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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, and NELDON JOHNSON,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>OPPOSITION TO RECEIVER'S MOTION FOR ORDER DIRECTING TURNOVER AND TRANSFER OF REAL PROPERTIES TITLED IN THE NAME OF GLENDA JOHNSON AND FUNDS IN ACCOUNTS CONTROLLED BY GLENDA JOHNSON (ECF 757)</p> <p>EVIDENTIARY HEARING REQUESTED</p> <p>Judge David Nuffer</p>
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COMES NOW Glenda Johnson and responds to the Receiver's Motion for Order Directing Turnover and Transfer of Real Properties Titled in the Name of Glenda Johnson and Funds in Accounts Controlled by Glenda Johnson (ECF 757).

INTRODUCTION

Glenda Johnson is not a party to this case. She has not been added as a defendant and her assets are not subject to the control or use provided to the Receiver by the Corrected Receivership Order (ECF 491). The Receiver acknowledges that every property it seeks to obtain through his motion is titled in the name of Glenda Johnson and not in the name of any Defendant to this action or any of the Receivership Entities. The Receivership Order does not remove or relax the requirement to provide due process to a non-party in Mrs. Johnson's position. The Receiver recognizes this and has already filed a separate lawsuit against Glenda Johnson because he has no right against her or her property, other than the right to sue to recover property in her name. See *Klein v. Johnson*, Case No. 2:19-cv-00625 (hereafter the "Collection Case").

The claims raised in the Collection Case against Glenda Johnson include the same transfers identified in his motion in this case. The Receiver has duplicated claims involving the same property; this violates the rule against claim splitting, as explained below. Mrs. Johnson should not have to defend the same claims on both fronts. Because this court has not asserted jurisdiction over Mrs. Johnson as a party defendant, she is entitled to defend herself and her ownership interests in the lawsuit filed against her, which is the only proper method and proper channel to provide her due process. The Collection Case represents a judicial admission that Glenda Johnson is entitled to due process by allowing her all the normal rights involved in litigation, including discovery, expert witness designations, reports, and a trial. This Motion is an attempt to skirt those requirements and should be denied.

Furthermore, this motion seeks summary judgment against Mrs. Johnson. However, the Receiver has not supported the motion with admissible evidence as required by FRCP 56. The evidence he relies upon is entirely inadmissible hearsay, lacking any foundation for admissibility.

Lastly, Mrs. Johnson disputes that the funds paid to her and in her possession are not owed to her. Mrs. Johnson was party to a contract pursuant to which she was entitled to each of the payments she received and she remains an unpaid creditor of the named Defendants. There exists, at a minimum, genuine issues of material fact for which summary judgment cannot be granted.

RESPONSE TO RECEIVER'S UNDISPUTED MATERIAL FACTS

1. Acreage Purchase (Millard County Parcel No's. HD-3511 and 3511-1):

a. On December 14, 2011, Glenda Johnson transferred \$70,000.00 from the RaPower savings account at Zions Bank to the RaPower checking account at Zions Bank. On the same day, she wrote a \$70,000 check from the RaPower checking account (check #195) to herself and deposited it into her personal checking account at Zions Bank. This payment was recorded in the RaPower QuickBooks records as a "Real Estate Purchase" expense.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. The Receiver includes this alleged transfer in its Complaint filed against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 3. Notwithstanding the objection, if the Court can ignore the hearsay, it is apparent from the face of the check register Ex. 1-7, that the funds were paid to Mrs. Johnson for wages owed to her.

b. On December 14, 2011, Glenda Johnson withdrew \$69,776.68 from her personal checking account at Zions Bank. Upon information and belief, she purchased a cashier's check from Zions Bank in the amount of \$69,776.68.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. It is unsupported conjecture without foundation and should be stricken. However, to the extent that this allegation is made it acknowledges the funds referred to were from her personal checking account, and all such funds were her property, earned by her, and she was entitled to make such use of her own funds as she saw fit. See Declaration of Glenda E. Johnson.

c. The description in Glenda Johnson's check book register for her personal Zions Bank account states that on December 14, 2011, \$69,776.68 was paid to "First American Title" for "land."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. Mrs. Johnson is not a party.

d. On December 16, 2011, the sale of this property to Glenda Johnson closed. After the payment of closing costs and a \$500.00 broker credit, the net paid for this property was \$69,776.68.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. On December 16, 2011, title to this 600-acre property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 assessor valuation of this property was \$120,000.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

g. HD-3511 and 3511-1 are listed at paragraphs 20(l) and (m) of the Order, respectively.

