

CASE NO. 19-4089

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC.,
LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,
Defendants,

BLACK NIGHT ENTERPRISES, INC., N.P. JOHNSON FAMILY L.P., SOLCO
I, LLC, SOLSTICE ENTERPRISES, INC., STARLIGHT HOLDINGS, INC., and
XSUN ENERGY, LLC

Non-Party Appellants.

On Interlocutory Appeal from the United States District Court, District of Utah,
Central Division, The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' OPENING BRIEF

Respectfully submitted,

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Oral Argument is requested.

SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rules of Appellate Procedure, Rule 26.1, none of the parties to this appeal are owned 10% or more by a public company. The following entities have the following owners and/or parent entities:

BLACK NIGHT ENTERPRISES, INC.

	Share Owner	Number of Shares
a.	DCL 16A, Inc., a Utah corporation	2000
b.	Roger Hamblin	2000
c.	LaGrand T. Johnson	1500
d.	Randale P. Johnson	1500
e.	The LaGrand T. Johnson Family Trust	1500
f.	The Randale P. Johnson Family Trust	<u>1500</u>
	TOTAL NUMBER OF SHARES	10,000

NP JOHNSON FAMILY L.P.

	Partnership Owner	Ownership Interest
a.	DCL 16A, Inc., a Utah corporation	20%
b.	Roger Hamblin	20%
c.	LaGrand T. Johnson	15%
d.	Randale P. Johnson	15%
e.	The LaGrand T. Johnson Family Trust	15%
f.	The Randale P. Johnson Family Trust	<u>15%</u>
	TOTAL	100%

SOLCO I, LLC

Owned and managed by Randale Johnson, LaGrand Johnson, Glenda Johnson

SOLSTICE ENTERPRISES, INC.

Owned and managed by Beryl Seaton of Superior Trust and Management Company, Ltd.

STARLIGHT HOLDINGS, Inc.

	Share Owner	Number of Shares
a.	DCL 16A, Inc., a Utah corporation	2000

b.	Roger Hamblin	2000
c.	LaGrand T. Johnson	1500
d.	Randale P. Johnson	1500
e.	The LaGrand T. Johnson Family Trust	1500
f.	The Randale P. Johnson Family Trust	<u>1500</u>
	TOTAL NUMBER OF SHARES	10,000

XSUN ENERGY, LLC

Owned by Solstice Enterprises, Inc.

Managed by LaGrand Johnson

/s/ Denver C. Snuffer, Jr.

Denver C. Snuffer, Jr.

Steven Paul

Attorney for Appellants

Dated: September 9, 2019

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PRIOR OR RELATED APPEALS

The following three appeals in the 10th Circuit Court of Appeals are related to this matter:

18-4119, United States v. RaPower-3, LLC, et al;

18-4150, United States v. RaPower-3, et al;

19-4066, United States v. RaPower-3, et al.

STATEMENT OF JURISDICTION

The Memorandum Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership was entered on May 3, 2019. (ECF 636) Appellants X Sun, Solstice, and Solco I filed their objection to the order within the time provided by the order on May 24, 2019. (ECF 664, ECF 665, ECF 666). The Notice of Appeal was timely filed under Rule 4(a)(1)(B)(i), F.R.A.P. on June 24, 2019. This Court has jurisdiction under 28 U.S.C. §1291(a)(2).

STATEMENT OF THE ISSUE

Whether the district court erred in ordering the joinder of the non-parties termed “Affiliated Entities” to the proceedings below, and particularly to the receivership estate, without appropriate due process.

The district court’s power and discretion in equitable receiverships is reviewed by an abuse of discretion standard. *Estate of Bishop v. Equinox Int’l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001) (“The district court, however, abuses its discretion and is not entitled to deference when its decision is “arbitrary, capricious, whimsical, or manifestly unreasonable.”) The US Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) provides a relevant discussion about due process. “Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.”¹ The right to notice and an opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”²

¹ *Id.* at 80 (citing *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864). See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385.)

² *Id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552.)

