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

<p>R. WAYNE KLEIN,  Plaintiff,  vs.  MATTHEW SHEPARD, an individual,  Defendant.</p>	<p><b>OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS</b></p> <p><b>Case No. 19-cv-00533</b></p> <p><b>ORAL ARGUMENT REQUESTED</b></p>
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COMES NOW Defendant Matthew Shepard and objects to the Motion to Dismiss by Plaintiff because the counterclaim against the receiver is well taken for his actions that have resulted in damage or loss to Defendant's property.

On July 30, 2019 the Receiver, Wayne Klein, filed lawsuits against LaGrand T. Johnson and Yotsuya Family Trust (Case No. 2:19-cv-00534), Randale Johnson (Case no. 2:19-cv-00532), and Matthew Shepard (Case No. 2:19-cv-00533). On August 19, 2019, Defendants in each of these cases filed an Answer, Jury Demand, and Counterclaim.<sup>1</sup>

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<sup>1</sup> See ECF 6 of the present case. Similar answers with jury demand and counterclaims were filed in each referenced case.

In a telephone discussion between counsel for the Receiver and counsel for Randale Johnson, LaGrand Johnson and Matthew Shepherd, counsel for the Receiver stated that the Receiver is of the belief that although it was proper for the Answer to be filed, the Counterclaims filed by these Defendants violate the stay imposed by the Corrected Receivership Order (ECF 491). This led to an investigation of several orders in this case, and the conclusion that the Orders entered by this Court relating to this narrow issue are multiple, contradictory and confusing.

Defendant believes the motion to dismiss should be denied because the *Barton* doctrine does not apply to ultra vires acts of the receiver. The Counterclaim alleges the receiver is liable to Defendant for the cancelation of the IAUS shares owned by him because the action of cancelling the shares exceeded the authority granted to the receiver by the court. In addition, the other arguments raised by the receiver in the motion to dismiss fail as a basis to dismiss and are better characterized as defenses.

## ARGUMENT

### **Barton Doctrine**

Plaintiff's first argument for dismissal is that the *Barton* doctrine arising from the U.S. Supreme Court case of *Barton v. Barbour*,<sup>2</sup> requires leave of court before initiating suit against a receiver for claims based on acts relating to the official duty of a receiver. However, the *Barton* doctrine is not without exceptions. In *Satterfield v. Malloy*,<sup>3</sup> the 10<sup>th</sup> Circuit Court of Appeals explains that the doctrine does not apply if the receiver acts ultra vires. *Id.* at 1235.

*Satterfield* holds that the *Barton* doctrine does not apply "if, by mistake or wrongfully, the receiver takes possession of property belonging to another." *Id.* In addition, "An individual whose

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<sup>2</sup> 104 U.S. 126 (1881)

<sup>3</sup> 700 F.3d 1231 (10<sup>th</sup> Cir. 2012).

property is wrongfully seized may bring suit against a receiver ‘personally as a matter of right; for in such case the receiver would be acting ultra vires.’” *Id.* While the court in *Satterfield* did not find the receiver’s actions ultra vires, the facts as pled in this case support a finding in favor of Defendant as explained below.

First, the Defendant is not one of the Receivership Entities or one of the Receivership Defendants. He is a third-party outside of the scope of the Receivership Order who has been sued by the receiver to recover alleged transfers to him. And second, the cancellation of the IAS shares owned by Defendant was not within the authority of the receiver and was not receivership property. The receiver cancelled shares belonging to Defendant. In so doing, the receiver wrongfully seized Defendant’s property.

The act of seizing Defendant’s property is ultra vires because the receiver did not seize the property of the Defendant to augment the Receivership Estate. Instead, he cancelled shares that actually depleted the Receivership Estate and destroyed the property of the Defendant and others similarly situated. As such, the court should find the act to be ultra vires and not in furtherance of the appointment as receiver.

The remaining two arguments by the receiver in support of dismissal are actually defenses: the stay provided by the Receivership Order (ECF 491) and a claim of privilege the receiver alleges that protects him in his appointment.

### **Stay Provided in the Receivership Order**

Paragraphs I. 44. and 45. of the Corrected Receivership Order<sup>4</sup> state:

#### **I. Stay of litigation.**

44. The proceedings described below (“Ancillary Proceedings”)—excluding the instant proceeding, all appeals related to this proceeding, and all policy or regulatory actions and

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<sup>4</sup> ECF 491, page 30.

actions of the United States related to the above-captioned action—are stayed until further order of this Court: All civil legal proceedings of any nature, including but not limited to, bankruptcy proceedings, arbitration proceedings, foreclosure actions, default proceedings, or other actions of any nature involving:

- a. the Receiver in his capacity as Receiver;
- b. any Receivership Property, wherever located;
- c. any of the Receivership Defendants, including subsidiaries, partnerships, or joint ventures; or
- d. any of the Receivership Defendants’ past or present officers, directors, managers, agents, or general or limited partners **sued for, or in connection with, any action taken by them while acting in such capacity**—whether as plaintiff, defendant, third-party plaintiff, third-party defendant, or otherwise.