RESPONSE: Undisputed.

2. Warehouse Purchase (Millard County Parcel No. DO-4568-1):

a. On January 18, 2012, Glenda Johnson withdrew \$110,000.00 from the RaPower bank account at Zions Bank and deposited these funds into her personal checking account at Zions Bank. In the RaPower QuickBooks records, Glenda recorded this transfer in the “Real Estate Purchase” expenses account, with a memo notation: “Oasis Building.”

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. The Receiver includes this alleged transfer in its Complaint filed against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 4.

b. On January 17, 2012, Glenda Johnson wrote a check (#495) in the amount of \$100,000.00 from her personal bank account at Bank of American Fork and deposited the funds into her personal checking account at Zions Bank. Prior to these deposits, Glenda Johnson’s checking account balance at Zions Bank was \$1,949.61. The description in the check book registry states that the \$100,000.00 was transferred to “Zions” for “building.”

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. Should the Court admit this evidence, it is apparent that these funds were transferred from one personal bank account to another personal bank account both of which were owned by Mrs. Johnson.

c. On January 18, 2012, Glenda Johnson withdrew \$210,174.15 from her personal checking account at Zions Bank for the purchase of the warehouse building. On information and belief, this withdrawal was by means of a cashier's check. The description in the check book registry states that the \$210,174.15 was paid to "First American Title" for "building."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. The purchase price for this building was \$210,000.00. After closing costs, the amount paid was \$210,255.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. On January 19, 2012, title to this warehouse property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 assessor valuation of this property was \$210,275.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The Receiver identifies no document to establish this amount.

g. DO-4568-1 is listed at paragraph 20(j) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

3. Acreage Purchase in Delta (Millard County Parcel No. MA-2662-B):

a. On November 15, 2012, Glenda Johnson transferred \$32,334.80 from the RaPower checking account at Millard County Credit Union to her personal savings account at Millard County Credit Union. On November 15, 2012, she wired \$32,334.80 from this account to William B. Cullen for the purchase of a 360-acre parcel of land.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. Should the Court consider this evidence, at the time of these transfers, Glenda Johnson's Millard County Credit Union 804-6 account had \$59,949.29. Given that all funds are fungible, one cannot say that the funds the Receiver identified were the same funds used to purchase the property. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. The purchase price for this property was \$32,000.00. After closing costs, the final amount due was \$32,334.80.

RESPONSE: See above response.

c. On November 21, 2012, title for this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. The 2018 assessor valuation of this property was \$72,000.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. MA-2662-B is listed at paragraph 20(x) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

4. 2013 Home and Land Purchase (Millard County Parcel No's. HD-4606-2 and 4606-2-1):

a. On January 16, 2013, Glenda Johnson withdrew \$168,000.00 from the RaPower bank account at Wells Fargo. The same day, she deposited \$168,000.00 into her personal checking account at Millard County Credit Union. She recorded this in the RaPower QuickBooks records as a "Real Estate Purchase" expense with a notation the expenditure was for "House & Land – Abraham."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. Before this deposit, her balance in the Millard County Credit Union account was \$14,953.88.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On January 17, 2013, she wired \$162,693.33 out of her Millard County Credit Union personal checking account.³⁵ This was the amount due for the purchase of this property after deduction for the earnest money deposit and a buyer's agent credit. A notation made by Glenda Johnson on the bank statement for this account, next to this transaction, denotes "house." The description in the check book register states that the \$162,693.33 was for "home on 7000."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. On January 18, 2013, title to these two parcels of real estate was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. In connection with this sale, water right #68-2388 was conveyed by the seller to Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 valuation of these two parcels by the Millard County Assessor was \$171,458.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

g. HD-4606-2 and HD-4606-2-1 are listed at paragraphs 20(o) and (p) of the Order, respectively.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

