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

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| <p>R. WAYNE KLEIN, as Receiver,<br/><br/>Plaintiff,<br/><br/>v.<br/><br/>MATTHEW SHEPARD, an individual,<br/><br/>Defendant.</p> | <p><b>PLAINTIFF’S 12(b)(1) MOTION TO<br/>DISMISS DEFENDANT’S<br/>COUNTERCLAIMS</b></p> <p><b>(Ancillary to Case No. 2:15-cv-00828)</b></p> <p>Civil No. 2:19-cv-00533-HCN-CMR</p> <p>Judge Howard C. Nielson, Jr.</p> <p>Magistrate Judge Cecilia M. Romero</p> |
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R. Wayne Klein, the Court-Appointed Receiver (the “Receiver” or “Plaintiff”) of RaPower-3, LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”) their subsidiaries and affiliates,<sup>1</sup> and the assets of Neldon Johnson and R. Gregory Shepard,<sup>2</sup> in the case styled as *United States v. RaPower-3, LLC, et al.*, Case No. 2:15-cv-00828

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<sup>1</sup> Collectively, unless stated otherwise, RaPower, IAS, LTB1, and all subsidiaries and affiliated entities are referred to herein as “Receivership Entities.” The subsidiaries and affiliated entities are: Solco I, LLC (“Solco”); XSun Energy, LLC (“XSun”); Cobblestone Centre, LC (“Cobblestone”); LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership (“NPJFLP”); Solstice Enterprises, Inc. (“Solstice”); Black Night Enterprises, Inc. (“Black Night”); Starlight Holdings, Inc. (“Starlight”); Shepard Energy; and Shepard Global, Inc.

<sup>2</sup> Collectively, RaPower, IAS, LTB1, Shepard, and Johnson are referred to herein as “Receivership Defendants.”

(D. Utah) (Nuffer, J.) (the “Civil Enforcement Case”), pursuant to Federal Rule of Civil Procedure 12(b)(1), hereby files this Motion to Dismiss Defendant Matthew Shepard’s counterclaims (the “Motion”).

### **INTRODUCTION**

This is an ancillary action to the Civil Enforcement Case where the Receivership Court has found, among other things, that Receivership Defendants were operated as a “massive tax fraud” and that assets have been transferred by Receivership Entities “for the purpose of defrauding creditors.”<sup>3</sup> Defendant Matthew Shepard (“Matthew Shepard”) was an insider of certain Receivership Entities and is the son of R. Gregory Shepard. The Receiver’s investigation has uncovered over \$140 thousand in ill-gotten, fraudulent funds that Matthew Shepard received from Receivership Entities and/or Receivership Defendants. Through this action, the Receiver seeks to recover these funds for the benefit of the Receivership Estate.

Relevant to this Motion are two counterclaims Matthew Shepard filed against the Receiver, one for “Inverse Condemnation” and the other for a “*Bivens* Violation of Due Process” (each a “Counterclaim”, collectively the “Counterclaims”).<sup>4</sup> Both Counterclaims relate to the Receivership Court’s July 8, 2019 order cancelling the shares of publicly-traded Receivership Entity IAS (the “Cancellation Order”).<sup>5</sup> Specifically, the Counterclaims assert that because the Receivership Court granted the Receiver’s motion asking the court to cancel IAS shares, the Receiver violated Matthew Shepard’s due process rights and took his property without just

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<sup>3</sup> *Findings of Fact and Conclusions of Law*, Civil Enforcement Case, [Docket No. 467](#) at 1, filed Oct. 4, 2018; Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership, Civil Enforcement Case, Docket No. 636 at 6, filed on May 3, 2019.

<sup>4</sup> *See Answer, Jury Demand and Counterclaim*, [Docket No. 6](#), filed August 19, 2019.

<sup>5</sup> *See* Civil Enforcement Case, [Docket No. 719](#).

compensation.<sup>6</sup>

In reality, the Counterclaims are nothing more than an attempt by Matthew Shepard to interfere with and delay the Receiver and the Receivership Court's administration of the Receivership Estate. As shown below, the Counterclaims must be dismissed for three reasons: (1) Matthew Shepard did not obtain leave of the Receivership Court before filing the Counterclaims against the Receiver as required under the *Barton* doctrine; (2) the Receivership Order prohibits the commencement and prosecution of all civil legal claims against the Receiver without further order of the Receivership Court; and (3) the Receivership Order grants the Receiver immunity for actions he takes in good faith compliance with any order of the Court.

