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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p>UNITED STATES' MOTION FOR ADDITIONAL SANCTIONS DUE TO CONTINUED CONTEMPT OF NELDON JOHNSON, GLENDA JOHNSON, LAGRAN JOHNSON, AND RANDELE JOHNSON</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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After the United States filed a Motion for Order to Show Cause¹ and hearings on April 26, May 3, and May 28, 2019, this Court entered an order holding Neldon Johnson, Glenda Johnson, LaGrand Johnson, and Randale Johnson in civil contempt for violating the Corrected Receivership Order (“CRO”) in this matter.² The CRO requires Defendant Neldon Johnson, and others working with him like Glenda, LaGrand, and Randale Johnson (collectively, “Respondents”), to provide documents and information to, and cooperate with, the Receiver. Johnson must also turn over assets to the Receiver. But even after the order holding them in civil contempt (“Contempt Order”)³, and this Court’s painstaking efforts to compel their compliance with remedies short of coercive incarceration, they are *still* in defiance of the CRO and the Contempt Order. To enforce this Court’s orders and to effect the remedy this Court ordered in response to Neldon Johnson’s outright fraud on the United States, we seek additional coercive and remedial sanctions for their failure to comply.

I. In spite of repeated admonitions from this Court and numerous chances to comply over the past eight months, the Johnsons failed to comply with this Court’s orders.

The Johnsons are in civil contempt for their continued defiance of the CRO,⁴ “stunning contempt” in the case of Neldon Johnson.⁵ But, as of the last evidentiary hearing in this matter on May 28, the Court was “interested in having this receivership go forward,” and did not “want

¹ ECF No. 559.

² ECF No. 701; ECF No. 491.

³ ECF No. 701.

⁴ See generally ECF No. 701.

⁵ May 28 Tr. part 2, 28:23-29:2.

to punish Mr. Johnson unnecessarily” with coercive incarceration for his continued and open defiance.⁶ The Court recognized the need for a “solution” to “make [Neldon Johnson] guide” the Court through the documents relevant to the Receivership Defendants and Affiliated Entities, and the financial transactions between and among them and the Johnson family and other insiders.⁷ Therefore, the Court identified certain specific failures by the Johnsons and ordered a procedure intended to help them fix those failures, come into compliance with this Court’s orders, and purge their contempt.⁸

A. Neldon Johnson failed to comply with ¶ 24 of the CRO and the Contempt Order.

In his final declaration, Neldon Johnson states that documents exist that are responsive to ¶ 24 of the CRO. But he did not produce all such documents as required, and he failed to “provide information to the Receiver identifying the [missing] records, the persons in control of the records, and efforts undertaken to recover the records.”⁹ Instead, once again, Neldon Johnson: 1) attempted to shift the burden to the Receiver to identify the documents Johnson has not delivered¹⁰; and 2) asserted that third parties have responsive documents that the Receiver can retrieve, including documents that are within Neldon Johnson’s control but are currently in

⁶ May 28 Tr. part 2, 29:2-4.

⁷ May 28 Tr. part 2, 28:23-29:10.

⁸ See generally [ECF No. 701](#).

⁹ [ECF No. 491](#) ¶ 24.

¹⁰ Compare [ECF No. 701](#) at 12 (“First, Johnson’s assertion that he has delivered all documents to the Receiver is an [improper] attempt to shift the burden to the Receiver to identify the documents that Johnson has not delivered.”) with [ECF No. 738 at 3](#) ¶ 6 (“These documents that I found are some, but not all, of the corporate documents of the Affiliate Entities . . .”).

possession of Nelson Snuffer Dahle and Polson (“NSDP”) or LaGrand Johnson.¹¹ But as this Court has already held, “[t]he evidence shows that [Neldon] Johnson could obtain documents currently being held by third parties”¹² like NSDP, LaGrand Johnson, Gary Peterson, Snell & Wilmer, and (newly disclosed) Cadence Group and Now CFO.¹³ The CRO and Contempt Order require him to take those steps to obtain the documents and not merely direct the Receiver to do so.

