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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>NELSON, SNUFFER, DAHLE & PAULSEN, P.C.'S OPPOSITION TO THE RECEIVER'S AFFIDAVIT OF NON- COMPLIANCE</p> <p>(Oral Argument Requested)</p> <p>Judge David Nuffer</p>
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Nelson, Snuffer, Dahle & Poulsen, P.C. ("NSDP"), by and through counsel, submits the following Opposition to the Receiver's Affidavit of Non-Compliance.

INTRODUCTION

This case concerns whether Neldon Johnson, R. Gregory Shepard, Roger Freeborn, and several entities associated with those individuals were involved in an illegal tax scheme.

Throughout the pendency of the proceedings, NSDP has represented two entities (among others): XSun Energy, and SOLCO I. To provide funding for ongoing defense and two appeals, those

entities deposited a retainer with NSDP (the “Retainer”). The Retainer comprises funds that are not property of the Receivership Estate. Thus, NSDP is entitled to those funds free and clear from the Receiver’s claims. Despite NSDP’s entitlement to the Retainer, the Receiver has filed an Affidavit of Non-Compliance, asking the Court to enter a writ of possession against NSDP for the amount of the Retainer.

Because NSDP is not a party to this lawsuit, it could not properly assert its position before the Court. There was no procedural mechanism for it to do so. Accordingly, NSDP moved to intervene, which the Receiver opposed. In lieu of litigating that motion to conclusion, the parties have agreed that NSDP will be permitted this opportunity to respond to the Receiver’s Affidavit of Non-Compliance, and the Receiver will then reply.

The Court should deny the Receiver’s request without prejudice because there are pending appeals which could moot the relief the Receiver seeks. If the Court is disinclined to deny the Receiver’s request without prejudice based on possible mootness, the Court should nonetheless dismiss the Receiver’s request without prejudice in favor of the parties litigating ownership of the Retainer in the Receiver’s separate pending case against NSDP. If the Court concludes that dismissal for either reason is not warranted, it should nonetheless deny the Receiver’s request because NSDP has earned certain retained funds in compliance with the Court’s orders in this case. Beyond what NSDP has already earned, XSun and SOLCO I will likely continue to incur fees from NSDP which are payable from the Retainer and which will likely exceed the total amount of the Retainer.

BACKGROUND

1. On June 25, 2018, XSun Energy and SOLCO I provided a retainer for deposit in NSDP's client trust account in the amount of \$1,168,000 (the "Retainer").
2. Of that amount, XSun Energy deposited \$1,000,000 while SOLCO I deposited \$168,000.
3. Over time, NSDP performed legal services for the benefit of XSun and SOLCO I.
4. To pay for those legal services, NSDP invoiced, provided copies of legal service fees to XSun and SOLCO I, and drew from the Retainer.
5. This case was tried to the Court in April and June 2018.
6. The Court issued an order on August 22, 2018, entitled, "Memorandum Decision and Order Freezing Assets and to Appoint a Receiver." (*See* Doc. No. 444).
7. In that order, the Court stated, "The appointment of a Receiver shall not, without further order, deprive any Defendants of the right to appeal orders in this case or otherwise defend this action through counsel (paid from sources other than Receivership Property) of Defendants' own choice." (*See* Doc. No. 444, p. 28).
8. The Court entered Findings of Fact and Conclusions of Law on October 4, 2018. (*See* Doc. No. 467). In that ruling, the Court found in favor of the United States against Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, LTB1, LLC, and R. Gregory Shepard.
9. The Court did not, however, enter any orders against XSun Energy, and SOLCO I. The Court specifically referred to both XSun Energy and SOLCO I as "non-defendants." (*See id.* p. 20, ¶¶ 83, 84).

10. The Court's October 4, 2018 Findings of Fact and Conclusions of Law is currently on appeal before the Tenth Circuit in Case Nos. 18-4150 and 18-4119.

11. Consistent with the Court's October 4, 2018 Findings of Fact and Conclusions of Law, the Court froze the assets of the Receivership Defendants on November 1, 2018 in the Corrected Receivership Order. (*See* Doc. No. 491). The Corrected Receivership Order specifically states that:

This Court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of Defendants RaPower-3 LLC, Neldon Johnson, International Automated Systems Inc ("IAS"), LTB1 LLC, and R. Gregory Shepard (collectively, the "Receivership Defendants"), *together with assets proven to be proceeds of activities of Receivership Defendants in possession of any and all subsidiaries and affiliated entities* including [both XSun Energy and SOLCO I.]