STATEMENT OF THE CASE AND FACTS

On October 31, 2018, the district court appointed Wayne Klein as a receiver over party defendants Neldon Johnson, Greg Shephard, LTB 1, RaPower3, Inc, and International Automated Systems, Inc. (ECF. 491). The party defendants filed a timely notice of appeal on October 10, 2018, and is currently the subject of appeal 18-4150 and 18-4119. On March 1, 2019, the Receiver, by motion, asked to add 13 non-party entities in the receivership estate, including Appellant Entities Solco I, LLC, and XSun Energy, LLC (who were known to the Government prior to and throughout the trial proceeding, yet the Government chose not to name them as parties at any time). On May 3, 2019, the district court granted the Receiver the requested relief, and included all 13 non-party entities in the receivership estate effective the date of the order. (ECF 636).

The order instructed all entities affected by the order to file a written objection within 21 days of the May 3, 2019 Order. Appellant Entities filed objections timely no later than May 24, 2019. (ECF 664, 665, 666). Those objections were denied on July 8, 2019 (ECF 718).

On June 24, 2019, the Appellant entities filed their notice of appeal within 30 days of the time permitted by the trial court to object to the May 3, 2019 order.

SUMMARY OF THE ARGUMENTS

Jurisdiction³ is proper here because the May 3, 2019 Order Non-Party Appellants are appealing from had the effect of appointing a receiver over Appellants.

This appeal arises from due process concerns. On May 3, 2019, Appellants were deprived of all their assets, of whatever kind and wherever situated, made part of a receivership estate without notice or hearing, and their directors, officers managers, employees, trustees, advisors, accountants, attorneys and other agents were dismissed by court order through a motion filed by a receiver in a case in which they were never parties. (Doc. 636.) Appellants were not served a summons and complaint by any means allowed under Rule 4, Fed. R. Civ. P. They were not joined as parties during the course of the proceedings. They were not allowed to file a response requiring a more definite statement or a dismissal on the pleadings. They were not afforded the opportunity to conduct any discovery. They were not able to hire any expert witnesses to help in their defense. They were unable to offer a defense to protect their interests. They were not allowed a jury trial, nor a bench trial either. They were not allowed to present evidence against claims targeting them. They were not allowed to cross-examine any witness. They were not allowed to present an opening or closing argument at a trial. They were not

³ Appellants are including this jurisdictional argument per the Court's July 16, 2019 request.

afforded any motion practice, including motions in limine to prevent incompetent witnesses or improper evidence to be excluded. Indeed, they have never been notified of the claims asserted against them.

These parties have been swept into a receivership that has taken complete control of their management and assets through only a motion. Yet, they were not given notice of the motion. They were made subject to a court order that is not grounded in any proof or opportunity to defend.

Moreover, the court's order is based only on an "adverse inference" against Appellants due to the actions of others. (Doc. 638.) That adverse inference is not based on anything Appellants did or failed to do and, after the fact, they objected to the threatened action against them. (Doc. 644.) The lower court disregarded and overruled their objections. (Doc. 680.) The lower court then punished these parties, subjected them to a receivership, removed all their management, confiscated their property, and removed any capacity from Appellants to protect themselves or their property because of what others failed to do. (Doc. 718.)

ARGUMENT

I. The Court’s Order is Immediately Appealable because it Appoints a Receiver Over Appellant Entities by Making Appellants Entities Part of the Existing Receivership Estate.

This Court has jurisdiction to hear this appeal under 28 U.S.C.S. § 1292(a)(2) which states:

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

The statute recognizes the necessity “to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence.” *Gardner v. Westinghouse Broad. Co.*, 559 F.2d 209, 212 (3d Cir. 1977) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 99 L. Ed. 233, 75 S. Ct. 249 (1955)). This is because appointing a receiver is a harsh remedy. *United States v. High Plains Livestock, LLC*, 148 F. Supp. 3d 1185, 1204 (D.N.M. 2015). Indeed, “[t]he power to appoint a receiver with authority to take custody and control of property and operate it as a going concern is a delicate one which is jealously safeguarded, and it should be exerted sparingly.” *Skirvin v. Mesta*, 141 F.2d 668, 673 (10th Cir. 1944).

In this case, the May 3, 2019 Order (Doc. 636) extended the Corrected Receivership Order (Doc. 491) to include the Appellant Receivership Entities. In relevant part, the May 3, 2019 Order states:

THEREFORE, IT IS HEREBY ORDERED that:

1. This court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities.
2. The Affiliated Entities are hereby made part of the existing receivership estate, which is being administered by court-appointed receiver Wayne Klein, in accordance with the Corrected Receivership Order.

