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

On November 16, 2018, Defendants filed a motion to lift the asset freeze order as to Solco I, LLC and XSun Energy, LLC pursuant to Fed. R. Civ. P. 59(e).[1] Defendants assert the court must "correct clear error or prevent manifest injustice."[2] The crux of their argument seems to be that the court could not freeze the assets of Solco I, LLC and XSun Energy, LLC[3] because we did not name those entities as Defendants in this suit and, therefore, they were deprived of due process.[4] But including these entities in the asset freeze was a decision well-grounded in the evidence adduced at trial, and need not be reconsidered. Further, the procedures outlined in the Receivership Order provide due process for all the affiliated entities and subsidiaries included in the order. Defendants are also appealing all relevant orders and will have the opportunity to be heard in the appeal on these issues as well.[5]

In making their motion, Defendants fail to satisfy the standards under Fed. R. Civ. P. 59(e) for altering or amending a judgment – they have not provided an intervening change in controlling law, newly discovered evidence, or shown that the asset freeze order should be amended to prevent clear error or manifest injustice. As such, Defendants' motion should be

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[1] ECF Doc. No. 509.

[2] *Id.* at 2.

[3] In their motion, Defendants state that the funds of XSun Energy and Solco I at Central Bank have been frozen in the amounts of $224,093.73 and $265.11, respectively. *Id.* at 5. Subsequently, counsel for Defendants filed an errata stating that the funds were actually at Bank of American Fork and not Central Bank. ECF Doc. No. 512. Counsel for the United States subsequently learned that the funds held by Bank of American Fork on behalf of XSun Energy and Solco I have been turned over to the receiver and that he plans to retain those funds separately so that he can return them if the Court determines they are not Receivership Property or lifts the asset freeze with respect to those funds.

[4] *Id.* at 2-5.

[5] ECF Doc. No. 472. Presumably, as XSun has deposited a "non-refundable legal retainer" in the trust account of Nelson, Snuffer, Dahle & Poulsen which is intended to fund the appeal of this case, Defendants and their counsel will also represent the interests of XSun in that appeal. *See*, ECF Doc. No. 509, at 5-6.

denied. In short, Solco I and XSun's funds, including the retainer, should remain frozen so that the Receiver may perform his duties to determine what assets are Receivership Property.

I. The decision to include Solco I and XSun in the asset freeze was well-supported by the evidence.

The decision to grant or deny a motion under Rule 59(e) is committed to the Court's discretion.[6] Under Rule 59(e), a court may alter or amend a judgment it has entered if there is "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice."[7] However, a Rule 59 motion is not appropriate to revisit issues that have already been addressed or to advance arguments or new supporting facts that could have been addressed in prior briefing.[8]

The Tenth Circuit has not precisely defined "manifest injustice" within the meaning of Rule 59(e), but the term is commonly defined as "[a] direct, obvious and observable error in a trial court..."[9] Defendants have failed to meet this standard. The evidence adduced at trial supports the Court's decision to include Solco I and XSun in the Receivership Order and to

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[6] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

[7] *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). Although Defendants' motion is made pursuant to Rule 59(e), the Receivership Order is not a final "judgment" with respect to Solco I and XSun. This Court may still however consider Defendants' motion as it has the inherent power to construe the motion as a motion for reconsideration that may have been made pursuant to other Rules. *See, e.g., Balding v. Sunbelt Steel Texas, Inc.*, 2017 WL 1435719, at *4 (D. Utah. 2017); *FDIC v. Arciero*, 741 F.3d 1111, 1117 (10th Cir. 2013); *Hannon v. Maschner*, 981 F.2d 1142, 1144 n.2 (10th Cir. 1992). The standards for a motion for reconsiderations under Rules 52(b), 54(b), and 60(b) are similar to the standard for a Rule 59(e) motion. But even under the most lenient standard, Defendants' motion must be denied.

[8] *Driessen v. Sony Music Entertainment*, 2015 WL 5007927 at *2 (D. Utah), (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1242-44 (10th Cir. 1991)).

[9] *Tri-State Truck Ins., Ltd. v. First Nat. Bank of Wamego*, 2011 WL 4691933 at *3 (D. Kan. 2011) (quoting Black's Law Dictionary 1048 (9th ed. 2009).

extend the asset freeze to those entities.[10] Defendants have not provided any evidence that the Court's decision should be altered or amended. Further, the Receivership Order itself provides Solco I and XSun with a notice and opportunity to be heard before any assets are deemed Receivership Property, thereby providing them with due process.

A. The evidence supports the decision to include Solco I and XSun in the asset freeze.

While Defendants do not explicitly argue that the Receivership Order should be altered or amended because of "newly discovered evidence," they cite to Neldon Johnson's Amended Compliance Verification[11] and make assertions about Solco I, XSun, and Solstice Enterprises in an attempt to present "new evidence."[12] Defendants' motion does not contain any admissible or credible evidence[13] and further evidences why the Receiver should be permitted to investigate whether Solco I and XSun's assets should be included as Receivership Property.

