsen, PC ("Declaration"),[1] requesting that the court enter "an order for turnover and writ of possession against [NSDP]" as to $735,202.22 held in NSDP's trust account.[2] Pursuant to the Receiver and NSDP's subsequent stipulation ("Stipulation"),[3] the court entered an order providing that NSDP would turn over the funds to the Receiver (which has presumably been accomplished) and be allowed to respond to the Declaration.[4] NSDP filed a memorandum opposing the Declaration and the Receiver replied.[5] As explained below, the court agrees with the Receiver that the funds at issue are Receivership Property over which NSDP has

[1] Docket no. 812, filed December 4, 2019.
[2] Declaration, *supra* note 1, at 1.
[3] Stipulation Regarding Retainer Funds Held in NSDP's Client Trust Account, docket no. 844, filed January 17, 2020.
[4] Order Granting Stipulation Regarding Retainer Funds Held in NSDP's Client Trust Account ("January 21, 2020 Order"), docket no. 847, filed January 21, 2020.
[5] Nelson, Snuffer, Dahle & Paulsen [sic], P.C.'s Opposition to the Receiver's Affidavit of Non-Compliance ("Opposition"), docket no. 859, filed February 20, 2020; Response to Objection to Affidavit of Non-Compliance Against Nelson Snuffer Dahle & Poulsen ("Response"), docket no. 889, filed March 23, 2020. Pursuant to DUCivR 7-1(f), oral argument is deemed unnecessary and NSDP's request for oral argument is denied.

no valid attorney's lien.

BACKGROUND

The following facts of record are drawn largely verbatim from NSDP and the Receiver's background statements:

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,"[6] XSun transferred $1 million to NSDP's client trust account.[7]

2. On August 22, 2018, the court entered the initial asset freeze ("Asset Freeze Order").[8] 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,[9] including attorneys for Receivership Defendants.[10]

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"

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[6] Findings of Fact and Conclusions of Law at 1-2, docket no. 467, filed October 4, 2018.
[7] Response, *supra* note 5, at 3; Opposition, *supra* note 5, at 3. The Opposition states that, on the same day, Solco I deposited an additional $168,000, for a total retainer of $1,168,000. *Id.* Because Solco I and XSun's deposits were made on the same day and these entities were subject to the same orders freezing their assets (on October 31, 2018), denying their joint motion to lift the freeze (on December 27, 2018), and extending the receivership to them (on May 3, 2019), the analysis below regarding the validity of NSDP's attorney's lien claim applies equally to the funds deposited by both entities, although Solco I is not always expressly discussed.
[8] Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, docket no. 444, filed August 22, 2018.
[9] *Id.* at 26 (Order, ¶ 3).
[10] *Id.* at 27 (Order, ¶¶ 4, 5). The Asset Freeze Order also provided: "The 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." *Id.* at 28 (Order, ¶ 8). As the Receiver correctly points out, "[w]hatever effect this paragraph had on XSun's ability to pay [NSDP] legal fees was clearly superseded by the asset freeze put in place on October 31, 2018." Response, *supra* note 5, at 6 n.24.

any assets of XSun.[11]

4. On November 16, 2018, NSDP disclosed that it had received a retainer in XSun funds, of which $735,202.22 remained in its client trust account.[12] As of the date of the asset freeze, these remaining funds had not been earned by NSDP.[13] Between that time and the end of January 2020 (i.e., the end of NSDP's last billing cycle at the time it filed its Opposition), NSDP represents that it performed unpaid legal services for XSun (and Solco I, and for other defendants whose interests are aligned with those of XSun and Solco I) in the amount of $702,172.21, and additional legal services thereafter. It claims a lien in the amount of all such services over the retainer funds.[14]

5. On December 27, 2018, the court denied NSDP's motion to lift the asset freeze as to XSun (and Solco I) and confirmed that the "full balance of that retainer [the $735,202.22] will remain subject to the Asset Freeze at this time."[15]

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").[16] 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

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[11] Corrected Receivership Order ("CRO") § A, docket no. 491, filed November 1, 2018. The CRO corrected formatting errors of the Receivership Order, docket no. 490, filed October 31, 2018. NSDP incorrectly refers to November 1, 2018 as the effective date of the freeze of XSun's assets. E.g., Opposition, *supra* note 5, at 4, 9-10. Because the substance of the CRO was entered on October 31, 2018, that is the effective freeze date of XSun's assets.