The May 3, 2019 Order is appealable because the ruling extends the appointment of the receiver over Appellants' for the first time. It subjects Appellants to the burdens and injustice of a Receiver without due process. For this reason, this Court's jurisdiction is proper under 28 U.S.C.S. § 1292(a)(2).

II. The Appointment of a Receiver over Appellants Violated Appellants' Right to Due Process Because Appellants Were Not Afforded Notice Prior to the Entry of the May 3, 2019 Order, Nor Were They at Any Time Joined as Parties to the Underlying Case.

A. Standard of Review of Orders Relating to Equity Receiverships is Abuse of Discretion

“It is generally recognized that the district court has broad powers and wide discretion to determine relief in an equity receivership.” *SEC v. Wing*, 599 F.3d 1189, 1194 (10th Cir. 2010) (internal quotation marks and ellipsis omitted). The

district court, however, abuses its discretion and is not entitled to deference when its decision is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Estate of Bishop v. Equinox Int'l Corp.*, 256 F.3d 1050, 1055 (10th Cir. 2001) (internal quotation marks omitted).

B. Due Process, Generally.

The due process requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.* (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982)). The Due Process Clause protects against the improper deprivation of a significant property interest. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 35 F.3d 1466, 1471 (10th Cir. 1994) (citing *Fuentes v. Shevin*, 407 U.S. 67, 82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)). "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Id.* (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 6 L. Ed. 2d 1230, 81 S. Ct. 1743 (1961)); *see also Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976).

The Supreme Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Eldridge*, 424 U.S. at 333, 96 S. Ct. at 902 (citing *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974) *Phillips v. Commissioner*, 283 U.S. 589, 596-597 (1931)). See also *Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889). The “right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.” *Id.* (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

C. The Trial Court Abused its Discretion when It Deprived Appellants of Due Process When They Were Not Served With Notice, Were Not Afforded a Hearing, Or Any Other Lawful Opportunity to Be Heard Before the May 3, 2019 Order.

1. Appellants were never served.

Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. “[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.” *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946). Thus, before a court may exercise personal jurisdiction over a person or entity, there must be a basis for the party’s amenability to service of summons. This means there must be authorization for service of summons on the party. See *Omni Capital*

Int'l v. Rudolf Wolff & Co., 484 U.S. 97, 104, 108 S. Ct. 404, 409 (1987). Service of process in a federal court is governed by Rule 4 of the Federal Rules of Civil Procedure. Rule 4 was not followed in this case. Appellants have never been summoned to appear before the court and, therefore, were not brought within the jurisdiction of the federal district court in this case.

The due process clause of the Fourteenth Amendment limits the power of a court to render an order against a person. Due process requires that the person be given adequate notice of the action and be subject to the personal jurisdiction of the court. *World-Wide Volkswagen v. Woodson*, 444 US 286, 291.

Without personal jurisdiction over Appellants, the May 3, 2019 Order is of no force or effect.

2. *Without notice, appellants were deprived of their property without any meaningful opportunity to be heard.*

As stated earlier, the Court has consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Eldridge*, 424 U.S. at 333, 96 S. Ct. at 902. In this case, Appellants were never afforded a hearing of any kind. In turn, they were deprived of the benefit of defending against the Receiver's claims; of confronting or cross-examining witness and challenging the Receiver's characterization of the evidence through witnesses of their own. They were not afforded the opportunity to conduct any discovery. They were not able to hire any expert witnesses to help in their defense. They

were unable to offer a defense to protect their interests. Only after afforded such an opportunity will due process be satisfied in this manner.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the jurisdictional and constitutional concerns central to this appeal, Counsel for Appellants believe that oral argument is necessary to adequately address the issues raised in this appeal.

CONCLUSION

For the reasons stated above, Appellants request that May 3, 2019 Order be vacated and this matter be remanded to the district court for further proceedings to afford and ensure Appellants the opportunity to present evidence at a hearing in defense of the Receiver's claims against them.

Respectfully Submitted,

By: /s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Attorney for Appellants

Certificate of Compliance

Section 1. Word Count

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 2,142 words.