And, as this Court has repeatedly told him, if Neldon Johnson “does not possess and cannot obtain responsive documents that he once possessed for Receivership Defendants, the Affiliated Entities, or any other Receivership Property, the plain language of paragraph 24 of the CRO requires him to identify what documents existed, where they are, and what efforts he made to obtain them.”¹⁴ The United States and the Receiver showed Neldon Johnson why his draft declaration did not meet this obligation, and how to meet it.¹⁵ Neldon Johnson knows that “[t]his roadmap is important to help the Receiver understand the facts underlying the financial transactions that may be voidable to increase assets of the Receivership Estate.”¹⁶ But he chose not to include this roadmap to his documents in his final declaration and, therefore, failed to comply with this Court’s orders.

¹¹ Compare ECF No. 701 at 12 (“Johnson’s assertion that third parties have documents does not to satisfy his burden under the Corrected Receivership Order.”) with ECF No. 738 at 9-11 & Ex. K.

¹² ECF No. 701 at 12-13.

¹³ See ECF No. 738 at 12.

¹⁴ ECF No. 701 at 13.

¹⁵ ECF No. 733-1 at 1-2, 5-13, 15.

¹⁶ ECF No. 701 at 13.

B. Neldon Johnson failed to comply with ¶ 26 of the CRO and the Contempt Order.

This Court has already described the conduct that placed Neldon Johnson in civil contempt for defying ¶ 26 of the CRO: failure to provide the “thorough and detailed financial roadmap it requires for a broad scope of assets and transactions, including the Affiliated Entities—not just assets held in Johnson’s name and transactions to or from him directly.”¹⁷ The Court rejected Neldon Johnson’s statements that “he either does not possess any property or that he has turned over all property to the Receiver” because such facile statements “do not acknowledge that Johnson’s accounting obligation extends not just to property officially titled in his name (which he has attempted to avoid), but to a far greater expanse of assets” including “real property, personal property (tangible and intangible), . . . cash held by any number of people and entities, including the Affiliated Entities,” and “[a]ny transfers [that] were made at Johnson’s direction and for his benefit.”¹⁸ The Court also rejected Neldon Johnson’s attempts to shift the burden of his compliance on to third parties or the Receiver.¹⁹ Yet, in spite of our corrections to his draft declaration,²⁰ Neldon Johnson’s final declaration contains the kinds of conclusory and burden-shifting assertions that landed him in civil contempt.

For example, instead of providing the “financial statement setting forth the identity, value, and location of all assets of each Receivership Defendant, including assets held outside the

¹⁷ ECF No. 701 at 14.

¹⁸ ECF No. 701 at 14-15.

¹⁹ *E.g.*, ECF No. 701 at 16-17.

²⁰ *E.g.*, ECF No. 733-1 at 26.

territory of the United States,”²¹ Neldon Johnson claims that such a financial statement does not already exist and he “do[es] not have and [is] not aware of such information as would enable [him] to prepare or provide a financial statement for any Receivership Defendants, Receivership Entities or Affiliated Entities.”²² This assertion is simply not credible. The evidence has shown, time and again, that Neldon Johnson controls the entities and behavior of people who received transfers of money and property from the solar energy scheme. This control, along with information demonstrably known to Neldon Johnson, could be used to create a financial statement.

Neldon Johnson also continued to defy the requirement that he account for “all expenditures exceeding \$1,000 made by any [Receivership Defendant], including those made on their behalf by any person or entity” *with complete documentation* to support the accounting.²³ In his final declaration, Neldon Johnson provided a list of transactions over \$1,000, but did not give an “accounting” of them and did not provide documentation to support them.²⁴ For example, Exhibit I contains a notation that Cobblestone made a \$47,951.17 payment to “Sahara Motors” for a “[c]ompany vehicle” on December 27, 2016.²⁵ But Neldon Johnson provided no further explanation or documentation about that transaction. What vehicle? What are the transaction

²¹ ECF No. 491 ¶ 25(g); ECF No. 738 at 14.