(*See* Doc. No. 491, ¶ 2).

12. The Order further provided that "Payment for any attorneys' fees, expenses, or other costs of such court filings or submissions shall be made from property that is not Receivership Property." (*Id.* ¶ 10).

13. The Corrected Receivership Order states, at paragraph 43:

In the event any person fails to deliver or transfer any Receivership Property or otherwise fails to comply with any provision of Section H of this Order, the Receiver may file ex parte an "Affidavit of Non-Compliance" regarding the failure, provided, however, if such an affidavit is directed to a Receivership Defendant, such Receivership Defendant shall be entitled to ten days' notice thereof (unless shortened by an order of this Court) and an opportunity to be heard. Except as set forth above, upon the filing of the affidavit, the Court may authorize, without additional process or demand, writs of possession or sequestration or other equitable writs requested by the Receiver. The writ shall authorize and direct the United States Marshal or any federal or state law enforcement

officer to seize the Receivership Property, document, or other thing, and to deliver it to the Receiver.

(Doc. No. 491, ¶ 43).

14. At the time the Court entered the Corrected Receivership Order, neither XSun Energy nor SOLCO I were “Receivership Defendants,” but their assets were nonetheless frozen.

15. Because neither XSun Energy nor SOLCO I were directly implicated by the asset freeze, they moved to lift the freeze. (*See* Doc. No. 509).

16. The Court denied the motion, concluding “RaPower and Solco have failed to show that the so-called ‘non-refundable’ retainer in the amount of \$735,202.22, which is currently in Nelson Snuffer Dahle & Paulsen’s trust account, is *not* property of the receivership estate, the full balance of that retainer will remain subject to the Asset Freeze at this time.” (Doc. No. 550, p. 2 (emphasis in original)).

17. The Court later entered an order including XSun Energy and SOLCO I as Receivership Defendants on May 3, 2019 (the “Affiliate Entities Order”). (Doc. No. 636).

18. That order, (Doc. No. 636), is on appeal before the Tenth Circuit in Case No. 19-4089.

19. From the deposit of the Retainer on June 25, 2018 until the Court’s entry of the Affiliate Entities Order on November 1, 2018, NSDP billed for legal services, and periodically transferred funds from the XSun and SOLCO I Retainer into NSDP’s operating account (“Earned Funds”).

20. To date, XSun and SOLCO I have incurred unpaid legal fees of \$702,172.21 after the November 1, 2018 freeze. As discussed in more detail below, NSDP maintains an attorney's lien over these funds ("Lien Funds").¹

21. The Receiver filed a lawsuit against NSDP on October 31, 2019 (Case No. 2:19-cv-00851-DN) seeking the balance of the Retainer, \$735,202.22, then being held in NSDP's client trust account. (*See* Doc. No. 2 in Case No. 2:19-cv-00851-DN ¶¶ 31-37; 45-48).

22. Citing paragraph 43 of the Corrected Receivership Order (Doc. No. 491), the Receiver filed an ex parte affidavit over a month later with the Court on December 4, 2019, seeking a writ of possession against NSDP for the Retainer. (Doc. No. 812 ¶ 25).

23. The Receiver is pursuing the same Retainer, first through Case No. 2:19-cv-008510-DN, and subsequently through his ex parte Affidavit of Non-Compliance of December 4, 2019.

24. In order to respond to the Receiver's Affidavit of Non-Compliance, NSDP moved to intervene. (*See generally* Doc. No. 820).

25. In lieu of litigating that motion to conclusion, the Receiver and NSDP entered to a stipulation whereby, among other things, NSDP agreed to turn over the Retainer to the Receiver, and the Receiver agreed to permit NSDP to respond to the Affidavit of Non-Compliance. (*See* Doc. No. 844).

26. The Court granted the stipulation. (*See* Doc. No. 847).

¹ The amount of the lien NSDP claims, and an accounting of the Retainer, is set forth in a declaration provided by Denver C. Snuffer Jr., attached as Exhibit "A."

ARGUMENT

I. The Court Should Deny the Receiver's Request while the Parties Await the Tenth Circuit's Opinions

There are at least four separate proceedings which might have an effect on the Retainer XSun Energy and SOLCO I paid to NSDP: (1) the appeal of the Court's Findings of Fact and Conclusion of Law (Doc. No. 467) in Tenth Circuit Case Nos. 18-4150 and 18-4119; (2) the appeal of the Affiliate Entities Order (Doc. No. 636) in Tenth Circuit Case No. 19-4089; (3) the Receiver's separate, direct proceeding against NSDP; and (4) the Receiver's Affidavit of Non-Compliance, pursuant to paragraph 43 of the Corrected Receivership Order (Doc. No. 812).