Complete one of the following:

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I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: /s/ Denver C. Snuffer, Jr.
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**CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY
REDACTIONS**

I hereby certify that a copy of the foregoing APPELLANTS' OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Windows Defender (virus scan up to date) and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: /s/ Denver C. Snuffer, Jr.

Attorney for Appellants/Defendants (Digital)

CERTIFICATE OF SERVICE

I, Denver C. Snuffer, Jr. hereby certify that on the 9th day of September, 2019, I served a copy of the foregoing **APPELLANTS' OPENING BRIEF**, to the following in manner indicated:

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ATTACHMENTS

1. Memorandum Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership (ECF 636)
2. Memorandum Decision and Order Overruling Objections to Including Affiliates and Subsidiaries in Receivership (ECF 718)

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;
and NELDON JOHNSON,

Defendants.

**MEMORANDUM DECISION AND
ORDER ON RECEIVER’S MOTION
TO INCLUDE AFFILIATES AND
SUBSIDIARIES IN RECEIVERSHIP**

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

District Judge David Nuffer

R. Wayne Klein, the court-appointed receiver (“Receiver”),¹ filed a motion (the “Motion”)² to extend the receivership to thirteen entities affiliated with Defendants RaPower-3 LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”), Neldon Johnson, and R. Gregory Shepard (collectively, the “Receivership Defendants”). Specifically, the Motion seeks to extend the receivership to the following (collectively, the “Affiliated Entities”):

1. Solco I, LLC (“Solco”);
2. XSun Energy, LLC (“XSun”);
3. Cobblestone Centre, LC (“Cobblestone”);

¹ See Corrected Receivership Order, [docket no. 491](#), filed November 1, 2018.

² Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Motion”), [docket no. 582](#), filed March 1, 2019; see Non-Parties Solco I, XSun Energy and Glenda Johnson’s Notice of Intent to File Opposition to Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate, [docket no. 586](#), filed March 4, 2019; Response to Receiver’s Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Response”), [docket no. 596](#), filed March 15, 2019; Neldon Johnson’s Opposition to the Receiver’s Report and Motion, [docket no. 597](#), filed March 18, 2019; Receiver’s Reply in Support of Its Motion to Include Affiliates and Subsidiaries in the Receivership Estate (“Reply”), [docket no. 602](#), filed March 29, 2019.

4. LTB O&M, LLC;
5. U-Check, Inc.;
6. DCL16BLT, Inc.;
7. DCL-16A, Inc.;
8. N.P. Johnson Family Limited Partnership (“NPJFLP”);
9. Solstice Enterprises, Inc. (“Solstice”);
10. Black Night Enterprises, Inc. (“Black Night”);
11. Starlight Holdings, Inc. (“Starlight”);
12. Shepard Energy; and
13. Shepard Global, Inc.

The Motion is based, in large measure, on the Receiver’s Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate (the “R&R”).³ The R&R was required by Paragraph 5 of the Corrected Receivership Order. The assets of these entities were frozen by that same paragraph “for the purpose of permitting the Receiver to investigate the assets, property, property rights, and interests of the” Affiliated Entities “to determine whether the assets, property, property rights, or interests of the [Affiliated Entities] derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity.”⁴ In the R&R, “[t]he Receiver recommends that the 12 affiliated entities identified in the [Corrected Receivership] Order, as well as one additional entity, U-Check, Inc., be included in the Receivership Estate as Entity Receivership Defendants.”⁵

³ Docket no. 581 (“R&R”), filed February 25, 2019.

⁴ Corrected Receivership Order, *supra* note 1, ¶ 5.

⁵ R&R, *supra* note 3, at 28-29, ep 31-32.

Each of the Affiliated Entities has received timely and sufficient notice of the Motion and been afforded an adequate opportunity to be heard with respect to it.⁶ Although Neldon Johnson and nonparties Glenda Johnson, XSun Energy, Solco, and Solstice filed responses opposing the Motion, they have not raised a genuine dispute as to any material fact set forth in support of the Motion.⁷ No other response has been filed in opposition to the Motion.