### **FACTS**

1. On October 31, 2018, Judge Nuffer, in the Civil Enforcement Case, issued a Receivership Order ("Receivership Order")<sup>7</sup> appointing the Receiver to take control over the assets of Neldon Johnson, R. Gregory Shepard, and Receivership Defendants. The Court has directed and authorized the Receiver to do, among other things, the following:

- "[D]etermine the nature, location and value of all property interests of each of the Receivership Defendants . . . ."<sup>8</sup>
- "To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive, and take into possession from third parties all Receivership Property and records relevant thereto."<sup>9</sup>
- "To bring legal actions based on law or equity in any state, federal or foreign

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<sup>6</sup> *Answer, Jury Demand and Counterclaim*, [Docket No. 6](#), filed August 19, 2019.

<sup>7</sup> Civil Enforcement Case, [Docket No. 490](#). A Corrected Receivership Order, which corrected formatting errors, was entered the next day, [Docket No. 491](#).

<sup>8</sup> Civil Enforcement Case, [Docket No. 491](#) at ¶ 13(a).

<sup>9</sup> *Id.* at ¶ 13(b).

court as the Receiver deems necessary or appropriate in discharging his duties as Receiver.”<sup>10</sup>

- “[T]o investigate, prosecute, defend, intervene in, or otherwise participate in . . . actions in any state, federal, or foreign court proceeding of any kind as may in his discretion, and after consultation with the United States, be advisable or proper to recover or conserve Receivership Property.”<sup>11</sup>
- “[S]eek, 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, and such other relief from this Court as may be necessary to enforce this Order.”<sup>12</sup>

2. The Receivership Order also directed the Receiver “to investigate the publicly traded status of IAS and provide a recommendation to the Court on whether IAS should remain a publicly traded company or should otherwise be liquidated and dissolved.”<sup>13</sup> If, after investigation, “the Receiver determines that there are no operations unrelated to the solar energy scheme, then the Receiver *shall* propose a liquidation plan . . . .”<sup>14</sup>

3. On December 31, 2018, the Receiver filed his *Accounting Recommendation on Publicly Traded Status of International Automated Systems, and Liquidation Plan* (the “Recommendation”).<sup>15</sup> In the Recommendation, the Receiver found, among other things, that “[t]he independent auditors of the IAS financial statements noted that because the company had no revenue and no operating income, ‘the Company may be unable to continue as a going concern.’”<sup>16</sup> And that “[a]fter being a public company for more than 30 years, IAS has failed to

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<sup>10</sup> *Id.* at ¶ 13(l).

<sup>11</sup> *Id.* at ¶ 59. On May 24, 2019, the Court entered an *Order Granting Motion to Commence Legal Proceedings*, [Docket No. 673](#), authorizing the Receiver to begin filing certain categories of litigation.

<sup>12</sup> *Id.* at ¶ 60.

<sup>13</sup> *Id.* at ¶ 85 (emphasis added).

<sup>14</sup> *Id.* at ¶ 85(f).

<sup>15</sup> Civil Enforcement Case, [Docket No. 552](#).

<sup>16</sup> *Id.* at 21.

generate any operating revenue or demonstrate that any technology it was developing was feasible.”<sup>17</sup> Summing up, the Receiver stated that, based on his investigation, it was clear that

IAS has functioned as:

1) an instrument to instill false hopes among potential investors willing to provide additional funding to Johnson’s ventures, 2) a vehicle for Neldon Johnson and his sons to pitch nonfunctioning technology so they can receive salaries, 3) a means of having IAS pay funds to Johnson or to pay Johnson’s personal expenses (such as power bills for his residence), and 4) likely a device for Johnson and his sons to receive income by selling their shares to gullible investors.<sup>18</sup>

4. Notably, Judge Nuffer had made similar findings both before the Receiver filed the Recommendation and after, including that the “whole purpose of . . . the Receivership Entities . . . was to perpetuate a fraud to enable funding for Neldon Johnson.”<sup>19</sup>