5. Acreage Purchase in Delta (Millard County Parcel No. HD-4648):

a. On February 26, 2013, Glenda Johnson wired \$20,269.07 from her personal savings account at Millard County Credit Union to Tao-Chen Chao to purchase an 80-acre parcel of land from Tao-Chen Chao.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. The previous September 10, 2012, Glenda Johnson had transferred \$87,976.48 from the RaPower checking account at Zions Bank to her personal savings account at Millard County Credit Union. Prior to this deposit, her savings account at Millard County Credit Union was \$9,295.80.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. Any funds transferred to her from RaPower were earned by her, owed to her, and she was entitled to receive and use those funds as she saw fit. See Declaration of Glenda E. Johnson.

c. On November 15, 2012, Glenda Johnson transferred \$32,334.80 from the RaPower checking account at Millard County Credit Union to Glenda Johnson's personal savings account at Millard County Credit Union. This \$32,334.80 was transferred out of Glenda Johnson's personal savings account the same day.

RESPONSE: These are the same funds listed in paragraph 3.a. above. See response to that paragraph.

d. The only other deposits into this savings account after September 1, 2012 totaled \$42.12, which consisted only of interest payments.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. The funds for the purchase of this property from Tao-Chen Chao could have come only from monies transferred into Glenda Johnson's personal savings account from RaPower after September 10, 2012.

RESPONSE: Mrs. Johnson objects to this statement as speculation and hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken Disputed. As argued by Receiver above, these funds were used for the purchase of other property.

f. After payment of closing costs and credit for property taxes, the settlement statement shows the final purchase amount for this property was \$20,269.07.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

g. On February 27, 2013, title for this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

h. The 2018 assessor valuation of this property was \$16,000.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The Receiver identifies no document to establish this amount.

i. HD-4648 is listed at paragraph 20(s) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

6. Condominium Purchase in Payson, Utah (Utah County Parcel No. 51:468:0132):

a. On May 31, 2013, Glenda Johnson agreed to purchase a condominium in Payson, Utah from Tonidon Enterprises for \$120,000.00. After the addition of closing costs, the final purchase amount was \$120,969.80.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. Payment for the purchase consisted of a \$75,413.91 cashier's check dated May 31, 2013 from the RaPower bank account at Zions Bank payable to Glenda Johnson, a \$44,620.00 cashier's check dated May 31, 2013 from the RaPower bank account at Wells Fargo Bank payable to Glenda Johnson, and a down payment of \$1,000.00 (check #215), from Glenda Johnson. The \$44,620.00 payment from the RaPower bank account was recorded in RaPower's QuickBooks records as a "Real Estate Purchase" expense with a notation it was for "Purchase Company Condo."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On June 3, 2013, title for this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. The 2018 assessed valuation of this property was \$158,500.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The Receiver identifies no document to establish this amount.

e. The property with tax number 51:468:0132 is listed at paragraph 20(z) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

7. Sherwood Drive Home (Millard County Parcel No. DO-SS-136&137):

a. On August 4, 2014, Glenda Johnson issued check number 3038 from the account of Cobblestone Centre at Wells Fargo to First American Title in the amount of \$1,000.00. The notation on the memo line of the check reads "Earnest Money for property – 424 South Sherwood Drive."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The Receiver identifies no document to establish this amount. Furthermore, the above-referenced funds were owed to Glenda Johnson. There was nothing improper in the transfer to her. See Declaration of Glenda Johnson.

b. The purchase price for this property was \$315,000.00. After the addition of closing costs and reductions for down payment and tax credits, the final amount due at closing was \$312,893.32.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On August 7, 2014, Glenda Johnson transferred \$315,000.00 from the Wells Fargo account of RaPower59 to the Wells Fargo account of Cobblestone.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. On August 7, 2014, Glenda Johnson wired \$312,893.32 from the Wells Fargo account of Cobblestone to First American Title.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. On August 8, 2014, title to this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 assessor valuation of this property was \$193,709.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. There is no document used to support this figure.

g. DO-SS-136&137 is listed at paragraph 20(k) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

8. West Mountain Home (Utah County Parcel No. 55:718:0006):

a. In November 2014, Glenda Johnson purchased this home and property at an auction for \$432,929.00. After the addition of closing costs, the amount owed for the purchase was \$433,613.75.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 6.

b. On November 21, 2014, Glenda Johnson transferred \$433,000.00 from the RaPower account at Wells Fargo to her personal checking account at Wells Fargo. Prior to this transfer, her personal bank account had a zero balance.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On November 21, 2014, Glenda Johnson withdrew \$12,420.00 from the RaPower bank account at Wells Fargo Bank in the form of a cashier's check and paid this amount as an earnest money deposit on this property. After giving credit for this earnest money deposit, the settlement statement showed that the remaining balance owed to close on this purchase was \$421,193.75.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. On December 15, 2014, Glenda Johnson wired \$421,193.75 from her personal Wells Fargo bank account to Meridian Title.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. In the RaPower QuickBooks, Glenda Johnson recorded both the \$433,000.00 and \$12,420.00 payments as “Real Estate Purchase” expense, with notations reading “Purchase for Company House in Payson.”