[10] Regardless of whether Solco I and XSun were named as parties, the Court has the inherent power to freeze their assets. Solco I and XSun participated in the abusive solar energy tax scheme (and conducted no other business) and may also be holding funds of the Receivership Defendants. As such, they have no legitimate claim to their assets and the freeze should remain in place with respect to all of their assets. *See e.g.*, *S.E.C. v. Friedland*, 2018 WL 1193539, at *6 (D. Colo. 2018) (assets of relief defendants frozen where the relief defendants did not have a legitimate claim to the assets); *S.E.C. v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998) ("[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.").

[11] ECF Doc. No. 510, filed the same day.

[12] Markedly absent from their motion however, is how/why Defendants have standing to raise this argument on behalf of Solco I and XSun or whether counsel for Defendants is now also representing Solco I and XSun on these issues. This quagmire further illustrates Defendants' lack of respect for corporate formalities and legalities that may stand in the way of pursuing their own agenda.

[13] *FDIC v. Arciero*, 741F.3d 1111, 1118 (10th Cir. 2013) (newly discovered evidence must be both admissible and credible) (citing *Goldstein v. MCI WorldCom*, 340 F.3d 238, 257 (5th Cir. 2003)).

Defendants assert that Neldon Johnson has no ownership interest in or control over Solco I or XSun.[14] But this assertion is contradicted by the evidence adduced at trial.[15] Defendants' assertions are supported only by the motion (which is not evidence) and the post-hoc self-serving "Amended Compliance Verification" of Neldon Johnson. This Court has already found that Neldon Johnson lacks credibility[16] and does not respect corporate formalities.[17] Defendants' attempts to introduce purported facts about Solco I and XSun lack any semblance of credibility at this juncture, especially when their objections about including these entities in the "solar scheme" were previously considered and did not alter the Court's findings or conclusions.[18]

Defendants chose to rest their case without calling a single witness. [19] Defendants made this choice after the hearing the testimony of 25 witnesses (both live and via deposition designation) in Plaintiff's case-in-chief. And, as Defendants so aptly point out in their motion, questions about Solco I and XSun were asked during discovery, during depositions, and at trial. Defendants were on notice of the fact that these entities' gross receipts were part of the proof adduced at trial. Factual findings were also made about Neldon Johnson's control and ownership of these entities.[20] Defendants' belated attempt to try and distinguish Solco I and XSun from

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[14] ECF Doc. No. 509, at 3-4.

[15] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF Doc. No. 467 at 13, ¶ 41; at 82, ¶¶ 389, 390; at 133.

[16] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF Doc. No. 467 at 51.

[17] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF Doc. No. 467 at 13, ¶ 41; at 82, ¶¶ 389, 390; at 133; Tr. 2519:8-2520:1, ECF Doc. No. 429-1.

[18] ECF Doc. No. 452, Defendants' Objections to Proposed Findings of Fact and Conclusions of Law, at 16-19, 22, 60-61; *RaPower-3*, Findings of Fact and Conclusions of Law, ECF Doc. No. 467, at 2.

[19] Tr. 2379:21-2380:4.

[20] *RaPower-3*, Findings of Fact and Conclusions of Law, ECF Doc. No. 467 at 13, ¶ 41; at 82, ¶¶ 389, 390; at 133; *see also*, ECF Doc. No. 351, United States' Brief on Disgorgement. The fact that XSun also provided the deposit for

Neldon Johnson and the other Receivership Defendants is merely another attempt to delay the repayment of their ill-gotten gains to the U.S. Treasury. There is no "manifest injustice" in not allowing Defendants to keep the proceeds of their wrongful conduct or use it to further their own agenda,[21] especially when the Receiver has not yet made his determination and recommendation as to whether the assets of Solco I and XSun should be considered Receivership Property.

B. Solco I and XSun are receiving due process.

As a general rule, due process requires that a person be given notice and an opportunity to be heard before being deprived of a property interest.[22] As outlined above, the evidence adduced at trial supports the conclusion that Neldon Johnson owned or controlled Solco I and XSun. Throughout this litigation, Defendants have made arguments on behalf of Solco I and XSun – including the lack of due process.[23] Accordingly, Defendants and Solco I and XSun have actually received notice and an opportunity to be heard. Defendants' have failed to present any "new evidence" or other basis to disturb this Court's order. Due process has been satisfied.

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a "non-refundable retainer" for Defendants' appeal of this case only serves to further support the Court's conclusions on ownership and control.

[21] *See S.E.C. v. Traffic Monsoon, LLC*, 245 F.Supp.3d 1275, 1303 (D. Utah 2017) (concluding that a civil defendant may not use ill-gotten gains to fund a defense); *S.E.C. v. Grossman*, 887 F.Supp. 649, 661 (S.D.N.Y. 1995) (In denying Defendants' request to modify the asset freeze to allow for the payment of attorneys' fees, the Court noted that "it is well-established that there is no right to use the money of others for legal services.").

[22] *United States v. 51 Pieces of Real Property Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994) (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1972)).