²² ECF No. 738 at 14.

²³ ECF No. 491 ¶ 26(intro text) & 26(g); ECF No. 701 at 17; ECF No. 738 at 23-24.

²⁴ ECF No. 738 at 23-24.

²⁵ ECF No. 738-25 at 15

documents for the purchase, and have they been delivered to the Receiver? What was the purported business purpose for the vehicle? Who actually used it, and for what? Where is it now?

Neldon Johnson also (again) attempted to shift the burden for the accounting of “all funds received by the Receivership Defendants, and each of them, in any way related, directly or indirectly, to the conduct alleged in the United States' Complaint in this case” on to the Receiver or other people.²⁶

C. Neldon Johnson failed to comply with ¶ 16 of the CRO and the Contempt Order.

The CRO requires Neldon Johnson to promptly turn over any assets belonging to any Receivership Defendant.²⁷ He did not.²⁸ In his final declaration, Neldon Johnson claims that he does not have any Receivership Property in his possession, but then he claims to have two “personal vehicles” and two wave runners.²⁹ Neldon Johnson has not turned over these assets.³⁰

D. Glenda, LaGrand, and Randale Johnson failed to comply with ¶ 24 of the CRO and the Contempt Order.

This Court has already described the reasons that Glenda, LaGrand, and Randale Johnson failed to comply with ¶ 24 of the CRO.³¹ The first draft declarations filed by LaGrand and Randale Johnson did not meet their obligations (and Glenda Johnson failed to file a first draft

²⁶ ECF No. 491 ¶ 26(intro text) & 26(f); ECF No. 701 at 17; ECF No. 738 at 22-23.

²⁷ ECF No. 491 ¶ 16-17.

²⁸ ECF No. 701 at 11-12.

²⁹ ECF No. 738 at 11, 18.

³⁰ See ECF No. 733-1 at 20.

³¹ ECF No. 701 at 18-23.

declaration), as the response and redline by the United States and the Receiver showed.³² Glenda, LaGrand, and Randale Johnson submitted final declarations with the same critical deficiencies identified in our response and redline.³³ They still fail to account for all documents they once saw or had access to, as required by ¶ 24, for all Receivership Entities, including the Affiliated Entities;³⁴ they continue to claim that they have turned over all documents relevant to ¶ 24 without identifying those documents with specificity;³⁵ they still fail to account for every document in NSDP files that is responsive to their obligations under ¶ 24;³⁶ and they continue to attempt to shift their burden of compliance on to Neldon Johnson.³⁷ Further, LaGrand Johnson did not recover “financial documents” or explain where they are as required by ¶ 24.³⁸

E. The Johnsons failed to comply with the orders requiring them to pay attorney’s fees and costs to the United States and the Receiver for enforcing the CRO.

The United States and the Receiver have incurred – and continue to incur – the Receiver’s own fees and attorney’s fees and costs to enforce the CRO. This Court ordered that

³² See [ECF No. 703](#) (Draft Declaration of LaGrand Johnson); [ECF No. 704](#) (Draft Declaration of Randale Johnson); [ECF No. 705-1](#) (Response by United States and Receiver).

³³ [ECF No. 714](#) (Final Declaration of Glenda Johnson); [ECF No. 715](#) (Final Declaration of LaGrand Johnson); [ECF No. 716](#) (Final Declaration of Randale Johnson).

³⁴ Compare [ECF No. 705-1](#) at 1, 5, 10, 11-12 with [ECF No. 714](#), [ECF No. 715](#), [ECF No. 716](#).

³⁵ Compare [ECF No. 705-1](#) at 13 with [ECF No. 714](#), [ECF No. 715](#), [ECF No. 716](#).

