Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (#15593) Joshua.d.egan@gmail.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960
Attorneys for Defendants

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, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **MOTION TO LIFT ASSET FREEZE ORDER AS TO SOLCO I AND XSUN ENERGY** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to Rule 59(e) of the Federal Rules of Procedure, Defendants collectively move to alter or amend the Receivership Order[1] entered in this case. The assets of non-parties Solco I and XSun Energy have been frozen without due process. Accordingly, the asset freeze order ought to be dissolved as to these two non-parties. Solco I, LLC and XSun Energy, LLC were known to the Plaintiff before this case was filed and Plaintiff elected to not include them as

[1]ECF 491, Corrected Receivership Order.

parties in this case. By deliberately excluding them from the proceedings, the Plaintiff should now be barred from any form of relief against them.[2]

Funds belonging to named Defendants IAS and RaPower have been frozen at Central Bank, and they are not the subject of this motion. IAS funds in the amount of $1,353,811.57[3] and RaPower funds in the amount of $76,758.02[4] have been frozen at Central Bank.

I. Argument

Grounds warranting a motion to alter or amend the judgment pursuant to Rule 59(e) include "the need to correct clear error or prevent manifest injustice."[5] Paragraph 1 of the Corrected Receivership Order in subparagraphs a and b freezes the assets of Solco I, LLC ("Solco I")[6] and XSun Energy, LLC ("XSun"). Both of these entities were deliberately omitted from this case by the Plaintiff.

TREATMENT OF SOLCO 1, LLC AND XSUN ENERGY, LLC

Both Solco I and XSun Energy were named recipients of the Kirton & McConkie tax Memoranda and both received and relied on legal assistance provided by Kirton & McConkie.[7] Exhibits naming both Solco I and XSun were used throughout discovery and as trial exhibits. Defendant Neldon Johnson was asked about both these entities in his deposition and also during depositions of other Defendant entities[8]. Yet neither Solco I nor XSun were named as parties in

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[2] *See United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) (Because the United States failed to join defendant's companies, Court questioned whether it would have had jurisdiction to order disgorgement of revenue obtained by defendant's non-party companies and entities that were not before the court.); *see also Bolsa Res., Inc. v. AGC Res., Inc.*, 2013 U.S. Dist. LEXIS 137604, *7 (Colo.) (District court declined to order non-party corporations to disgorge stock to satisfy judgment.)

[3] IAS account ends in numbers 123.

[4] RaPower account ends in numbers 063.

[5] *Alpenglow Botanicals, Ltd. Liab. Co. v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (citing *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)).

[6] Solco I, LLC is a Utah company owned 33 1/3% each by Randale Johnson, LaGrand Johnson, and Glenda Johnson.

[7] See, e.g., ¶Ex. 358, Ex. 364, Ex. 370

[8] Johnson Dep., Vol. 1, 82:8-83:6, LTB1 Dep. 78:22-79:5, 79:12-80:9, IAS Dep. 38:10-40:6, 45:4-17; See generally Pl. Ex. 355; IAS Dep. 47:2-19, Johnson Dep., vol. 1, 79:8-81:7.

this case. Plaintiff made a strategic decision to exclude these entities and leave them out of the pleadings, discovery, and trial rather than naming them at the outset or asking the Court for leave to join these non-parties once the case was pending. That strategic decision has excluded both of these parties from participating and presenting any defense to Plaintiff's claims, if Plaintiff has any claim against them.[9]

Now that both of these entities know what Plaintiff intends to show as proof of an "illegal scheme" and "damage to the Treasury," neither Solco I nor XSun can be surprised in the event Plaintiff attempts to bring a new case against them. Both of these parties will be able to hire expert accounting witnesses to track for their defense their sources and uses of funds. Both of these parties can hire forensic witnesses to show that none of their sales resulted in any harm to the Treasury. Both of these parties can bring third-party claims against Kirton & McConkie for the tax advice they received and relied upon. If the Plaintiff brought a case against these two parties, it would involve different proof and cover a significant change in scope than the current case.

Plaintiff's decision not to name Solco I and XSun has deprived these non-parties of the right to participate in the current proceedings, yet now the freeze order subjects them to punishment along with Defendants who did have their day in court. This violates Solco I and XSun Energy's due process rights.

No Defendant owns an interest in XSun or Solco I. Mr. Johnson has served as a manager, but owns no interest in X Sun, 100% of it is owned by Solstice Enterprises. Neldon Johnson has filed (or will be filing) an Amended Declaration of Neldon P. Johnson on behalf of himself, RaPower-3, LLC, International Automated Systems, Inc, and LTB1, LLC in relation to the

[9] *C.f.* *Glenny v. Am. Metal Climax, Inc.*, 494 F.2d 651, 653 (10th Cir. 1974) ("Because appellants are demanding monetary and injunctive relief for damages caused solely by this smelter, we believe that Blackwell Zinc, although a wholly owned subsidiary of ALZ and AMAX, has at least an interest in the subject of this action. Without its joinder, Blackwell Zinc's ability to protect that interest may be impaired.")

required Compliance Verification of ECF Doc. 467, which sets out the various entities and ownership.

Mr. Johnson served as a manager of Solco I, but does no longer and has no ownership interest in it.[10] The owner of XSun, Solstice Enterprises, is a foreign corporation protected under trade agreements including the International Centre for Settlement of Investment Disputes.[11] Counsel for Solstice Enterprises is in Nevis and will likely claim any action involving that entity must be determined according to the ICSID, jurisdiction over such claims being established in Article 25.

The current case outcome cannot be used as either res judicata or collateral estoppel as against these two non-parties.[12] They are not bound by any outcome in this case because these non-parties are not in privity with the parties to this case nor did these non-parties have a full and fair opportunity to litigate their claims and defenses in the bench trial. These two entities are uniquely the recipients of a legal memorandum addressed to them and providing them legal advice on how to proceed with plans to sell Fresnel solar lenses.

It is likely the unique facts involving these non-parties motivated Plaintiff to exclude Solco I and XSun Energy from the named Defendants in the case rather than address their unique position. Plaintiff elected to avoid the expected advice of counsel defense that these two non-parties would have raised. Additionally, these two non-parties would have a third-party complaint

[10] Solco I is owned by Randale Johnson, LaGrand Johnson and Glenda Johnson.

[11] The United States entered into the agreement on August 27, 1965 and it became of force on October 14, 1966, conferring on the ICSID the jurisdictional authority to resolve conflicts involving foreign corporations and the United States. Subsequent bilateral trade agreements by the US consented to ICSID arbitration of disputes with foreign corporations including Nevis companies.

[12] *See Nwosun v. Gen. Mills Rests.*, 124 F.3d 1255, 1257 (10th Cir. 1997) ("Res judicata requires the satisfaction of four elements: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.")

against their legal counsel who guided their business, and both Solco I and XSun will be entitled to a jury trial on that third-party complaint. Further, no funds belonging to Solco I or XSun were ever mingled with funds belonging to any of the named Defendants. Both Solco I and XSun sold and collected their own sales revenue and kept those funds apart from any of the Defendants. Neither Solco I nor XSun advertised on the internet, nor did either one operate an internet site or page in which they solicited sales. No doubt these, and other factors, weighed in Plaintiff's decision to not bring a claim against XSun and Solco I. Nevertheless, and despite Plaintiff's reliance upon legal memoranda evidence addressed to these entities, Plaintiff elected to not bring any claims against them.

At present there is a freeze on funds belonging to XSun Energy in the amount of $224,093.73 at Central Bank, and funds belonging to Solco I in the amount of $265.11 at Central Bank. These should be released.

