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

<p>R. WAYNE KLEIN, Plaintiff, vs. GLENDA E. JOHNSON, an individual, Defendant.</p>	<p>DEFENDANT’S REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS</p> <p>Case No. 19-cv-00625</p> <p>ORAL ARGUMENT REQUESTED</p>
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The Receiver has filed an opposition to Defendant Glenda Johnson’s motion to stay the present proceedings pending the outcome of the appeal filed and argued before the 10th Circuit Court of Appeals in the matter of United States of America v. RaPower-3, LLC, et al (Civil No. 15-828-DN). The reasons the Receiver opposes Defendant’s motion are not sufficient to deter this Court from staying collection proceedings until the Court of Appeals has issued a ruling on the appeal.

1. Defendant is subject to specific extreme hardship should this case not be stayed.

This Defendant and others similarly situated are faced with defending claims by the Receiver for the recovery of money that is being directly challenged on appeal. If the 10th Circuit

Court of Appeals reverses or remands the judgment against the original RaPower-3 Defendants, then the Receiver's claims in this case will be mooted, or at a minimum significantly curtailed. To require the defendants in the Receiver's collection cases to defend the claims prior to the Court of Appeals' decision will work a substantial hardship on them and waste resources.

As noted in her motion, the scope of the Receiver's claims against Defendant encompass seven pages of transactions over the course of 9 years, totaling approximately 300 separate transactions totaling \$5,050,572.07. The amount of discovery and preparation to defend those claims will require extraordinary time, money and resources. The Receiver has sued over 70 individuals and entities under the same legal theories as in this case. Not all claims are in the excess of \$5 Million dollars, but all are burdensome on the defendants. To undertake that effort in light of the Court of Appeals case that is now fully briefed and argued, seems unreasonably burdensome on Defendant. A decision from the Court of Appeals is expected within the next 6-9 months. The deadlines in the case management orders are much shorter than that. Thus, without a stay, the work will be done and the expense incurred in this case before the Court of Appeals decision is issued in the underlying case.

2. There is no harm to the Receiver if a stay is granted until the Court of Appeals issues a decision.

The Receiver claims "two immediate and real" harms if the stay is granted. (1) the loss of documents and evidence relating to case and (2) the potential that assets and monies the Receiver seeks may be dissipated during the stay. Given the relatively short period of time that a stay is sought and the broad timeframe over which the Receiver is seeking recovery, the claimed harm is nominal or non-existent. A few months delay in a claim concerning payments in 2005 will not cause the speculative harm alleged by the Receiver. First, the receiver is already in possession of

all the documentation needed for him to assert the claims against the Defendant. The Receiver expects to stand on numerous assumptions for his legal proof.

The Receiver is approaching these cases like a preference in bankruptcy. Based on the claims in his Complaint, he seems to be saying that because payments were made to Defendant by the Receivership Entities, those payments were fraudulent. The Receiver is thrusting the burden of proving the payments are NOT voidable on defendants, rather than bearing any burden to prove they are voidable.

Thus, allowing defendants until the 10th Circuit Court of Appeals rules, will not harm the Receiver or his legal theories. The Receiver's generalized concern over collectability of his judgments is both unsupported and premature at this point. He has provided no basis for a concern whether there are assets subject to dissipation or concealment, or even whether he is aware of any dissipation or concealment of assets. He has not shown what the assets of this Defendant are and what he expects to recover, he has not shown that other defendants whose motions are also pending are likely to dissipate assets. He has not shown that there is concealment or movement of assets. That claim simply lacks support. *F.M. v Walden*, Case No. 1:13-cv-00264-ACT/RHS 2013 US Dist Lexis 187803 (August 6, 2013).

3. Waste of resources should be considered by the Court in deciding this motion.

To require 70 plus litigants to proceed with their cases will cause each of those litigants to spend money in the defense of their claims. But more importantly, it will needlessly drain the resources of the Receivership Estate and drain judicial resources. If the 10th Circuit Court reverses the trial court, the funds spent by the Receiver will have been lost.

While requiring each individual defendant to proceed with their defense will cause hardship to those parties, the real concern expressed in the motion to stay is judicial resources and

the Receivership Estate being wasted until the appeal is decided. The purpose of appointing the Receiver was to identify and gather the assets of the Receivership entities into a “settlement fund” (ECF 491, ¶ 58) and administer that settlement fund subject to “his obligation to expend receivership funds in a reasonable and cost-effective manner”. (Id. at ¶ 60).

The Receiver is gathering assets to pay (1) the United States Department of Justice for its costs incurring in pursuing the claims against the RaPower defendants; (2) distributing to the United States \$14,207,515; (3) customers of RaPower who file claims against the Receivership Estate; and (4) pay other claims that may arise. See ECF 491, ¶ 89.

Pursuing the collection claims without consideration of the potential waste of resources is a violation of the Receiver’s scope of authority. He is obligated to expend receivership funds in “reasonable and cost-effective manner”. Pursuing this claim and the other 70 collection cases before the Court of Appeals has issued a decision is a waste of receivership funds and should weigh in favor of a stay.

4. The Receiver discounts the strong likelihood of success on appeal.

The Receiver’s opposition fails to address the argument made by Defendant for the likelihood of success on appeal. The 10th Circuit Court panel hearing the appeal clearly had doubts about the evidentiary support for a finding of \$50 Million in disgorgement. The briefing to the Court of Appeals supports that the evidence before the trial court never approached \$50 Million. The government’s argument never sought \$50 Million. The only reason for a judgment over and above what was proven was to punish the defendants for the conduct the court found to be reprehensible.

The \$50 Million judgment will not withstand scrutiny by the 10th Circuit Court of Appeals. There will be some alteration of the Judgment entered in this case. All good sense and reason

dictate that this Court should stay the enforcement of that Judgment against third parties such as this Defendant and the 70 others similarly situated until the Court of Appeals has ruled.

CONCLUSION

For all of the foregoing reasons, Defendant respectfully request that the Court stay this litigation pending final consideration of the appeal to the 10th Circuit Court of Appeals

DATED this 18th 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.

/s/ Steven R. Paul
Attorneys for Defendant