³⁶ Compare [ECF No. 705-1](#) at 1-2 with [ECF No. 714](#), [ECF No. 715](#), [ECF No. 716](#).

³⁷ Compare [ECF No. 705-1](#) at 13 with [ECF No. 714](#), [ECF No. 715](#), [ECF No. 716](#). In the now-tedious game of pass-the-buck, Neldon Johnson also tries to foist his compliance burden on to Glenda and LaGrand Johnson.

³⁸ Compare [ECF No. 705-1](#) at 12 with [ECF No. 714](#), [ECF No. 715](#), [ECF No. 716](#).

the Johnsons are jointly and severally liable for those fees and costs,³⁹ and approved those fees and costs in the following amounts: \$25,146.85 to the United States and \$31,563.52 to the Receiver.⁴⁰ The Court ordered the Johnsons to deliver payment by certified check, from non-Receiver assets, no later than August 15, 2019.⁴¹ As of the time of filing this motion, the counsel for the United States and the Receiver have not received payment.

II. To remedy the Johnsons' ongoing and willful contumacious conduct, this Court should impose additional coercive and remedial civil sanctions.

On May 28 – more than two months ago – this Court refrained from ordering coercive fines or coercive incarceration for the Johnsons in the “great hope” that the compliance process it set forth would work.⁴² But the Johnsons chose to exploit the Court’s restraint and continue to delay and hinder the Receiver. They cannot hide behind the excuse – as flimsy as it was⁴³ – that they may not have understood their obligations,⁴⁴ because the Court, and the United States and the Receiver painstakingly explained those obligations in black and white – and red.⁴⁵ Instead (and in spite, presumably, of the counsel of their own attorneys), once again, the Johnsons took

³⁹ ECF No. 701 at 29. R. Gregory Shepard is also jointly and severally liable for these fees and costs. *Id.* However, at this time and due to Shepard’s prior financial disclosures, we are not asking the Court to hold Shepard in contempt for failure to pay.

⁴⁰ ECF No. 731, ECF No. 732.

⁴¹ ECF No. 731, ECF No. 732.

⁴² May 28 Tr. part 2, 70:14-18.

⁴³ *E.g.*, May 3 Tr. 172:17-173:25.

⁴⁴ ECF No. 701 at 24.

⁴⁵ *E.g.*, ECF No. 701, ECF No. 705-1; ECF No. 733-1.

license by the Court's leeway.⁴⁶ The Johnsons' choices have left the Court with few options to enforce its lawful orders and remedy the harm their ongoing defiance has caused the Receivership and, thereby, the United States.

This Court's "interest in ensuring a party's compliance with its orders is a great one."⁴⁷ Coercive sanctions like a monetary penalty and incarceration are available for the kind of continued defiance the Johnsons demonstrate.⁴⁸ Such sanctions may "remain [in place] only until the contemnor complies with the order."⁴⁹ This Court has already warned that if it gave Neldon Johnson the time and resources his attorney requested, and his declaration was "still nonresponsive and insufficient," Neldon Johnson would be incarcerated.⁵⁰ Glenda, LaGrand, and Randale Johnson received a similar warning.⁵¹ A coercive fine is unlikely to be effective to compel compliance because 1) they failed to pay the attorney's fees and costs already ordered and 2) many (if not all) of their assets are likely to be recovered as Receivership Property anyway because of the money that flowed out of the solar energy scheme and into their pockets.

⁴⁶ See Trial Tr. 2103:22-2104:9.

⁴⁷ *Ohlander v. Larson*, 114 F.3d 1531, 1541 (10th Cir. 1997); see also *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225, 1238 (10th Cir. 2018) ("The district court has 'inherent power to enforce compliance with [its] lawful orders through civil contempt.'" (quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966))); see also *United States v. Bibbins*, 113 F. Supp. 2d 1194, 1202 (E.D. Tenn. 2000) ("In large measure, the American legal system is fundamentally dependent upon voluntary compliance with its judgments and procedures by all participants in the system The Court does not have a standing army to enforce its rules and orders.").

