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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., LTBI,
LLC, R. GREGORY SHEPARD, and
NELDON JOHNSON,

Defendants.

Civil No. 2:15-cv-00828-DN-EJF

**OPPOSITION TO MOTION FOR
LEAVE TO COMMENCE LEGAL
PROCEEDINGS (DOC. [628](#))**

Judge David Nuffer

COME NOW XSun Energy, LLC (“XSun”) and Solco I, LLC (“Solco”), Solstice LLC, Randale Johnson, Glenda Johnson, and LeGrand Johnson and submit this Opposition to the Receiver’s Motion for Leave to Commence Legal Proceedings, as follows:

I. The Receiver’s Request Should be Delayed and Notice Given.

The Receiver’s Motion is an improper *ex parte* communication between the Receiver and this Court. It affects the interests of unnamed parties while denying them any notice of this communication or the right to object. As a result, those directly targeted are denied notice and unable to participate before their interests are affected. Accordingly, the Motion violates both

attorney ([Rule 3.5\(b\)](#)) and judicial ([Rule 2.9\(A\)](#)) professional ethics. The Court tacitly acknowledged this defect by its Order instructing “any party wishing to object” to do so by May 9, 2019. (Docket Text Order, Doc. 631.) The Court’s minute order raises the questions: Who is the party(ies) that might wish to object? Why issue an order to unnamed party unless the intention is to apprise them and remove the taint of an *ex parte* communication?

It is clear the Receiver intends to obtain an advantage by filing a motion he expects will notify none of his targets, which, if the Court grants, will violate Judicial Conduct Canon [2.9\(A\)\(1\)\(a\)](#). This obvious defect cannot be cured without giving notice to the unnamed targets of the Motion and affording them the opportunity to respond.¹

The Receiver’s motion, in effect, asks this Court to ignore due process by failing to provide to the Receiver’s targets an opportunity to weigh in on a proposed order that dramatically affects their rights. For example, to ask that the order appoint Judge Nuffer in advance as the exclusive judge to hear all claims may be so significant to some of the targets that they ought to be permitted to weigh in before that exclusive appointment be considered. If that provision is removed, and the targets were served process, with the normal random assignment of judge(s) taking place, then Judge Nuffer would not be assigned to any of these cases. Judge Nuffer has resigned from the Central District and been reassigned to the Southern District of Utah. Consequently, he would not be the original judge for any of the Receiver’s proposed cases. The Receiver could always file a

¹ Of course, this Court could not cure the defect since the Court itself cannot identify the unnamed targets. This whole filing is a waste of judicial resources. If any party objects, and they were never a target of the Receiver’s request, that Party has incurred fees and expense that were meaningless, and a waste of resources for the Court, the Party, and all involved. If on the other hand, the Party correctly intuit that they are a party of interest to the Receiver, the objection even if filed, is meaningless since no specific basis is disclosed upon which the Receiver seeks authority to file suit. In essence, the Receiver is asking for a “blank check.” If this Court grants the Receiver’s Motion the Receiver will obtain complete authority and autonomy to decide whether a suit is merited without having to move through the gatekeeper function this Court should exercise on a case-by-case basis.

motion to reassign the case, and each target could respond to that motion, and the randomly assigned judge could weigh the reasons and determine if the case should be handled by her or sent to Judge Nuffer. Clearly this issue ought to be addressed after the targets are involved, not before. Moreover, objections to Judge Nuffer are likely, and such objections to him ought not be heard by him, but by another judge.

There is no reason to assign one judge to hear an unknown number of cases, each of which may involve a jury. If the target elects to have a jury, which undoubtedly would occur with the parties we represent in this objection (Solco I, XSun, Randale Johnson, LeGrand Johnson and Glenda Johnson), then there is little advantage or reason to have Judge Nuffer be the only judge assigned to handle the matter. Indeed, given the time required to conduct discovery, seat and complete jury trials, there is little reason to have a single judge hear what the Receiver implies will be a number of new matters. In fact, good reason exists to spread the burden among the entire bench, not only because of the apparent volume, but also because of the unique facts of each case. The division of labor among different judges will prevent any preconceived opinions from prejudicing the interests of individual targets.

There may be, and likely are, concerns about each of the individual issues raised by this motion for each of the unnamed targets. The Receiver is attempting to avoid any threshold showing to justify filing against a specific target, demonstrate a basis to name/sue them, and get carte blanc authority to sue at will twelve categories of targets. (ECF [628](#), ¶3.) Those issues cannot be addressed if the targets' identities remain concealed before this motion is decided. If, however, the Receiver is required to follow the normal process and provide names for the targets, then each one would be afforded the due process opportunity to provide whatever input they may have to fully inform the Court before the Receiver is granted authority to proceed against them.

The idea that assets would be moved if notice were given is purely speculative, an extraordinarily negative view of those involved, and assumes the worst sort of conspiratorial motivation by all those involved. Worse still, two of the twelve categories clearly identify lawyers as intended targets. (ECF [628](#), ¶¶3 III and XI.) The contents of the Receiver's Motion offends the Utah Rules of Professionalism:

Lawyers shall not, without adequate factual basis, attribute to other counsel or the court improper motives, purposes, or conduct. Lawyers should avoid hostile, demeaning or humiliating words in written and oral communication with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

Utah Standards of Professionalism and Civility, 3.

Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

Utah Standards of Professionalism and Civility, 4.

These rules demonstrate how ill-advised it is to lump twelve categories of targets into an indiscriminate Motion seeking authority to sue, while suggesting sinister, dishonest and potentially criminal wrong-doing justifies concealing the Receiver's targets and disparaging these unknown parties. The Receiver has tainted the reputation of the attorneys he is targeting by the mere inference of ethical wrongdoing. If the Receiver's Motion is granted, the reputational interests of the attorneys is damaged by the Court joining in the fear that if the lawyers knew in advance they were targets, they would wrongly transfer assets. (ECF [628](#), p. 4, fnt. 7.) This Court should reject such improper incivility. If the Receiver is going to make such accusations and can offer no proof that those targeted ever had a motive to hide or dissipate assets, the Receiver's claims should be barred against that party and the Receiver sanctioned for violating the Utah Rules of Professionalism.

The Receiver wants to avoid notice and due process because he wants authority to sue apparent bad characters. But avoiding the basics of due process, notice and an opportunity to address the Court, is an evil in itself.

Even if this very negative view of the targets is justified, it is an easy thing for the Receiver to track transfers, particularly when they occur in close proximity to the commencement of litigation.

Solco I and XSun were left out of the original proceedings, despite the IRS raiding their files in 2012, knowing of them for years prior to commencing this case, and despite using as exhibits documents written for/by them. These parties have been strategically omitted from all the prior proceedings, and ought to be excluded from any Receiver's litigation now. This Court should, at a minimum, order the Receiver to disclose whether these parties are intended targets now for a new round of litigation. If targets, they would be able to file objections on multiple grounds, not the least of which is the doctrine of laches which ought to bar claims involving them at this point. Other issues involving both Solco I and XSun are before the 10th Circuit Court and ought to be decided before anything further is brought involving them.

Finally, the underlying obligation, including the Receivership itself, is likely to be affected by the decision of the 10th Circuit Court of Appeals in Appeals 18-4419 and 18-4150. The Receiver's Motion, the Receivership itself, and any further proceedings ought to be stayed until after we know whether the Court's decision against the Defendants will stand or be reversed.

DATED this 9th day of May, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.

Denver C. Snuffer, Jr.

Steven R. Paul

