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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.; LTB1,
LLC; R. GREGORY SHEPARD; NELDON
JOHNSON; and ROGER FREEBORN,

Defendants.

**RECEIVER'S REPLY IN SUPPORT
OF HIS MOTION TO COMMENCE
LEGAL PROCEEDINGS**

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

District Judge David Nuffer

The Receiver¹ hereby replies in support of his Motion to for Leave to Commence Legal Proceedings (the "Motion").²

INTRODUCTION

The Receiver has requested leave to bring claims as described in the Motion. The Corrected

¹ Defined terms have the meaning given in the Motion.

² [Docket No. 628](#), filed April 30, 2019.

Receivership Order (“Order”) specifically authorizes the Receiver to “seek, among other legal and equitable relief, the imposition of constructive trusts, disgorgement of profits, asset turnover, avoidance of fraudulent transfers, rescission, restitution, collection of debts”³ Before deciding which categories of potential defendants to seek leave to pursue, the Receiver engaged in an extensive investigation of transactions involving Defendants, affiliated entities,⁴ and other relevant persons and entities. That investigation is on-going, but the Receiver has determined that at this stage of the Receivership it is necessary and appropriate to seek leave to commence legal proceedings.

The Motion, which the Court set on an expedited briefing schedule,⁵ was filed by the Receiver to satisfy a requirement under the Order. Importantly, outside of the Order, there is no legal requirement that the Receiver must file a motion for leave to commence legal proceedings. The purpose of the requirement to seek leave before filing ancillary actions is to allow the Court to supervise the Receivership as part of the Court’s role to “promote orderly and efficient administration of the estate by the district court for the benefit of the creditors.”⁶

Nelson Snuffer Dahle & Poulsen (“Nelson Snuffer”) filed an opposition to the Motion (“Opposition”). The gravamen of the Opposition is that the Motion “ignore[s] due process by

³ [Docket No. 491](#) at ¶ 60, filed November 1, 2019.

⁴ The affiliated entities are now part of the Receivership Estate. See [Docket No. 636](#).

⁵ Docket Text Order, Docket No. 631. Nelson Snuffer misstated the Court’s order in its Opposition. The Opposition incorrectly says that the order “instruct[ed] ‘any party wishing to object’ to do so by May 9, 2019.” In fact, the order states “[a]ny response to the [628](#) motion must be filed by no later than May 9, 2019.” See Docket No. 631. Under the Court’s order, the filing of objections was not limited to parties. Therefore, Nelson Snuffer’s claim that the Court “tacitly acknowledged” that the Motion constituted an *ex parte* communication is inaccurate.

⁶ [Broadbent v. Advantage Software, Inc., 415 F. App’x 73, 78 \(10th Cir. 2011\)](#) (“[A] district court’s power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad.” (citations omitted)).

failing to provide to the Receiver’s targets an opportunity to weigh in” before the Receiver files a potential suit.⁷ The Opposition also states that “the normal process” is to “provide names of the targets” so that “each one would be afforded the due process opportunity to provide whatever input they [sic] may have” before a suit is filed.⁸ The Opposition does not explain—or cite to any authority that explains—why a potential defendant has a right to be informed of a lawsuit that may be filed against it *before* a lawsuit is filed and a summons and complaint have been served.⁹ The reason the Opposition does not cite any authority is because there is no statutory or constitutional right to be informed and heard *before* a potential lawsuit is filed. Indeed, even if the Court does what Nelson Snuffer asks and requires the Receiver to name each potential defendant before he files suit, a potential defendant’s objections regarding the merits of a potential action would not be ripe for review because a potential defendant’s objections involve “uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹⁰

Given that the purpose of the requirement for leave to commence litigation is to allow the Court to oversee certain aspects of the Receivership, an objection to the Motion based on nonexistent due process rights of potential defendants is without foundation. Therefore, the Receiver requests that the Court grant the Motion.

⁷ [Docket No. 643, May 8, 2019](#), at 2.

⁸ *Id.* at 3.

⁹ The Opposition also does not cite any authority showing that “the normal process” is to “provide names of the targets” so that “each one would be afforded the due process opportunity to provide whatever input they may have” before a suit is filed.

¹⁰ [S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1158 \(10th Cir. 2013\)](#) (citing [Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1089 \(10th Cir.2006\)](#)).

ARGUMENT

I. The Requirement to Seek Leave Does Not Create Due Process Rights for Potential Defendants and Potential Defendants are not entitled to Due Process Regarding the Motion.

The Motion does not affect (or create) due process rights of unnamed parties because potential defendants—whether named or unnamed—have no right to be informed and heard before a potential lawsuit is filed. The Motion does not seek a judgment, factual finding, fine, subpoena, garnishment, transfer of property, or any other relief that affects the rights of any party or nonparty. The relief the Receiver seeks—namely the ability file lawsuits against persons he believes have received Receivership assets in violation of certain statutes and/or common law doctrines—is a power that is already expressly provided to him in the Order.¹¹ The requirement to seek leave before the commencement of litigation is not designed or intended to provide notice or rights to potential defendants.¹² Instead, the purpose of the requirement to seek permission to commence litigation is to enhance the Court’s ability to oversee the work of the receiver it has appointed.¹³

If the proceedings up to this point have raised questions in the Court’s mind about whether the RaPower was insolvent or whether badges of fraud existed, the Court could deny, circumscribe, or delay the Receiver’s ability to commence litigation. If the Court doubted the Receiver’s competence or judgment, it could deny or circumscribe his authority. If the Court

¹¹ [Docket No. 491](#) at ¶¶ 3, 60.

¹² Unlike here, due process is required before a person is deprived a property interests. [United States v. 51 Pieces of Real Prop. Roswell, N.M., 17 F.3d 1306, 1314 \(10th Cir. 1994\)](#) (“as a general rule, due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest.”) (citing [Fuentes v. Shevin, 407 U.S. 67, 81–82 \(1972\)](#)). And, of course, actual defendants in lawsuits filed by the Receiver will be entitled to due process in the normal course.

¹³ See [Broadbent, 415 F. App’x at 78](#); see also [S.E.C. v. Vescor Capital Corp., 599 F.3d 1189, 1194 \(10th Cir. 2010\)](#).

thought more time and investigation was needed before allowing litigation to move forward against certain groups, the Court could request clarification or deny authorization. Moreover, requiring authorization before the Receiver can commence litigation gives the Court say over timing of the administration of the Receivership. If the Court thinks the Receiver has not learned enough about the Receivership Defendants' operations or the Court wants other issues resolved before commencing litigation, this pre-approval requirement is a means of the Court retaining control over how the Receivership Estate is operated.

Put differently, the target of the Motion is not—as Nelson Snuffer argues—the potential defendants. The target of the Motion is the Court. And the requirement to seek leave is for the benefit of the Court, not third parties or potential defendants. The requirement does not create an independent right for potential defendants to receive notice and be heard before a lawsuit has been filed.

II. The Motion is Not an *Ex Parte* Communication.

Nelson Snuffer claims that the Motion is an improper *ex parte* communication between the Receiver and the Court. The firm seems to be asserting that since the Receiver did not serve notice of the motion on each potential defendant, the motion constituted an *ex parte* communication. Nelson Snuffer is wrong. The Motion is not an *ex parte* communication and the Receiver is under no obligation to provide notice to potential defendants of the Motion.

Rule 5 of the *Federal Rules of Civil Procedure* governs serving and filing motions in federal court. It provides that a written motion, such as the Motion, must be served on *every party*, unless the *Federal Rules of Civil Procedure* provide otherwise.¹⁴ Nelson Snuffer does not claim

¹⁴ [Fed. R. Civ. P. 5\(a\)\(1\)\(D\)](#).

that the Motion is not a “written motion” or cite to Rule or order that requires service of the Motion to nonparties.¹⁵ Therefore, the Receiver’s service of the Motion upon every party satisfies the requirements of the *Federal Rules of Civil Procedure*.

Next, because the Motion was served upon every party at the time it was filed, the Motion is not an *ex parte* communication. *Ex parte* communication is “a communication between counsel and the court when opposing counsel is not present.”¹⁶ Here, there is no allegation that the Receiver and the Court communicated without the presence of Plaintiff’s counsel, Defendants, or Nelson Snuffer or that the Motion was made to the Court without notice to the parties. To the contrary, the Motion is a public filing that was properly served on every party. Other than incorrectly citing to the Court’s order expediting briefing of the Motion,¹⁷ Nelson Snuffer references no authority relating to its allegation of improper *ex parte* communication by the Receiver to the Court.

Nelson Snuffer’s *ex parte* objections are based on the incorrect assumption that because the Receiver must seek leave to commence litigation, a potential defendant is entitled to a notice and a right to weigh in on the merits of claims the Receiver might bring against them. As explained above, the purpose of the approval requirement is for the benefit of the Court, not for the benefit of potential defendants. Nelson Snuffer fails to cite any authority to support its position that potential defendants are entitled to due process before a lawsuit can be filed against them. Receivership courts, on the other hand, routinely issue orders granting receivers broad discretion

¹⁵ By citing due process, Nelson Snuffer suggests that service of process under Rule 4 of the *Federal Rules of Civil Procedure* was required. The firm does not, however, cite any authority holding that due process requires notice of a potential lawsuit before it is filed.

¹⁶ Black’s Law Dictionary (10th ed. 2014); see also [Slevin v. Bd. of Commissioners for the Cty. of Dona Ana, No. 08-CV-1185 MV/DJS, 2012 WL 13005331, at *3 \(D.N.M. Mar. 7, 2012\)](#) (quoting Black’s Law Dictionary, 9th ed. 2009).

¹⁷ See Note 5, *supra*.

to litigate claims on behalf of receivership estates without giving notice to potential defendants.¹⁸

III. Objectors Lack Standing to Object to Potential Future Lawsuits.

The Opposition raises a number of issues regarding the standing of Nelson Snuffer and the parties it claims to represent. First, and most obviously, is the issue of ripeness. “In evaluating ripeness the central focus is on whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”¹⁹ Here, it is clear that Nelson Snuffer’s objections, whether on behalf of its clients or undefined potential defendants, are not ripe. Until the Receiver has received the authority to sue and actually files suit against one of these parties, Nelson Snuffer’s expressed fears are not ripe for judicial review. Indeed, objecting to a potential lawsuit for which a complaint has not been filed—or even drafted—is a prototypical example of a “case [that] involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.”²⁰

Next, Nelson Snuffer lacks authority to make this filing on behalf of XSun, Solco, and

¹⁸ See e.g., [S.E.C. v. Billion Coupons, Inc., No. CIV. 09-00068 JMSLEK, 2009 WL 2143532, at *3 \(D. Haw. July 13, 2009\), report and recommendation adopted](#), No. CIV. 09-00068JMS-LEK, 2009 WL 2365689 (D. Haw. July 29, 2009) (granting broad authorization to “locate potential defendants in order to recover fraudulently transferred funds” and to “commence litigation to obtain recovery of fraudulently transferred funds.”); *Order Granting the Receiver’s Motion for Leave to Commence Ancillary Litigation*, [Docket No. 410](#), filed March 13, 2019, *SEC v. Christopher Faulkner, et al.*, case number 3:16-cv-1735 (N. D. Texas) (order entered two days after the *Motion for Leave to File Ancillary Litigation* was filed on March 11, 2019 ([Docket No. 409](#))); *Order Granting Receiver’s Ex Parte Motion for Leave to Commence Legal Proceedings*, [Docket No. 240](#), filed March 29, 2013, *SEC v. National Note of Utah, LC, et al.*, case number 2:12-cv-00591 (D. Utah) (order granting broad authority to commence litigation entered two days after the motion seeking leave was filed ([Docket No. 236](#), filed March 27, 2013)); *Order Granting Authorization to Commence Litigation* [Docket No. 192](#), filed January 30, 2014, *FTC, et al., v. Fortune Hi-Tech Marketing, Inc., et al.*, case number 5:13-cv-00123 (E.D. Ky). (granting broad discretion to Receiver to commence litigation).

¹⁹ [S. Utah Wilderness All. v. Palma, 707 F.3d 1143, 1158 \(10th Cir. 2013\)](#) (citing [Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1089 \(10th Cir.2006\)](#)).

²⁰ *Id.* On the final page of the Opposition, Nelson Snuffer takes a shotgun approach raising multiple issues that have either (1) already been considered and rejected by the Court, such as excluding Solco and XSun from the Receivership and staying the Receivership until the appeal has been decided, or (2) are clearly not ripe for judicial review before a lawsuit is filed, such as a laches defense in a potential lawsuit.