5. The Receiver recommended that IAS should not remain a publicly traded company and outlined the steps he would take to recover IAS assets and liquidate the company.<sup>20</sup>

6. On May 27, 2019, the Receiver filed a motion asking the Court to cancel the shares of IAS (“Cancellation Motion”).<sup>21</sup> From the time of the filing of the Recommendation to the time of the filing of the Cancellation Motion, the Receiver’s investigation uncovered further information demonstrating Neldon Johnson and his family’s improper use of IAS resources. This information included that the SEC obtained injunctions against Johnson and family members in 2005 based on allegations the Johnson family members manipulated the price of IAS shares in

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<sup>17</sup> *Id.* at 22.

<sup>18</sup> *Id.* at 23.

<sup>19</sup> *Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership*, Civil Enforcement Case, [Docket No. 636](#), filed May 3, 2019; *see also Findings of Fact and Conclusions of Law*, Civil Enforcement Case, [Docket No. 467](#), at 128, filed Oct. 4, 2018.

<sup>20</sup> Recommendation, Civil Enforcement Case, [Docket No. 552](#) at 24-30.

<sup>21</sup> Civil Enforcement Case, [Docket No. 682](#).

the course of selling shares they owned,<sup>22</sup> that IAS was sanctioned twice by the Utah Division of Securities for selling unregistered securities,<sup>23</sup> and that share price manipulation was likely still occurring.<sup>24</sup>

7. On June 7, 2019, Nelson Snuffer Dahle & Poulsen, (“Nelson Snuffer”), purportedly on behalf of IAS,<sup>25</sup> filed an opposition to the Cancellation Motion, primarily arguing that a cancellation of IAS shares would be an unlawful taking.<sup>26</sup>

8. On July 8, 2019, after the Receiver filed a reply in support of the Cancellation Motion,<sup>27</sup> the Court granted the Cancellation Motion and ordered all equity in IAS shares cancelled.<sup>28</sup> In the Cancellation Order the Court found, among other things, that (1) “material information that IAS has publicly disclosed is false and misleading”;<sup>29</sup> (2) “[w]hile IAS had been telling shareholders and public markets for years that IAS was developing a variety of products, the only active product development in which IAS engaged was the solar lens scheme. IAS does not engage in any business operations other than this scheme”;<sup>30</sup> and (3) “[t]he immediate cancellation of IAS shares is necessary to prevent manipulation of the price of IAS shares and to halt the sale of assets belonging to the Receivership Estate.”<sup>31</sup>

9. On July 26, 2019, the Receiver filed this action against Matthew Shepard. The

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<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 8-10.

<sup>25</sup> Nelson Snuffer did not have authority to represent IAS for the purposes of the filing. *See* Cancellation Order, Civil Enforcement Case, [Docket No. 719](#) at n. 7.

<sup>26</sup> Civil Enforcement Case, [Docket No. 690](#).

<sup>27</sup> Civil Enforcement Case, [Docket No. 696](#).

<sup>28</sup> Civil Enforcement Case, [Docket No. 719](#).

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 5.

Receiver has traced over \$140 thousand in ill-gotten, fraudulent funds from Receivership Entities and/or Receivership Defendants to Matthew Shepard.

11. On August 19, 2019, Matthew Shepard filed his Counterclaims against the Receiver. The Counterclaims stem from Judge Nuffer's Cancellation Order.<sup>32</sup>

### **ARGUMENT**

Matthew Shepard's Counterclaims are an improper attempt to interfere with the administration of the Receivership Estate and must be dismissed for three independent reasons: (1) Matthew Shepard failed to obtain leave of court before filing the Counterclaims against the Receiver; (2) the Receivership Order expressly prohibits claims against the Receiver without further order of the Receivership Court; and (3) the Receivership Order grants immunity to the Receiver for his good faith compliance with court orders.