[12] Motion to Lift Asset Freeze Order as to Solco I and XSun Energy ("Motion to Lift") at 5, docket no. 509, filed November 16, 2018.

[13] *Id.* at 5-6 (characterizing retainer as nonrefundable and stating that balance was expected to fund services performed after entry of freeze order). The Opposition does not include any argument regarding the purported nonrefundable character of the retainer.

[14] Opposition, *supra* note 5, at 6, 11; *id.*, Exhibit A (Declaration of Denver C. Snuffer, Jr.).

[15] Memorandum Decision and Order Denying Motion to Lift Asset Freeze as to Solco I and XSun Energy ("Order Denying Motion to Lift Asset Freeze") at 2, docket no. 550, filed December 27, 2018.

[16] Docket no. 636, filed May 3, 2019.

"Affiliated Entities").[17]

7. The Affiliates Order ordered that "[t]his court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities [including XSun]."[18]

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 . . . ."[19]

9. On October 31, 2019, a little over a month before filing the Declaration in this case, the Receiver filed a lawsuit against NSDP (Case No. 2:19-cv-00851-DN-PK) seeking, among other things, the balance of the retainer, $735,202.22, then being held in NSDP's client trust account.[20]

DISCUSSION

The Status of the Funds at Issue in the Declaration May Be Decided Here.

NSDP raises two procedural issues in the Opposition. The first – suggesting that the Receiver's request should be denied "because there are pending appeals which could moot the relief the Receiver seeks"[21] – has itself become moot because the orders appealed were affirmed, or the appeal was otherwise denied.[22]

Second, NSDP urges denial "in favor of the parties litigating ownership of the Retainer in the Receiver's separate pending case against NSDP."[23] This argument is premised on "general

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[17] *Id.*
[18] *Id.* at 6 (Order, ¶ 1).
[19] *Id.* at 8 (Order, ¶ 9).
[20] Klein v. Nelson Snuffer Dahle & Poulsen, PC, Case No. 2:19-cv-00851-DN-PK, Complaint, ¶¶ 31-37, 45-48, ECF 2, filed October 31, 2019.
[21] Opposition, *supra* note 5, at 2.
[22] *United States v. RaPower-3, LLC*, Nos. 18-4119 & 18-4150, — F.3d —, 2020 WL 2844694; *United States v. Solco I, LLC*, No. 19-4089, — F.3d —, 2020 WL 3407013.
[23] Opposition, *supra* note 5, at 2.

principles of fairness" and "[t]he rule against claim-splitting."[24] However, while NSDP has "the right to discovery and motion practice" in the separate case,[25] which are not available to it here, NSDP has not identified any potentially discoverable facts that could affect its right to the funds at issue here.

The entire $1 million transferred from XSun to NSDP is raised in the separate lawsuit. But the $735,202.22 retainer fund at issue here "is fundamentally different from the [remaining] balance [(of $264,797.78)] because the ownership of [the latter amount] [was] transferred to [NSDP] for work performed *before* the asset freeze was put in place."[26] Thus, "for the Receiver to recover those rest of the $1 million ($264,797.78) he must show that the transfer of ownership to [NSDP] was a fraudulent or voidable transfer under Utah law."[27]

In contrast, as explained more fully in the next section, the $735,202.22 retainer fund is "currently XSun property, not property of [NSDP]."[28] Moreover, that specific fund was subject to freeze orders and turnover orders and "[NSDP] has no legitimate ownership claim over [it]."[29] As a result, "in refusing to turn over the XSun property in its possession, [NSDP] 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.'"[30] The process followed by the Receiver here in seeking to recover the $735,202.22 held by NSDP is the very one contemplated in the CRO,[31] so NSDP's attempt to defeat that process by reliance on the rule against claim-splitting is rejected.