It is generally recognized that district courts have broad powers and wide discretion to determine relief in a receivership.⁸ “When a district court creates a receivership, its focus is to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.”⁹ To accomplish the purpose of the receivership, courts frequently include all subsidiaries and affiliates of receivership defendants in the receivership, regardless of where they may be located.¹⁰

⁶ See Reply, *supra* note 1, at 4-6.

⁷ See Response, *supra* note 2; Opposition, *supra* note 2. No other person, including R. Gregory Shepard, has filed anything in opposition to the Motion, and the time to do so has now expired.

⁸ *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

⁹ *Id.* (citation and internal quotation marks omitted).

¹⁰ See, e.g., *SEC v. Nationwide Automated Sys., Inc.*, No. CV-14-07249-SJO, 2014 WL 12599624, *5 (C.D. Cal. Nov. 10, 2014); *Orlowski v. Bates*, No. 2:11-cv-01396-JPM, 2014 WL 12771523, *1 (W.D. Tenn. July 28, 2014); *FTC v. Money Now Funding, LLC*, No. CV-13-01583-PHX, 2014 WL 11515024, *8 (D. Ariz. Apr. 28, 2014); *FTC v. Vacation Commc’ns Group, LLC*, No. 6:13-CV-789-ORL, 2013 WL 2468307, *7 (M.D. Fla. June 6, 2013); *SEC v. Small Bus. Capital Corp.*, No. 5:12-CV-03237-EJD, 2012 WL 12862153, *3 (N.D. Cal. June 26, 2012); *SEC v. Sunwest Mgmt., Inc.*, No. 09-6056-HO, 2009 WL 3245879, *2 (D. Or. Oct. 2, 2009); *FTC v. Direct Connection Consulting, Inc.*, No. 1:08-CV-1739, 2008 WL 11336186, *7 (N.D. Ga. May 14, 2008); *Commodity Futures Trading Comm’n v. Aurifex Commodities Research Co.*, No. 1:06-cv-166, 2007 WL 2481015, *1 (W.D. Mich. 2007); *Commodity Futures Trading Comm’n v. Wall Street Underground, Inc.*, No. Civ.A.03-2193-CM, 2004 WL 957852, *2 (D. Kan. Mar. 18, 2004); *FTC v. Sierra Pac. Mktg.*, No. CV-S-93-134-PMP, 1993 WL 78579, *6 (D. Nev. Feb. 22, 1993).

FACTUAL BASIS

The following facts are based on the evidence presented and existing record, including proof presented in hearings held April 26 and May 3, 2019.

1. For more than ten years, the Receivership Defendants promoted an abusive tax scheme centered on purported solar energy technology featuring “solar lenses” to customers across the United States. But the solar lenses were only the cover story for what the Receivership Defendants were really selling: unlawful tax deductions and credits. Their conduct, which is subject to penalty under the Internal Revenue Code, caused serious harm to the United States Treasury.¹¹ As a result, they have been enjoined from promoting their abusive solar energy scheme, ordered to disgorge their gross receipts, and required to turn over their assets and business operations to the Receiver.¹²

2. The whole purpose of RaPower, IAS, and LBT1 (collectively, the “Receivership Entities”) was to perpetrate a fraud to enable funding for Neldon Johnson. The same is true for other entities Johnson created, controls, and owns (either directly or indirectly), including Solco, XSun, Solstice,¹³ Cobblestone, LTB O&M, DCL16BLT, DCL-16A, NPJFLP, U-Check, Black Night, and Starlight. Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an

¹¹ Findings of Fact and Conclusions of Law, at 1, electronic page (“ep”) 6 (“FFCL”), [docket no. 467](#), filed October 4, 2018.

¹² See Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, [docket no. 444](#), filed August 22, 2018.