⁴⁸ *United States v. Ford*, 514 F.3d 1047, 1052 (10th Cir. 2008).

⁴⁹ *Acosta*, 884 F.3d at 1239.

⁵⁰ May 28 Tr. part 2, 28:23-29:6; see also April 26 Tr. 108:13-21.

⁵¹ May 28 Tr. part 2, 70:14-18 ("I am not going to order a fine right now. That's purposeful. I found the defendants and respondents in contempt. That's purposeful. I've not ordered incarceration of anyone because it's my great hope that this process will work."); ECF No. 701 at 25 ("Coercive sanctions like a monetary penalty and incarceration are available for continued defiance.").

Therefore, coercive incarceration appears to be the last option to focus the Johnsons' minds on fully complying with the lawful orders of this Court. The Court should order the Johnsons incarcerated until they submit declarations that comply with their obligations under the CRO and the Contempt Order. The Johnsons would "hold[] the proverbial keys to the prison doors" because each of them could "choose to end his [or her] incarceration [and purge his or her contempt] at any point in time, by simply complying" with the Court's orders.⁵²

Even if the Johnsons were to purge their compliance immediately, no coercive sanction can fully remedy the harm caused to the Receivership – and therefore, to the United States – of the Johnsons' flagrant defiance of the CRO. These contempt proceedings have been ongoing for nearly eight months, but they have been defying it since it was entered on October 31, 2018. Their nearly ten-months long "stubborn refusal to comply with the CRO has made the receivership significantly more difficult than usual for the experienced Receiver in this case."⁵³ It has prejudiced the United States by prejudicing the Receivership remedy this Court imposed because of Neldon Johnson's proven past defiance of the laws of the United States. That heightened difficulty also increases the cost of the Receivership which, in turn, decreases the amount that will be available to pay the United States Treasury. And every additional week that goes by without the Receiver having the full roadmap to the financial and business transactions conducted by IAS, RaPower-3, Neldon Johnson, and the Affiliated Entities, and the documents to show them, is another week less in the dwindling one-year time period that the Receiver has to

⁵² *Ford*, 514 F.3d at 1053.

⁵³ ECF No. 701 at 3 (quotation omitted).

file lawsuits to gather assets that rightfully belong in the receivership.⁵⁴ The Johnson’s non-compliance risks Receiver (and judicial) inefficiency because the Receiver will need to make litigation decisions before the one-year tolling deadline without having adequate information about the purposes of transfers.

For these reasons, the Court should order certain remedial sanctions in its “wide discretion to fashion an equitable remedy for civil contempt that is appropriate to the circumstances,”⁵⁵ to “compensate the contemnor’s adversary for injuries resulting from the contemnor’s noncompliance.”⁵⁶ Often, such remedial sanctions are monetary.⁵⁷ But remedial sanctions may also require the contemnor to engage in specific conduct that attempts to “recreate the past as it would have existed” absent defiance of a court order.⁵⁸ For example, an employer that showed an anti-union video in violation of court orders that prohibited the employer from

⁵⁴ See, e.g., *Klein v. Cornelius*, 786 F.3d 1310, 1321-22 (10th Cir. 2015) (regarding the one-year period after appointment in which a receiver may file an action to avoid a fraudulent transfer in which statute of limitations defenses are not available).

⁵⁵ *United States v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999) (quotation and alteration omitted); accord *Ford*, 514 F.3d at 1051 (noting abuse of discretion standard).

⁵⁶ *Acosta*, 884 F.3d at 1239-40 (quotation omitted).

⁵⁷ See *Acosta*, 884 F.3d at 1240-41.