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. On December 15, 2014, title to this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

g. The purchase price for this property included a water right from a well on the property. This water right (#51-7009) was recorded in the name of Glenda Johnson. This water right was acquired using the same funds as were used to purchase the home.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

h. The 2018 assessor valuation of this property was \$854,900.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The statement is unsupported without any foundation and should be stricken.

i. The property with tax number 55:718:0006 is listed at paragraph 20(y) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson’s name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

9. Acreage Purchase (Millard County Parcel No’s. 4805, 4806-A, and 4806-B):

a. On October 15, 2014, Glenda Johnson paid \$1,000.00 to Bullock Realty (check #1115) from the bank account of Cobblestone Center at Wells Fargo Bank as earnest money for the purchase of 4805, 4806-A, and 4806-B.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. After giving credit for the earnest money deposit and adding closing costs, the amount owed at closing was \$61,618.85.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On December 19, 2014, Glenda Johnson transferred \$61,000.00 from the RaPower account at Wells Fargo to her personal bank account at Wells Fargo. The Wells Fargo account description for this transfer says “Online Transfer to Johnson G . . . for Property 225 W Main St. Delta UT.”⁷⁸ Prior to this transfer, her personal bank account had a balance of \$11,778.38. This payment was recorded in RaPower’s QuickBooks records at a “Real Estate Purchase” expense.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. On December 19, 2014, Glenda Johnson wired \$61,618.85 from her personal bank account to First American Title.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. On December 30, 2014, title to these three properties (160 acres, 640 acres, and 320 acres) was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 assessor valuation of these three properties was \$84,000.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The statement is unsupported without any foundation and should be stricken.

g. 4805, 4806-A, and 4806-B are listed at paragraphs 20(a)-(c) of the Order, respectively.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

10. California Condominium (Los Angeles County Parcel No. 2842-027-174):

a. On March 23, 2015, Glenda Johnson transferred \$300,000.00 from the RaPower bank account at Wells Fargo to her personal bank account at Wells Fargo. Prior to this deposit, her bank account had a balance of \$11,117.50. This payment was recorded as a "Commission Expense" expense for "Condo in California" in the RaPower QuickBooks records.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

b. On March 31, 2015, she wired \$7,000.00 from her personal bank account at Wells Fargo to Pinnacle Estate Properties as an earnest money deposit on property in Newhall, California. Notations by Glenda Johnson on her bank statement dated April 8, 2015 state that the \$300,000.00 deposit and the \$7,000.00 expenditure in the account were for "California Condo."

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

c. On April 23, 2015, she wired \$240,582.83 to Pinnacle Estate Properties. Again, she made a notation on the bank statement that this payment was for "California Condo." The total purchase price for this property was \$247,582.83.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

d. On April 27, 2015 title to this property was recorded in the name of Glenda Johnson.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

e. On April 27, 2015, Neldon Johnson transferred to Glenda Johnson all of his interest in this property by quitclaim deed. No consideration was given by Glenda Johnson to Neldon Johnson for this transfer.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

f. The 2018 assessor valuation of this property by the Los Angeles County Assessor was \$263,957.00.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

g. 2842-027-174 is listed at paragraph 20(aa) of the Order.

RESPONSE: The Court listed all property in Glenda Johnson's name, including this parcel of property, despite the fact that she is not and has not ever been named as a party or a receivership entity in this action.

11. The Table below summarizes each of these Real Property purchases:

RESPONSE: Mrs. Johnson objects to the use and consideration of the table as it is hearsay within hearsay and therefore inadmissible.

Transfer of Funds to Glenda Johnson Controlled Accounts

12. On June 22, 2018, immediately after closing arguments in the bench trial in this case, the Court delivered partial findings of fact and an initial ruling from the bench, concluding that Receivership Defendants engaged in a "massive fraud" for which they would be enjoined and disgorgement would be ordered.

RESPONSE: Mrs. Johnson was not a party to the litigation mentioned. Further, Mrs. Johnson denies that she was involved in any fraudulent activity. There is no finding that she was involved in a fraud.

13. On June 22, 2018, Receivership Defendants had notice of the Court's partial findings entered that day.

RESPONSE: Mrs. Johnson is not a Receivership Defendant.

14. On June 22, 2018, Glenda Johnson transferred \$140,000.00 from the RaPower bank account at Bank of American Fork (#1198) to the Cobblestone Bank Account at Bank of American Fork (#3739).

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken.

15. That same day, June 22, 2018, Glenda Johnson Transferred \$1,945,500.00 from the #1206 Cobblestone bank account at Bank of American Fork to her personal bank account at Bank of American Fork. Her personal Bank of American Fork account number ends in 2790 (the "2790 Account").

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 8.

16. After depositing the \$1,945,500.00 into the 2790 Account on June 22, 2018, the account balance of the 2790 Account was \$2,216,275.60.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

17. There have been no other deposits in the 2790 Account since June 22, 2018.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

18. Over the next eleven months there was a significant depletion of the funds in the 2790 Account, including a \$200,000.00 transfer to a bank account in the name of Glenda Johnson's parents at Bank of American Fork. Her parents' bank account ends in 8749 (the "8749 Account," also known as the Folks account).

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

19. Glenda Johnson's parents, Norman and Eldoris Fenn, passed away in 2009 and 2010, respectively. Glenda Johnson controls the 8749 Account.

RESPONSE: Mrs. Johnson objects to this statement as hearsay. The exhibit relied upon is unsupported without any foundation and should be stricken. These alleged transactions are included in the Complaint filed by the Receiver against Mrs. Johnson. See Complaint, ¶ 24; Exhibit A, p. 5.

20. On May 24, 2019, the Court ordered that all funds in 2790 Account and the 8749 Account be preserved and the balances maintained.

RESPONSE: Not disputed.

21. As of August 1, 2019, the 2790 Account contained \$1,209,954.57.

RESPONSE: Not disputed.

22. As of August 1, 2019, the 8749 Account contained \$200,414.14.

RESPONSE: Not disputed.

**MRS. JOHNSON'S STATEMENT OF ADDITIONAL MATERIAL FACTS IN
OPPOSITION TO SUMMARY JUDGMENT**

1. On January 18, 2013, Solstice entered into a contract with Glenda Johnson to purchase 200 solar towers at the price of \$175,000 each. See Declaration of Glenda Johnson, Exhibit 1, and the attachment to it.

2. The contract provided that Solstice is entitled to 81.3% of gross proceeds from RaPower, LLC. *Id.*

3. Pursuant to the contract, the parties agreed that RaPower could pay its obligation directly to Glenda Johnson, but Solstice would receive credit for those payments. *Id.*

4. Payments were to be made when money was available. *Id.*

5. Funds transferred or paid to her in the transactions involved in this motion for summary judgment were owed to her, earned by her, and her property. Accordingly, she was entitled to use them as she saw fit. *Id.*

ARGUMENT

I. These Claims are Already Pending in Another Case.

On September 4, 2019, Mr. Klein filed a lawsuit against Glenda E. Johnson (Case No. 2:15-cv-00828). In that lawsuit, Mr. Klein alleges five claims for relief, four of which are alleged under the Avoidance of Fraudulent Transfers Under Utah Code Ann. §§ 25-6-5(1)(a) and 25-6-8 or Utah Code Ann. §§ 25-6-202(1)(a) and 25-6-303; §§ 25-6-5(1)(b) and 25-6-8 or Utah Code Ann. §§ 25-6-202(1)(b) and 25-6-303; §§ 25-6-6(1) and 25-6-8 or Utah Code Ann. §§ 25-6-203(1) and 25-6-303; §§ 25-6-6(2) and 25-6-8 or Utah Code Ann. §§ 25-6-203(2) and 25-6-303. The fifth cause of action is for Unjust Enrichment. Each of the claims for relief are based upon alleged transfers of property or funds from one of the Receivership Entities to Mrs. Johnson. In total, Mr.