¹³ Solco, XSun, and Solstice have each made an affirmative appearance in this case. See Response, *supra* note 2, at 1.

attempt to avoid creditors.¹⁴ (U-Check, which is not specifically named in the Corrected Receivership Order, is in possession of a Cessna twin-engine airplane, which may have significant value, and which Neldon Johnson owned and controls.)¹⁵

3. Each of the Affiliated Entities is a subsidiary or affiliated entity of Receivership Defendants¹⁶ and has close associations with the Receivership Entities.¹⁷ 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.¹⁸

4. The failure of the Receivership Defendants and Affiliated Entities to cooperate or provide records,¹⁹ together with the evidence the Receiver has obtained from financial institutions, show that the Receivership Defendants and Affiliated Entities have engaged in transactions without objective economic justification or compliance with legal formalities, while concealing assets and withholding records from the Receiver.²⁰

¹⁴ FFCL, *supra* note 11, at 128, ep 133; *id.* ¶¶ 17 n.26, 41, 284; R&R, *supra* note 3, §§ B.4-5, B.7, B.10-13, F.4-5, F.7, F.10-13; *id.* at 20, 36-37, ep 23, 39-40. The term “Receivership Property” has the same meaning in this Memorandum Decision and Order as it does in the Corrected Receivership Order.

¹⁵ R&R, *supra* note 3, at 35, ep 38.

¹⁶ See Corrected Receivership Order, *supra* note 1, ¶¶ 2, 5.

¹⁷ R&R, *supra* note 3, at 35, ep 38.

¹⁸ *Id.*

¹⁹ *Id.* at 1-3, ep 4-6; see also United States’ Motion to Show Cause Why Neldon Johnson, R. Gregory Shepard, Glenda Johnson, LaGrand Johnson, and Randale Johnson Should Not Be Held in Civil Contempt of Court for Violating the Corrected Receivership Order, [docket no. 559](#), filed January 29, 2019; Receiver’s Accounting, Recommendation on Publicly-Traded Status of International Automated Systems, and Liquidation Plan, [docket no. 552](#), filed December 31, 2018; Receiver’s Initial Quarterly Status Report, [docket no. 557](#), filed January 28, 2019; Receiver’s Second Quarterly Status Report, [docket no. 608](#), filed April 15, 2019; and transcripts of proceedings April 26 and May 3, 2019.

²⁰ R&R, *supra* note 3, at 37-48, ep 40-51.

5. 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.²¹

6. Based on the Receiver's investigation of the Affiliated Entities, the Receiver has recommended that the receivership be extended to include each of the Affiliated Entities.²²

7. To fulfil the purposes of the receivership, safeguard receivership assets, administer receivership property as suitable, and achieve a final and equitable distribution of receivership assets, it is necessary to extend the receivership to include the Affiliated Entities.²³

8. Although many of the Affiliated Entities are now defunct and without assets, bringing them into the receivership estate is necessary to prevent their use to perpetuate further fraud in contravention of the receivership's purposes.²⁴

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

1. This court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities.

2. The Affiliated Entities are hereby made part of the existing receivership estate, which is being administered by court-appointed receiver Wayne Klein, in accordance with the Corrected Receivership Order.

²¹ *Id.* at 35-36, ep 38-39.

²² *Id.* at 48-49, ep 51-52.

²³ See *Vescor*, 599 F.3d at 1194.

²⁴ R&R, *supra* note 3, at 36, ep 39.

3. The “Asset Freeze” set forth in the Corrected Receivership Order shall continue to include and apply to the Affiliated Entities.

4. The directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys, and other agents of the Affiliated Entities are hereby dismissed, and the powers of any general partners, directors, or managers are hereby suspended. Such persons shall have no authority with respect to the Affiliated Entities’ operations or assets, except to the extent as may hereafter by expressly granted by the Receiver or the court.

5. No person holding or claiming any position of any sort with any of the Affiliated Entities shall possess any authority to act by or on behalf of any of the Affiliated Entities.

6. The Receiver shall have all powers, authorities, rights, and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners of the Affiliated Entities under applicable state and federal law, by the governing charters, bylaws, articles, or agreements in addition to all powers and authority of a receiver at equity.

7. In carrying out his responsibilities as receiver, the Receiver shall have all control over assets, books, records, and accounts of Affiliated Entities and all powers and rights granted to the Receiver in the Corrected Receivership Order.

8. The Receivership Defendants, their subsidiaries, any affiliated entities, any affiliated individuals (including spouses and other family members), and the past and present officers, directors, agents, managers, servants, employees, attorneys, accountants, general and limited partners, trustees, and any person acting for or on behalf of the Affiliated Entities, shall cooperate with and assist the Receiver in the performance of his duties and obligations relating to

the Affiliated Entities to the same extent as required in the Corrected Receivership Order with respect to the Receivership Defendants.