⁵⁸ See *City of Miami*, 195 F.3d at 1299; see also *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) (“The measure of the court’s power in civil contempt proceedings is determined by the requirements of full remedial relief.”); *Acosta*, 884 F.3d at 1240 (there must be a “direct causal relationship” between the violation of a court order and the remedial sanctions).

interfering with employees' union rights was required to take or refrain from taking certain actions to ameliorate the effects of having shown the video.⁵⁹

While nothing will put the Receiver in the position he should have occupied had the Johnsons fully complied with the CRO as of December 31, 2018, this Court should attempt to recreate the past as it would have existed absent their defiance as of that date. The Johnsons' defiance goes to the heart of questions the Receiver needs to answer for suits to recover avoidable transfers: documents and information that go to the finances and control of entities and people that Neldon Johnson directed to execute and support the solar energy scheme (and who reaped the fraudulent proceeds of that scheme). Therefore, this Court should enter an order that the universe of documents and information about these entities and transactions is closed for Neldon, Glenda, LaGrand, and Randale Johnson. If they failed, by August 2, 2019, to produce or identify (with the specificity required by the CRO) documents or information required of them, they should not be allowed to use such document or information in the future to support any claim or defense against the Receiver or the United States in future proceedings. To be clear, the CRO requires the Johnsons to cooperate with the Receiver and deliver such additional documents and information that he may request going forward.⁶⁰ But the Johnsons should not be allowed to resist CRO disclosure requirements for the vast majority of the Receiver's one-year tolling period, and then use undisclosed documents or information to defend against the Receiver's claims (either already filed or forthcoming).

⁵⁹ *Fla. Steel Corp. v. N.L.R.B.*, 648 F.2d 233, 234, 239-41 (5th Cir. 1981).

⁶⁰ *E.g.*, ECF No. 491 ¶ 23, 28; ECF No. 701 at 5-6.

In addition, ordering the Johnsons to take the following corrective actions within 10 days would help the Receiver recover from the Johnsons' lengthy defiance:

- Require all Johnsons to certify that the payment of attorneys' fees for the contempt proceedings come from non-Receivership assets and identify the source of the funds used to make payment;
- Require Neldon Johnson to deliver to the Receiver boxes 15-27, and file a declaration explaining where these documents have been for the past nine months and why these documents were not provided timely;
- Require the Johnsons, and any attorney from NSDP who does represent or has represented them, to identify what search parameters were used to identify responsive documents within NSDP files, both electronic and hard-copy;
- Require Neldon Johnson to include in his financial statement a list of all material assets he has ever owned or controlled (even if an asset was put into the name of Glenda, Randale, or LaGrand Johnson, or any other insider) and information about what happened to those assets;
- Require Neldon Johnson to obtain from his bank a log of who accessed his purportedly empty safety deposit box, and when, from November 23, 2015 to the present date and deliver that log to the Receiver and the United States.

III. Conclusion

The Johnsons have had more than nine months to marshal documents, information, and/or assets within their control for delivery to the Receiver.⁶¹ They rejected the Court's final opportunity to comply with the CRO. Therefore, both coercive incarceration until they comply, and the remedial sanctions we request are appropriate to ensure their compliance and to remedy the harm caused to the Receivership and the United States.

⁶¹ See [ECF No. 557](#) § I.E. All Respondents acknowledged receipt of the Corrected Receivership Order no later than November 30, 2018, 264 days ago.

Dated: August 21, 2019

Respectfully submitted,

/s/ Erin Healy Gallagher

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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2019, the foregoing UNITED STATES' MOTION FOR ADDITIONAL SANCTIONS DUE TO CONTINUED CONTEMPT OF NELDON JOHNSON, GLENDA JOHNSON, LAGRAN JOHNSON, AND RANDALE JOHNSON was 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.

I also certify that, on the same date and consistent with his written consent, I served the same documents by email upon:

R. Gregory Shepard
greg@rapower3.com.

Defendant and respondent pro se

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney