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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>MOTION TO STRIKE NEW EVIDENCE AND ARGUMENT IN REPLY MEMORANDUM (ECF 802)</p> <p>EVIDENTIARY HEARING REQUESTED</p> <p>Judge David Nuffer</p>
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COMES NOW Glenda Johnson and moves to strike the new evidence and arguments raised for the first time in the Receiver's Reply Memorandum filed on November 22, 2019 (ECF 802) in support of his 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).

The Receiver submitted new evidence and made new arguments that are inappropriate in a reply memorandum and, therefore, should be stricken. In addition, the memorandum exceeds the allowed length under the rules.

ARGUMENT

1. The Receiver's new evidence (Exhibits B-F) should be stricken under DUCivR 7-1(b)(2).

The local rules of practice require that a Reply Memorandum “must be limited to rebuttal of matters raised in the memorandum in opposition.” The Receiver has included significant new matters in the Reply, ECF doc. 802. All of the exhibits submitted in support of the Reply memorandum are procedurally improper and unfairly prejudice Mrs. Johnson in her defense of the summary judgment claims. The Receiver filed a defective motion and cannot cure his defective pleading in the original motion by submitting evidence for the first time as Exhibits to his reply. A reply may not properly be used to offer new evidence for the first time, and to raise new arguments in support of a party's position.

The Receiver has tried to cure the obvious hearsay nature of his statements of fact in the original motion by simply attaching four affidavits of bank custodians. That was inappropriate. But ignoring that impropriety, the bank affidavits only state that they have each complied with subpoenas to produce records. But there is no correlation between the respective affidavit and any document provided in the original motion. Simply producing the affidavit of the custodian of records (after the fact) and making Mrs. Johnson guess as to which documents were produced under the claimed subpoena is wrong. Further, attaching surprise evidence to the Reply Memorandum, after she has already responded to the original motion, prejudices her ability to respond the Receiver's allegations.

2. The Hearsay Evidence Submitted by Receiver in Support of His Motion Should be Stricken.

One of the obvious problems with the Receiver's motion is that Mrs. Johnson is not a party defendant in this case. The evidentiary bases on which the Receiver tries to rely in admitting evidence against her, should not be allowed when offered against a non-party. For example, the Receiver claims that deposition testimony from Mrs. Johnson can be used to support the summary judgment motion. Yet, FRE 801(d)(1)-(2), cited by the Receiver in the Reply, are meant to be used only to prove a prior inconsistent statement or a prior consistent statement to rebut fabrication, improper influence, motive, or to rehabilitate credibility (See FRE 803(d)(1)), or as "an opposing party's statement" (See FRE 803(d)(2)). Neither of those cases apply to the use of Mrs. Johnson's deposition testimony in the Receiver's motion. Thus, using Mrs. Johnson's deposition testimony is improper hearsay and must be stricken.

Likewise, using documents allegedly provided by persons under the Receivership Order still require a foundation and must survive scrutiny under the hearsay rule. Simply because a document may "affect an interest in Property" is not enough to except the document under hearsay. Proper foundation must be established that the document is an authentic public record. The Receiver's motion fails to show that proof, and the attempt in the reply memorandum to lay that foundation is lacking. Summary judgment should be denied based on the Receiver's motion and inadmissible surprise evidence in his reply.

3. The Reply Memorandum Exceeds the Page Limitation of DUCiv 56-1(g).

The Rule requires that a reply memorandum relating to summary judgment "cannot exceed 5,000 words, or twenty (20) pages." The Receiver's Reply Memorandum is 23 pages. Therefore, the Rule requires a certificate of compliance with the word-count limit. The limitation includes

the introduction, relief sought, background, statements of facts and responses thereto, additional facts, argument and conclusion. (See DUCiv 56(1(g))).

Because the Reply exceeds the page limitation, it should be stricken.

DATED this 26th day of November, 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.

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/s/ Steven R. Paul
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Johnson and Randale Johnson*