9. All 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 to the same extent as required by the Corrected Receivership Order with respect to Receivership Defendants.

10. As the holder of all ownership and management interests of the Affiliated Entities, the Receiver is granted power and authority to transfer all assets (including intellectual property and real estate) owned or controlled by foreign-based entities to the United States and to liquidate or abandon all foreign entities created by Receivership Defendants.

11. The stay of litigation set forth in the Corrected Receivership Order shall apply to the Affiliated Entities to the same extent as it does to the Receivership Entities.

12. All other provisions of the Corrected Receivership Order shall 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.

13. Any person who may have an objection to this Memorandum Decision and Order, whether in whole or in part, must file such objection in this case within 21 days of receiving actual notice of this Memorandum Decision and Order or else such objection shall be considered waived.

Signed May 3, 2019.

BY THE COURT:



David Nuffer
United States District Judge

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;
and NELDON JOHNSON,

Defendants.

**MEMORANDUM DECISION AND
ORDER OVERRULING OBJECTIONS
REGARDING INCLUSION OF
AFFILIATES AND SUBSIDIARIES**

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

District Judge David Nuffer

The Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership (“Affiliates Order”) states that “[a]ny person who may have an objection to” the Affiliates Order, “whether in whole or in part, must file such objection in this case within 21 days of receiving actual notice of” the Affiliates Order “or else such objection shall be considered waived.”¹ Since then, XSun Energy LLC has filed a timely objection to the Affiliates Order;² Solco I LLC has filed a timely objection to the Affiliates Order;³ and Solstice Enterprises Inc., Black Night Enterprises Inc., Starlite Holdings Inc., and N.P. Johnson Family Limited Partnership have filed a timely objection to the Affiliates Order.⁴ All three objections

¹ [Docket no. 636](#) (“Affiliates Order”), filed May 3, 2019.

² XSun Energy LLC’s Objection to Order on Memorandum and Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 664](#), filed May 23, 2019; *see* Receiver’s Response to Objections to Memorandum Decision and Order Including Affiliates and Subsidiaries in Receivership Estate (“Response”), [docket no. 687](#), filed June 6, 2019.

³ Solco I LLC’s Objection to Order on Memorandum and Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 665](#), filed May 23, 2019; *see* Response, *supra* note 2.

⁴ Solstice Enterprises Inc., Black Night Enterprises Inc., Starlight Holdings Inc., N.P. Johnson Family Limited Partnership’s Objection to Order on Memorandum and Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 675](#), filed May 24, 2019; *see* Response, *supra* note 2; *see also*

(collectively, the “Objections”) are essentially identical and argue the same thing: that the Affiliates Order violates the objectors’ procedural due process rights.

XSun Energy LLC, Solco I LLC, and Solstice LLC previously made this same argument (nearly verbatim), and it was rejected.⁵ For the same reasons as before, it is rejected again today.

It has already been established that each of the objectors “received timely and sufficient notice of the” Receiver’s Motion to Include Affiliates and Subsidiaries in the Receivership Estate⁶ and was “afforded an adequate opportunity to be heard with respect to it.”⁷ The Objections do not raise a genuine dispute regarding this issue or as to any other material fact stated in the Affiliates Order. As a result, the objectors were afforded due process prior to issuance of the Affiliates Order, and, by allowing them to raise further objections after that order was entered, they were afforded additional due process.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Objections⁸ are OVERRULED.

Signed July 8, 2019.

BY THE COURT:



David Nuffer
United States District Judge

Solstice Enterprises Inc., Black Night Enterprises Inc., Starlight Holdings Inc., N.P. Johnson Family Limited Partnership’s Objection to Order on Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, [docket no. 666](#), filed May 23, 2019; Notice of Deficiency, [docket no. 667](#), filed May 23, 2019.

⁵ Response to Receiver’s Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate, [docket no. 596](#), filed March 15, 2019; *see* Affiliates Order, *supra* note 1.

⁶ [Docket no. 582](#), filed March 1, 2019.

⁷ Affiliates Order, *supra* note 1, at 3.

⁸ [Docket no. 664](#), filed May 23, 2019; [Docket no. 665](#), filed May 23, 2019; [Docket no. 675](#), filed May 24, 2019.