[23] *See e.g.*, ECF Doc. No. 452, Defendants' Objections to Proposed Findings of Fact and Conclusions of Law; ECF Doc. No. 461, Defendants' Objections to Plaintiff's Proposed Receivership Order. Defendants' objections were found to be without merit or otherwise overruled. *See*, ECF Doc. No. 467, Findings of Fact and Conclusions of Law; ECF Doc. No. 491, Corrected Receivership Order. Defendants have made these arguments throughout the case without explaining why they have authority to make these arguments on behalf of Solco I and XSun all while maintaining that Solco I and XSun are wholly unrelated to the Defendants.

Defendants have already filed their notice of appeal on all relevant orders, including the Receivership Order and the asset freeze.[24] Defendants will have an opportunity, if they choose, to raise Solco I and XSun's alleged due process violation in their appeal given that their objections on the basis of due process were overruled in the orders they are appealing.

However, regardless of Defendants' capacity to make arguments on behalf of Solco I and XSun, these entities are still receiving due process by the terms of the Receivership Order.[25] Under the terms of the Receivership Order, the Extended Asset Freeze that applies to Solco I and XSun lasts for 120 days. During that time, the Receiver should investigate all subsidiaries and affiliated entities to determine whether any of their assets should be included as Receivership Property. Once the Receiver completes his investigation, he will file a report and recommendation with the Court. This procedure will provide notice to Defendants and their subsidiaries and affiliated entities an opportunity to be heard. Defendants have failed to establish that due process is lacking.

C. The retainer should remain frozen.

In Defendants' motion, Defendants disclose that XSun deposited a "non-refundable legal retainer in the trust account of Nelson, Snuffer, Dahle & Poulsen, which is not part of the freeze." But Defendants do not provide any details about the deposit – such as when the deposit was made, or the source of the funds. The initial asset freeze was put into place on August 22, 2018.[26] Without knowing when the deposit was made, it is unclear whether the funds are subject

[24] ECF Doc. No. 472.

[25] ECF Doc. No. 491, at 3-5.

[26] ECF Doc. No. 444.

to the asset freeze. The mere fact that the funds are currently in the possession of Nelson, Snuffer, Dahle & Poulsen does not mean that the funds are not property of the Receivership Defendants.[27]

Counsel states that they are bringing this to the attention of the Court to get "immediate clarification," and presumably pay their accrued fees out of the non-refundable retainer. However, their motion is devoid of any details about the retainer that would permit the Court to determine whether the retainer funds are Receivership Property. [28] Defendants' counsel also fails to include any explanation of their efforts to ascertain the source of the funds and assure the Court that the "client does not own the property."[29]

The motion is also made well before the Receiver has had an opportunity to conclude his investigation into subsidiaries and affiliated entities as contemplated by the Receivership Order. As such, and because Defendants have failed to meet their burden to show that the Receivership Order and Extended Asset Freeze should be altered or amended, the Court should not release the retainer funds at this juncture. Rather, the Court should permit the Receiver to conduct his

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[27]Generally, funds held in a lawyer's trust account are not considered property of the attorney but property of the client. *See* Utah Rules of Professional Conduct 1.15; *Utah State Bar v. Jardine*, 289 P.3d 516, 528 (Utah 2012); *see also*, Utah State Bar Ethics Advisory Opinion No. 12-02, 2012 WL 8416318, at *4-5 ("Given the prohibition on unreasonable fees under Rule 1.5, there is no such thing as a fully nonrefundable fee. … To the extent that Utah State Bar Ethics Advisory Opinion No. 136 suggests otherwise, it is hereby superseded by the instant opinion.").

[28] In light of the Receivership Order provisions permitting the Receiver or the United States to bring contempt proceedings for failing to abide by the Receivership Order, the United States is contemplating steps it may take to ascertain more information about XSun's purported retainer and whether the asset freeze has been violated – including the source and date of the deposit. Defendants' motion fails to provide sufficient facts on its face to determine whether the funds should be considered Receivership Property. However, if the Court determines a hearing is necessary on this motion, given counsel's request for "immediate clarification" on the issue, the United States requests the Court order persons with knowledge of XSun's ownership, control, management, and financials be ordered to appear at the hearing and/or a deposition prior to the hearing.

[29] *See FTC v. Assail, Inc.*, 410 F.3d 256, 265 (5th Cir. 2005); *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1144 (9th Cir. 2010) (recognizing that in the context of an FTC enforcement action that "an attorney is not permitted to be willfully ignorant of how his fees are paid" when an asset freeze has been ordered.).

investigation in accordance with the Receivership Order and revisit the issue once the Receiver has filed his recommendation and report.

II. Conclusion.

Because Defendants have failed to make the requisite showing under Fed. R. Civ. P. 59(e) and because the Receivership Order provides due process to Solco I and XSun (and other subsidiaries and affiliated entities), this Court should deny Defendants' motion, permit the Receivership to proceed as outlined in the Order, and continue the asset freeze on the retainer.

Dated: November 30, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin R. Hines
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