#### **I. The Counterclaims Must be Dismissed Because Matthew Shepard Failed to Obtain Leave of Court.**

It is well-established that "before suit is brought against a receiver, leave of the court by which he was appointed must be obtained."<sup>33</sup> This doctrine, based on the Supreme Court's decision in *Barton v. Barbour*,<sup>34</sup> is commonly referred to as the *Barton* doctrine. The Tenth Circuit Court of Appeals has found that the *Barton* doctrine is jurisdictional in nature and the therefore "dismissal under *Barton* should be made pursuant to Fed. R. Civ. P. 12(b)(1) rather than 12(b)(6)."<sup>35</sup>

"Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take

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<sup>32</sup> Answer, Jury Demand and Counterclaim, [Docket No. 6](#), filed August 19, 2019.

<sup>33</sup> [Lankford v. Wagner](#), 853 F.3d 1119, 1121 (10th Cir. 2017) (quoting [Barton v. Barbour](#), 104 U.S. 126, 128 (1881)).

<sup>34</sup> [104 U.S. 126 \(1881\)](#).

<sup>35</sup> [Satterfield v. Malloy](#), 700 F.3d 1231, 1234 (10th Cir. 2012); see also [Lankford](#), 853 F.3d at 1122.

two forms. First, a facial attack on the complaint’s allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.”<sup>36</sup> “Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint’s factual allegations.”<sup>37</sup> When considering a factual attack “a court has wide discretion to allow” evidence outside the pleadings to resolve the jurisdictional question.<sup>38</sup> Here, the Receiver brings a factual attack on the counterclaims by challenging “the facts upon which subject matter jurisdiction depends.”

Under the *Barton* doctrine, claims that are based on acts related to the official duties of a receiver are barred unless leave of court is obtained from the court of appointment.<sup>39</sup> Such claims are barred even if it is alleged that the Receiver took such actions with improper motives.<sup>40</sup> “The *Barton* doctrine exists to ensure other courts do not intervene in the [appointment-court’s] administration of an estate without permission.”<sup>41</sup> The doctrine prevents receiverships from “becom[ing] a more irksome duty” and ensures that competent people are available for appointment, reduces the expenses of receiverships, and enables judges to monitor the work of the receivers more effectively.<sup>42</sup> A limited exemption to the *Barton* doctrine exists when a

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<sup>36</sup> [Holt v. United States](#), 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> [Lankford](#), 853 F.3d at 1121 (quoting [Barton](#), 104 U.S. at 128).

<sup>40</sup> See [Satterfield](#), 700 F.3d at 1236.

<sup>41</sup> *Id.* at 1237.

<sup>42</sup> [Lankford](#), 853 F.3d at 1122-23 (quoting [Satterfield](#), 700 F.3d at 1236-37).



Receiver acts *ultra vires*, or outside the scope of his court-appointed authority.<sup>43</sup> Accordingly, the *Barton* doctrine bars suits against receivers without permission from the court of appointment so long as the Receiver's actions fall within the scope of his court-appointed authority.<sup>44</sup>

Here, Matthew Shepard did not obtain permission from the Receivership Court before filing his counterclaims against the Receiver. Instead, by filing his counterclaims without permission, he is attempting to interfere with the Receiver and the Receivership Courts' administration of the Receivership Estate.

Although the counterclaims allege that the Receiver acted *ultra vires* in the cancellation of IAS shares, it does not—and cannot—explain how the Receiver could have acted outside his authority when it was the Receivership Court—not the Receiver—who issued the order that resulted in cancellation of the IAS shares. To put it more simply, the Receiver could not have acted *ultra vires* in the cancelling of the IAS shares because the Receiver did not cancel the IAS shares.

Indeed, the facts show that the Receivership Court cancelled IAS shares only after extensive investigation and reporting by the Receiver and after multiple findings by the Court that IAS—along with other Receivership Entities—operated as a “massive tax fraud.”<sup>45</sup> Moreover, the Cancellation Motion was fully briefed, including an opposition by Matthew Shepard's counsel, Nelson Snuffer, before the IAS shares were cancelled.<sup>46</sup> Accordingly, because IAS shares were cancelled by court order—not by independent acts of the Receiver—there is no possibility the Receiver acted outside the scope of his court-appointed authority.

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<sup>43</sup> *Id.* at 1122.

<sup>44</sup> [Satterfield, 700 F.3d 1231 at 1237.](#)

<sup>45</sup> See Facts ¶¶ 3-8, *supra*.

<sup>46</sup> Facts ¶ 6-8, *supra*.

Accordingly, the Counterclaims should be dismissed.