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[24] *Id.* at 8-9; *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011).
[25] Opposition, *supra* note 5, at 8.
[26] Response, *supra* note 5, at 12 (emphasis added).
[27] *Id.*
[28] *Id.* at 11.
[29] *Id.*
[30] *Id.*; CRO, *supra* note 11, at 27 (¶ 36(e)); Affiliates Order, *supra* note 16, at 8 (¶ 9).
[31] CRO, *supra* note 11, at 29 (¶¶ 42-43).

NSDP Does Not Have a Valid Attorney's Lien on the $735,202.22.

NSDP and the Receiver agree that, "[g]enerally speaking, funds held in an escrow account, such as an attorney trust account, are considered to be funds owned by the client and held by the attorney in a fiduciary capacity."[32] Thus, funds held in trust "at the hour of the signing of [a] freeze order" have been held to be client property subject to a turnover order.[33]

While acknowledging this case law, NSDP argues that it does not apply because "the November 1, 2018 asset freeze" "did not directly implicate XSun . . . ."[34] This argument is incorrect. The CRO expressly froze the assets of XSun and the other Affiliated Entities for the purpose of allowing the Receiver to investigate whether the assets "derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity."[35] Clearly, the asset freeze "directly implicate[d]" the entities whose assets were frozen. Under the acknowledged rule and the plain language of the CRO, as the Receiver has argued, "as of October 31, 2018[,] the $735,202.22 was frozen and therefore [NSDP] could not set off, change, pledge, assign or otherwise dispose of [those funds]."[36]

NSDP further asserts that "[t]he [r]etainer comprises funds that are not property of the Receivership Estate" because it was deposited by XSun "from [its] own funds . . . ."[37] NSDP has presented no evidence to support this assertion (i.e., showing how XSun obtained the funds it transferred to NSDP),[38] nor has it shown why this would matter. The CRO expressly froze

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[32] *S.E.C. v. Credit Bancorp, Ltd.*, 109 F. Supp. 2d 142, 144 (S.D.N.Y. 2000) (citations omitted); Opposition, *supra* note 5, at 9-10; Response, *supra* note 5, at 6.
[33] *S.E.C. v. Princeton Econ. Int'l Ltd.*, 84 F. Supp. 2d 443, 446 (S.D.N.Y. 2000); Opposition, *supra* note 5, at 10; Response, *supra* note 5, at 6.
[34] Opposition, *supra* note 5, at 10.
[35] CRO, *supra* note 11, at 2-4 (¶¶ 2-5) (footnote omitted).
[36] Response, *supra* note 5, at 5; CRO, *supra* note 11, at 2-4 (¶¶ 2-5); *Credit Bancorp, Ltd.*, 109 F. Supp. 2d at 144.
[37] Opposition, *supra* note 5, at 2, 12.
[38] Nor has the Receiver carried the day going the other way. The Receiver cites pages 8 and 9 of his report and recommendation leading to the Affiliates Order – Receiver's Report and Recommendation on Inclusion of Affiliates

XSun's assets,[39] and the Affiliates Order clearly requires "all assets" *of XSun* to be turned over to the Receiver.[40] Thus, for purposes of deciding the validity of NSDP's lien claim, the source of XSun's deposit is irrelevant.

NSDP suggests that the funds were subject to its lien under certain provisions of Utah law.[41] These provisions do not contradict the basic rule that retainer funds belong to the client until the time "fees are earned."[42] That is generally when services are provided.[43] Here, NSDP has not shown, nor has it even asserted, that it has not been paid for any legal services it provided prior to entry of the freeze order on October 31, 2018. On the contrary, in its motion to lift the asset freeze, it represented that, at the time of the October 31, 2018 asset freeze, the services