Klein alleges that Mrs. Johnson received \$3,640,203.36 in fraudulent transfers. Mr. Klein attaches as support for his allegations a spreadsheet he created to identify these transfers. They include each transfer Mr. Klein now wishes to undo with this motion. At their core, both the instant motion and the action filed against Mrs. Johnson concern the same subject matter, claims, and parties, and therefore violates the rule against claim splitting.

"The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit." *Harbinger Capital LLC v. Ergen*, 103 F. Supp. 3d 1251, 1259 (D. Colo. 2015) (quoting *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011)). "Claim-splitting is not the same as claim preclusion (*res judicata*). Claim preclusion applies when another case has reached final judgment, whereas claim-splitting applies when the other case is ongoing." *Id.* "[T]he test for claim splitting is not whether there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." *Id.* This case classically falls directly within those lines. The subject matter and claims of both the motion and the Complaint arise from the same transactions or transfers the Receiver now seeks to undo. The parties in both the motion and the Complaint are the same – the Receiver and Mrs. Johnson. Finally, if summary judgment is granted in this case, or judgment was granted in the separate case, the result in one would preclude adjudication of the claims in the other. Allowing the Receiver to pursue the claims in both venues creates the opportunity for disparate outcomes and violates the rule against claim-splitting. Under these circumstances, and where a separate action has been filed, the Receiver's claims should be pursued in the separate action where Mrs. Johnson has been named a party defendant.

The Receiver relies upon *SEC v. Cavanagh*, 155 F.3d 129, 136 (2nd Cir. 1998) to argue that "[f]ederal courts may order equitable relief against a person who is not accused of wrongdoing

in a securities enforcement action where that person: (1) has received ill-gotten funds; and (2) does not have a legitimate claim to those funds.” In that case, the SEC named Tamar Lehmann as a **defendant** because she was a recipient of proceeds from the sale of stock that were deposited in her account. *Id.* The Court found that her account could be frozen, despite the lack of evidence of any participation by her in the SEC violation. *Id.* The difference between Mrs. Lehmann and Mrs. Johnson, is that Mrs. Lehmann was a named **defendant** in that action. The Court had jurisdiction to take action against her. Mrs. Johnson is not a named party in this action. She is a named party in the separate action.

The Receiver further relies upon *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005) where the court upheld a disgorgement order directing a gift recipient to return assets purchased with money derived from defendant’s fraudulent scheme. Again, the innocent party against whom the SEC sought disgorgement, had been named as a **defendant** in the action. *Id.* The disgorgement order was entered against party **defendants**. *Id.* Indeed, in each of the cases the Receiver relies upon for this proposition, the court enforced the requested relief against a **named party**. The Receiver has gone to the trouble of naming Mrs. Johnson as a defendant, but in another action entirely – not in this action. As such, this motion must be denied and the Receiver should pursue his claims in the Collection Case he filed against her on the same issues raised in his motion here.

The Receiver summarily states that the Receivership Order (ECF 491) and the Affiliates Order (ECF 636) grants him the authority “to investigate, take possession or bring legal action to collect, recover, receive, and/or take possession of all Receivership property, including real property in which Receivership Entities have a beneficial interest even if titled in the name of another, such as a spouse.” (emphasis added). This is partially correct, but imputes too much. It does not give him the authority to take possession of property **owned by another**. All property

(both real and personal) that the Receiver has identified and is seeking to recover is not Receivership Property titled in Glenda Johnson's name, but legally belongs to Glenda Johnson. She has a superior claim to ownership and title to the property. It is not Receivership Property held in name only. Mrs. Johnson asserts direct ownership over the identified property. As such, at a minimum, a genuine issue of material fact precludes summary judgment on this point, but given the doctrine of claim splitting, the motion should be denied and the matter pursued in the Collection Case. This basis under the Order gives the Receiver the right (and duty) to bring a "legal action", which the Complaint by the Receiver, as the more appropriate avenue, allows him to litigate his claims.

Mrs. Johnson is neither a Receivership Defendant, nor a Receivership Entity. Neither the Receivership Order nor the Affiliates Order grants the Receiver any authority over her and her assets. Those orders may authorize the Receiver to bring legal action against Mrs. Johnson, but they do not grant him authority over her or her possessions. Simply tracing funds from account to account does not make the money (and resulting property) a Receivership Asset. Given the assertion of ownership and title by Mrs. Johnson, the motion should be denied.