NON-REFUNDABLE LEGAL RETAINER:

XSun has also deposited a non-refundable legal retainer in the trust account of Nelson, Snuffer, Dahle & Poulsen, which is not part of the freeze. However, out of an abundance of caution, this issue will be addressed separately. Although the retainer is not property that should be viewed as frozen because the client does not own the property,[13] counsel is bringing this to the attention of the Court to get immediate clarification. The retainer balance at present is in the amount of $735,202.22, and is intended to be sufficient to fully fund an appeal from this case,

[13] As the Utah State Bar Ethics Advisory Opinion Committee has explained, "Certainly, in some contexts fixed-fee contracts are definitely reasonable. In an article criticizing the Cooperman opinion, Professor Stephen Gillers points out that in some instances (such as complex commercial or criminal litigation), a lawyer's commitment to be available has value in and of itself. In addition, he notes that an attorney's acceptance of a matter, even for a short while, may, on conflicts grounds, disqualify the attorney and his firm from accepting other matters. A fixed-fee agreement in these instances compensates the attorney in part for accepting that conflict." Utah Ethics Opinions, USB EAOC Opinion No. 136, p. 2, citing *All Non-Refundable Fee Agreements Are Not Created Equal*, New York Law Journal, February 3, 1993. Here the law firm has turned down other clients to make time available to accomplish the multi-year task of pursuing representation in this case and on 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 I and XSun, in the event any are brought by Plaintiff. In the event of a successful appeal, both Solco I and XSun will be benefitted by having all claims against Defendants resolved in Defendants' favor, leaving no risk of any subsequent claim against Solco I and XSun.

Since 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 because counsel wants clarification from the Court first. This amount is due and owing at present and, if the stay order applies to the non-refundable retainer, it needs to be released from the stay to allow legal fees to remain current.[14] There are numerous on-going requirements that require attention from legal counsel, and in order for that compliance to happen counsel must be employed and paid.[15]

The non-refundable retainer funds should be available for its intended purpose to defend against the Plaintiff's claims. At a minimum, counsel has a statutory lien against the retainer[16] and because XSun Energy is not a party, and the funds are not controlled by any Defendant, the funds ought to be available for use for the defense of both the present litigation and pending appeals.[17] If a claim is brought against XSun Energy or Solco I, the retainer is intended to also fund that defense.

In the Court's August 22, 2018 Order, the Court specifically determined there was nothing intended to "deprive any Defendant of the right to appeal orders in this case or otherwise defend this action through counsel (paid for from sources other than Receivership Property) of

[14] The last billing does not include fees incurred in November, and therefore those fees are not included in the $18,897.25 amount.
[15] See, ECF Doc. 467, 491.
[16] See, Utah Code Ann. § 38-2-7.
[17] See, ECF Doc. 444, page 28 (¶8),

Defendant's own choice."[18] The retainer amount is clearly not part of the Receivership Property, and cannot become part of the Receivership Property without a separate lawsuit brought against these two parties on which the Plaintiff ultimately prevails. The retainer was intended to provide for a defense of such a claim. It would be altogether improper to deprive Solco I and XSun Energy from the right to use their own property to defend claims against them.

Although the retainer amounts are not part of the freeze order to counsel's understanding, counsel would like the Court to clarify and confirm that this is also the Court's intent and understanding.

CONCLUSION

For the reasons stated above, we request that the Corrected Receiver Order be amended or an order of this court is entered directing the release of the freeze on property belonging to non-parties Solco I and XSun Energy, and in particular that the Court approve the non-refundable retainer in possession of Nelson, Snuffer, Dahle & Poulsen. Both of these parties should not have their assets frozen. In any event it is important for the freeze to exclude legal counsel's retainer, even if the Court decides to defer addressing the other funds belonging to these two until later. Counsel cannot continue representation without compensation.

Dated this 16th day of November, 2018.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Joshua D. Egan
Attorneys for Defendants

[18] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **MOTION TO LIFT ASSET FREEZE ORDER AS TO NON-PARTIES** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
__X__ Electronic Service via Utah Court's e-filing program

/s/ Steven Paul
Attorneys for Defendants