45. The Receiver shall file a notice of stay in any and all currently pending litigation (excluding this action) and in any and all actions that may be filed against Receivership Defendants while the receivership is ongoing.

On May 3, 2019, this Court entered its Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership<sup>5</sup>. In that Memorandum Decision, this Court added to the already defined “Receivership Entities”, thirteen “Affiliated Entities” including: Solco I, LLC, XSun Energy, LLC, Cobblestone Center, LC, LTB O&M, LLC, U-Check, Inc., DCL16BLT, Inc., DCL-16A, Inc., N.P. Johnson Family Limited Partnership, Solstice Enterprises, Inc., Black Night Enterprises, Inc., Starlight Holdings, Inc., Shepard Energy, and Shepard Global, Inc. *Id.* Although directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys and other agents of the Affiliated Entities were dismissed by the Order, and spouses, family members, officers, directors, agents managers, servants, employees, attorneys, accountants, general and limited partners, trustees, and any person acting for or on behalf the Affiliated Entities were order to cooperate with and assist the Receiver in the performance of his duties and obligations, no additional individual persons were named within the expanded jurisdiction of the Receiver or asset freeze. *Id.*

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<sup>5</sup> ECF 636.

On May 24, 2019, this Court entered its Order Granting Motion to Commence Legal Proceedings<sup>6</sup>, which authorized the Receiver to initiate legal proceedings against certain very broad categories of unidentified persons and entities. Included within that Order are “Persons, including family members and other insiders, who received monies or assets from Receivership Defendants, Receivership Entities, or Affiliated Entities, including property transfers for little or no consideration.” *Id.* at ¶ 1.b.

It is clear that this Court has authorized the receiver to bring the action against the three complaining individuals, but it is not clear whether the stay of ECF 491 ¶¶ 44-45 is lifted as to the all parties once they are sued by the receiver, or whether commencing permitted litigation does not relieve all litigants of the stay imposed by the Corrected Receivership Order. Specifically, it is unclear whether targeted defendants are stayed from defending and pursuing either compulsory or permissive counterclaims, brought as individuals and not officers, directors, agents, or general or limited partners, against the receiver. The better view is that once litigation is begun, all parties are entitled to litigate all claims.

Paragraph I. 44. a. provides that Receivership Entities (and possibly the Affiliated Entities through the Memorandum Decision and Order on Receiver’s Motion to Include Affiliates and Subsidiaries in Receivership) are stayed from certain actions, including civil legal proceedings involving the Receiver in his capacity as Receiver. Defendant is unaware of any Order from the Court which incorporates him into this specific order. Defendant is not mentioned by reference, nor would it make sense for him to be affected. For example, is Defendant prohibited by the Receivership Order from being able to file bankruptcy? Or, if a credit card company sued Defendant for an unpaid balance, is that stayed? Or, if Defendant has a civil dispute with his

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<sup>6</sup> ECF 673.

neighbor is that stayed? Does the order prevent a divorce? We do not believe the Order was intended nor does contemplate such a wide net. Similarly, as Defendant is not bound in these type actions, how could he be stayed from asserting his personal claims against the Receiver?

Paragraph I. 44.d. extends the stay to Receivership Defendants' past or present officers, directors, managers, agents, or general or limited partners, which Defendant was neither, but only under actions "sued for, or in connection with, any action taken by them **while acting in such capacity**" are stayed. The claims asserted by Defendant are personal. The Receiver destroyed his property. The claims do not arise from, nor are they connected with any action taken by him while acting in any governing, ownership, or agency role for one of the Receivership Defendants. The stay does not extend to Defendant.

Defendant is not aware of any bar that would prevent him from asserting a claim against the Receiver for injuries or damage claimed caused by him either personally or in his capacity as Receiver. Defendant, therefore, asks the Court to deny the motion to dismiss, or alternatively to clarify whether leave of court is required for such actions, or whether such claims are prohibited.

### **Privilege**

Finally, the receiver claims that he is the beneficiary of "receiver immunity". He claims that because he filed a motion to cancel the shares and Judge Nuffer granted the motion that he is without liability. This defense will only hold true if the acts taken by the receiver were in fact in furtherance of the appointment as receiver. Defendant has alleged that the act of cancelling the shares is outside the scope of the receiver's authority. The fact that he convinced the court that an order should issue allowing the act is not basis for a motion to dismiss. It is a factual determination that this court needs to make.

Under the standards of review for a motion to dismiss that the allegations of the counterclaim must be taken as true and the court must draw all reasonable inferences in favor of the non-moving party,<sup>7</sup> the presumption must hold that the motion to dismiss should be denied and the claim of privilege addressed by the court either at trial or by dispositive motion at the appropriate time.

### **CONCLUSION**

Based on the foregoing, the motion to dismiss should be denied.

DATED this 23<sup>rd</sup> day of September, 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.

/s/ Steven R. Paul  
*Attorneys for Defendant*

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<sup>7</sup> *Doe v. Woodward*, 912 F.3d 1278, 1285 (10<sup>th</sup> Cir. 2019).