II. The Motion Fails for Lack of Proof as all of the Receiver's Exhibits are Inadmissible Hearsay and are not Properly Before the Court.

The Federal Rules of Civil Procedure allow a court to grant summary judgment where there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As stated by the Receiver, "[u]nder Rule 56, facts must be supported by citation to materials in the record and the court must 'examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" See Motion, p. 28. Rule 56 clearly requires that the evidence used to support a motion for summary judgment must be materials from the record. See Fed.R.Civ.P. 56(c)(1)(A). The Receiver admits

that no evidence used to support this motion are from the record of this case. Rather, they are unsupported documents allegedly “acquired as part of the Receiver’s investigation”. See Motion, p. 29. While the Receiver may have acquired these documents, they are not authenticated in any fashion, not by the custodian of records of the financial institution they were obtained from, not by Glenda Johnson (who is alleged to be the author of some of the documents), and not even by the Receiver who claims to have obtained them from his investigation.

“Hearsay’ means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). The United States Court of Appeals for the Tenth Circuit has stated that courts cannot consider hearsay in deciding a motion for summary judgment. See *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995) (“It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment. Hearsay testimony cannot be considered because [a] third party’s description of [a witness’] supposed testimony is not suitable grist for the summary judgment mill.” (internal quotations and citations omitted)).

Pursuant to Fed.R.Evid. 803(6), business records are admissible despite their hearsay nature if the records’ custodian, or another qualified witness, testifies the records (1) were prepared in the normal course of business; (2) were made at or near the time of the events recorded; (3) were based on the personal knowledge of the entrant or of a person who had a business duty to transmit the information to the entrant; and (4) are not otherwise untrustworthy. *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008).

The Receiver has not authenticated nor provided any testimony from any witness to provide the necessary foundation for any of the exhibits used as evidence in support of the factual

statements made in this motion. All exhibits he relies upon are hearsay. This Court cannot consider hearsay to decide a motion for summary judgment. See *Gross*, 53 F.3d at 1541. Having failed to support by affidavit or admissible testimony any of the factual statements made by the Receiver to support the motion, summary judgment must be denied.

III. There Are Factual Disputes Preventing Summary Judgment.

The Statement of Additional Material Facts and the accompanying Declaration from Mrs. Johnson demonstrate material facts are in dispute and therefore summary judgment cannot be granted. Fed. R. Civ. P. 56(a). In particular, Mrs. Johnson disputes that the funds transferred to her and with which she financed the purchase of the properties at issue herein belonged to the receivership entities and were not earned by her.

On January 18, 2013, Solstice entered into a contract with Glenda Johnson to purchase 200 solar towers at the price of \$175,000 each. See Declaration of Glenda Johnson, Exhibit 1, and the attachment to it. The contract provided that Solstice is entitled to 81.3% of gross proceeds from RaPower, LLC. *Id.* Pursuant to the contract, the parties agreed that RaPower could pay its obligation directly to Glenda Johnson, but Solstice would receive credit for those payments. *Id.* Payments were to be made when money was available. *Id.* Funds transferred or paid to her in the transactions involved in this motion for summary judgment were owed to her, earned by her, and her property. Accordingly, she was entitled to use them as she saw fit. *Id.*

Even if this Court ignores the claim splitting rule, and considers the hearsay the Receiver has supplied as support for this motion, there exists a genuine issue of material fact as to whether or not the transfers of funds where earned payments to Mrs. Johnson in accordance with a contractual right. Pursuant to contract, Glenda Johnson was owed every payment she received.

She is still owed much more under the terms of that contract. Given that there is a genuine issue of material fact, this Court cannot grant summary judgment.

DATED this 11th day of October, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul
Denver C. Snuffer, Jr.
Daniel B. Garriott
Steven R. Paul

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the court's CM/ECF filing system and that system sent notice of filing to all counsel and parties of record.

In addition, the foregoing was mailed or emailed as indicated to the following who are not registered with CM/ECF.

Greg Shepard greg@rapower3.com

/s/ Steven R. Paul
*Attorneys for Glenda Johnson, LaGrand
Johnson and Randale Johnson*