Solstice. The Court recently issued an order that made those entities part of the Receivership Estate.²¹ That order—issued before the Opposition was filed—gave the Receiver “all powers, authorities, rights, and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners . . . 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.”²² Moreover, the Court ordered that “the directors, officers, managers . . . attorneys, and other agents of [Solco, XSun, and Solstice] are hereby dismissed” and “[s]uch persons shall have no authority with respect to [Solco, XSun, and Solstice] operations or assets, except to the extent as may hereafter be expressly granted by the Receiver or the court.” Nelson Snuffer cannot represent these entities unless expressly granted permission by the Receiver or the Court. Neither the Receiver nor the Court have granted Nelson Snuffer the authority to represent Solco, XSun, or Solstice. Accordingly, Nelson Snuffer lacks the authority to file the Opposition and object on behalf of these entities.²³

IV. The Motion Does Not Violate the Rules of Professionalism.

Nelson Snuffer makes various allegations against the Receiver regarding the Rules of Professional Conduct, including alleging that the Receiver made improper *ex parte* communications and that “the Receiver has tainted the reputation of attorneys he is targeting by the mere inference of ethical wrongdoing” in violation of the Utah Standards of Professionalism and Civility.²⁴

²¹ [Docket No. 636](#), filed May 3, 2019.

²² *Id.* at Order, ¶ 6.

²³ Also, to the extent Nelson Snuffer is asserting that the rights of potential defendants other than those it claims to represent, it lacks standing to object on behalf of others.

²⁴ [Docket No. 643](#) at 2, 4.

First, as shown above, the Motion is not an *ex parte* communication so it does not follow that there has been a violation the Rules of Professionalism regarding *ex parte* communications.

Next, the Receiver has not attributed to any attorneys instances of wrongdoing or improper conduct. Most, if not all, of the actions the Receiver plans to bring to recover Receivership assets will be brought as voidable conveyance actions. Under that statute, there is no requirement of wrongdoing, improper motive, purpose, or conduct on the part of the recipients of transfers. The statute requires only that the defendant received funds from a person who was engaged in fraud.²⁵ Accordingly, the Receiver's statement that he intends to sue law firms to recover funds that belong to the Receivership Estate is not suggesting wrongdoing, improper motive, or conduct.²⁶

Indeed, in addition to law firms, the Receiver lists charitable organizations, credit card issuers, insurance companies, stockholders, and salespersons as potential defendants. It does not follow that because a charitable organization received funds from a person who was engaged in fraud, the charitable organization engaged in wrongful or unethical conduct or is a "bad character" as Nelson Snuffer alleges the Receiver suggests about potential defendants.²⁷ Instead, the Receiver believes—based on his investigation and the facts that have been presented to the Court²⁸—that the categories listed represent potential defendants who received funds that belong to the

²⁵ See Utah Code § 25-6-202(1)(b).

²⁶ Even assuming Nelson Snuffer's claim that by listing categories of potential defendants, the Receiver is somehow suggesting "sinister, dishonest and criminal wrong-doing" (he is not), the plain language of the Utah Standards of Professionalism and Civility states that "[l]awyers shall not . . . *attribute* . . . improper motives, purposes, or conduct." (emphasis added). Nothing in the Motion attributes wrongdoing to an attorney. See Motion at 3-4.

²⁷ [Docket No. 643](#) at 5.

²⁸ The Motion cites to the Receiver's reports which document how assets have been transferred to and between various entities, defendants, insiders, and family members. Further, the evidence presented at the hearings on the order to show cause motions on April 26 and May 3, 2019 shows that assets were transferred before, during, and after trial in this case. Moreover, the Court recently found that "[i]n 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." See [Docket No. 636](#) at Factual Basis ¶ 5.

Receivership Estate.

V. The Local Rules Permit a Single Judge to Preside Over Each Action.

In the Motion, the Receiver expressed a preference that either Judge Nuffer or another single judge preside over the actions brought by the Receiver under the Order due to the common issues of law and fact that will be present in each action, the risk of inconsistent rulings, and the complex history and facts involved in this case. As the Motion makes clear, the Local Rules for the District of Utah allow for cases to be assigned to a particular judge by the chief judge, a motion, or sua sponte by the court. Having Judge Nuffer or a single judge presiding over each action would certainly be in the interest of judicial economy and the efficient administration of justice. Ultimately, however, it is in the Court's discretion how it wishes to handle case assignments under the Order. Regardless of how a judge in a particular case is selected, parties to the litigation may seek to have the case reassigned by motion after the initial judge is assigned.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and give leave to the Receiver to commence litigation to recover Receivership assets against the categories of potential defendants defined in the Motion.

DATED this 17th day of May, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr

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