**II. The Receivership Order Prohibits Commencement and Prosecution of Civil Legal Claims Against the Receiver Without Further Order of the Receivership Court.**

Next, the Counterclaims should also be dismissed because the Receivership Order stays—until further order the Receivership Court—any proceedings against the Receiver.

The Receivership Order states that all “Ancillary Proceedings” are “stayed until further order of this Court[.]”<sup>47</sup> “Ancillary Proceedings” are defined, in relevant part, as “[a]ll civil legal proceedings of any nature . . . involving: the Receiver in his capacity as Receiver.”<sup>48</sup> The Receivership Order further states that “the parties to any and all Ancillary Proceedings are enjoined from *commencing* or continuing any such legal proceeding, or from taking any action, in connection with any such proceeding, including, but not limited to, the issuance or employment of process.”<sup>49</sup> And that “[a]ll Ancillary Proceedings are stayed in their entirety, and all courts having any jurisdiction thereof are enjoined from taking or permitting any action until further order of this Court.”<sup>50</sup>

Therefore, because the Counterclaims are civil legal proceedings involving the Receiver in his capacity as Receiver, they are Ancillary Proceedings that are stayed under the Receivership Order. No order of the Receivership Court removed the stay of Ancillary Proceedings against the Receiver. Therefore, Matthew Shepard was—and still is—enjoined from commencing and prosecuting the Counterclaims. Because Matthew Shepard’s Counterclaims were filed in violation of the Receiver Order, they should be dismissed, or—in the alternative—

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<sup>47</sup> Receivership Order, Civil Enforcement Case, [Docket No. 491](#) at ¶ 44.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at ¶ 46 (emphasis added).

<sup>50</sup> *Id.* at ¶ 47.

stayed until further order of the Receivership Court.

### **III. The Receivership Order Granted the Receiver Immunity.**

To the extent Matthew Shepard is alleging that the Receiver should be liable for carrying out the orders of the appointing judge or even that the Judge Nuffer could be liable for the cancellation of the IAS shares, the Receiver and Judge Nuffer are entitled to absolute immunity here.<sup>51</sup> It well established that “[A] receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity.”<sup>52</sup>

Indeed, this immunity is expressly provided in the Receivership Order:

The Receiver and Retained Personnel, acting within the scope of such agency, are entitled to rely on all outstanding rules of law and orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.<sup>53</sup>

Given that the Receiver acted pursuant to Court order and that Matthew Shepard has not made any showing to the Receivership Court that the Receiver acted in bad faith, gross negligence, or reckless disregard of his duties, the Receiver is immune from the substance of the Counterclaims.

### **CONCLUSION**

For the foregoing reasons, the Counterclaims should be dismissed until leave of the

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<sup>51</sup> [Swain v. Seaman](#), 505 F. App'x 773, 775 (10th Cir. 2012) (unpublished) (quoting [T & W Inv. Co. v. Kurtz](#), 588 F.2d 801, 802 (10th Cir.1978)); see also [Turney v. O'Toole](#), 898 F.2d 1470, 1472 (10th Cir. 1990) (“official[s] charged with the duty of executing a facially valid court order enjoy[ ] absolute immunity from liability for damages in a suit challenging conduct prescribed by that order.”) (collecting cases).

<sup>52</sup> *Id.*

<sup>53</sup> Receivership Order, Civil Enforcement Case, [Docket No. 491](#) at ¶ 68.

Receivership Court is obtained, or—in the alternative—the Counterclaims should be stayed until further order of the Receivership Court, which must include a finding by the Receivership Court that the Receiver acted in malfeasance, bad faith, gross negligence, or reckless disregard of his duties.

DATED this 9<sup>th</sup> day of September, 2019.

**PARR BROWN GEE & LOVELESS, P.C.**

*/s/ Michael S. Lehr*

Jonathan O. Hafen

Jeffery A. Balls

Michael Lehr

*Attorneys for R. Wayne Klein, Receiver*

**CERTIFICATE OF SERVICE**

I hereby certify that the above **PLAINTIFF'S 12(b)(1) MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** was filed with the Court on this 9th day of September, 2019, and served via ECF on all parties who have requested notice in this case.

*/s/ Michael S. Lehr*