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and Subsidiaries in Receivership Estate ("R & R"), docket no. 581, filed February 25, 2019 – for the proposition that "the Receiver has traced the funds that made up the $1 million payment from XSun to [NSDP] and has determined that prior to XSun transferring the funds to [NSDP]'s client trust account, the funds were transferred directly from Receivership Defendant RaPower's bank account to XSun for no consideration." Response, *supra* note 5, at 8. The cited pages indicate that about $1.5 million was transferred from RaPower to XSun in July 2012, but *they do not show the transfer of the money from XSun to NSDP.* Underscoring this, page 32 of the R & R says that "[t]he Receiver *expects* that he will find that the amount XSun paid to [NSDP] for its retainer fee derived from this $1.498 million transfer from RaPower to XSun." (Emphasis added.) An accompanying footnote states: "*The Receiver has not yet been able to confirm that the retainer came from this account* due to several factors: a) [NSDP] has refused to provide information showing the date, amount, and bank account source of funds deposited into its retainer account, b) the bank records the United States obtained for trial only go through February 2017, and c) Wells Fargo Bank has not yet provided the Receiver with copies of bank statements for the period after February 2017." R & R at 32 n.169 (emphasis added).

[39] CRO, *supra* note 11, at 2-4 (¶¶ 2-5).

[40] Affiliates Order, *supra* note 16, at 6, 8 (Order ¶¶ 1, 8).

[41] Utah Code Ann. §§ 38-2-7(2)(b) ("An 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"); 38-2-7(3) ("An attorney's lien commences at the time of employment of the attorney by the client.").

[42] Utah R. Prof'l Conduct 1.15(c) ("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*.") (emphasis added).

[43] *Utah State Bar v. Jardine*, 2012 UT 67, ¶ 50, 289 P.3d 516, 528 (stating that "[i]n most cases, a lawyer will withdraw money from the client trust account after having performed some work, frequently in proportion to his hourly rate," but recognizing that "there are occasionally situations in which money is earned even if little or no work is performed: situations where a lawyer of towering reputation provides a benefit just by agreeing to represent a client, or if the lawyer's commitment to be available has value in and of itself, or when, by accepting representation, the lawyer is disqualified from other representation. In those situations, money may actually be earned at the time the lawyer accepts the representation.") (footnote omitted). *See also In re Wagers*, 514 F.3d 1021, 1028 (10th Cir. 2007) (applying Kansas law and noting 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") (citation and quotation marks omitted). NSDP has not argued that any of the exceptional circumstances identified in *Jardine* apply here.

underlying the lien now asserted had not yet been provided.[44] That is consistent with its representations here.[45]

Accordingly, the Receiver is correct that the Receivership Order (superseded by the CRO) froze XSun's assets on October 31, 2018, including the retainer then held in NSDP's trust account, which was therefore not subject to an attorney's lien for services provided thereafter. Because the retainer was an asset of XSun at all relevant times after entry of the October 31, 2018 freeze order, NSDP was required to turn it over to the Receiver following entry of the Affiliates Order on May 3, 2019.

[44] Motion to Lift, *supra* note 12, at 5-6 (stating that "*[s]ince the freeze order was entered*, additional fees have been billed in the amount of $18,879.25, but have not been paid from the retainer" due to concern about the reach of the freeze order, and identifying future services that were expected to be paid from the retainer balance, including "an appeal from this case, handl[ing] any remaining issues before this court, assist[ing] in preparing the reports required by this court, and also to defend any claims against Solco I and XSun, in the event any are brought by Plaintiff") (emphasis added).

[45] Background, *supra*, ¶ 4.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED as follows:

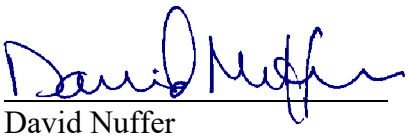
1. The $735,202.22 in XSun funds are Receivership Property;

2. Nelson Snuffer Dahle & Poulsen, PC does not have a valid attorney's lien on any portion of the $735,202.22;

3. The $735,202.22 currently held by the Receiver pursuant to the Stipulation may be retained as Receivership Property.

SIGNED July 6, 2020.

BY THE COURT:



David Nuffer
United States District Judge