The most fair and efficient way for the Court to manage the Parties' dispute over the Retainer is to deny the Receiver's Affidavit of Non-Compliance without prejudice, pending resolution of XSun and SOLCO I's appeals of docket entries 467 and 636. If XSun and SOLCO I prevail in either or both appeals, then there will be no question that NSPD is rightfully entitled to the Retainer. Both appeals are currently pending, the first having been fully argued and submitted for decision, and the second scheduled for oral argument in Denver, Colorado on March 11, 2020. The parties are awaiting a ruling from the Tenth Circuit Court of Appeals on the first appeal, and oral argument on the second. Permitting further litigation in this matter will potentially lead to inconsistent rulings, and might potentially waste resources of the Parties and the Court. Thus, the Court should deny the Receiver's Affidavit of Non-Compliance without prejudice and stay this action, as well as the Receiver's separate action against NSDP, pending a resolution of the appeals pending before the Tenth Circuit Court of Appeals. If XSun and

SOLCO I fail in those appeals, the Receiver would then be free to pursue his rights as he deems appropriate.

II. Litigation in the Receiver’s Separate Case against NSDP is More Appropriate

If the Court is disinclined to deny the Receiver’s request without prejudice pending resolutions of the appeals, the Court should nonetheless deny the Receiver’s request without prejudice in favor of litigating the propriety of the Retainer in the Receiver’s separate case litigated against NSDP. That case is a more appropriate forum for this dispute. As a practical matter, NSDP will have the right to discovery and motion practice. In this proceeding, however, NSDP is currently limited to this opposition. Permitting the Parties to more fully litigate issues pertaining to the Retainer in the separate case better comports with general principles of fairness.

Beyond such principles, the Receiver has effectively split his claims against NSDP by seeking relief in the Affidavit of Non-Compliance and its separate case against NSDP. “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.” *Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2011). “District courts have discretion to control their dockets by dismissing duplicative cases.” *Id.* Here, the Affidavit of Non-Compliance and the Receiver’s separate cases are duplicative cases—they both seek the Retainer. The Court should exercise its discretion and dismiss the instant

action without prejudice in favor of permitting the Parties to more fully and fairly litigate the dispute in the Receiver's separate suit against NSDP.

III. NSDP Earned Funds Drawn from the Retainer, and NSDP is Entitled to Continue Representing XSun and SOLCO I

If the Court is disinclined to deny the Receiver's request without prejudice in favor of awaiting rulings from the Tenth Circuit, or to deny the Receiver's request due to the Receiver's splitting his claims and seeking the same relief in two separate proceedings, NSDP is still entitled to (1) the Earned Funds, with no limitations attached, and (2) a valid attorney's lien over the Lien Funds. NSDP is entitled to the Earned Funds and a valid attorney's lien in congruity with the Court's orders.

XSun and SOLCO I incurred the Earned Funds before the November 1, 2018 asset freeze. Therefore, NSDP is entitled to these funds free from any limitation.

And after the November 1, 2018 asset freeze, NSDP is entitled to a valid attorney's lien over the Lien Funds. When the Court appointed the Receiver, the Court specifically permitted Defendants to defend against the United States' case as well as pursue any related appeals with the assistance of counsel of their own choosing. (*See* Doc. No. 444, p. 28). At that point in time, XSun and SOLCO I were not Receivership Defendants. In fact, XSun and SOLCO I did not become Receivership Defendants until May 3, 2019 through the Affiliate Entities Order. (*See* Doc. No. 636). Until the Court entered the Affiliate Entities Order, XSun and SOLCO I were entitled to pay the attorneys of their choice with funds that were not part of the Receivership Estate. Therefore, NSDP is entitled to a valid attorney's lien over the Lien Funds.

Various courts have concluded that funds held in a trust account constitute property of the client. "Generally speaking, funds held in an escrow account, such as an attorney trust account,

are considered to be funds owned by the client held by the attorney in a fiduciary capacity.” *S.E.C. v. Credit Bancorp, Ltd.*, 109 F.Supp.2d 142, 144 (S.D.N.Y. 2000); *see also S.E.C. v. Princeton Economic Intern. Ltd.*, 84 F.Supp.2d 443, 446 (S.D.N.Y. 2000) (“It is clear that any funds held in an attorney’s trust account remained the property of the payor.”). In *Princeton Economic*, the court held that funds which remained in a law firm’s trust account at the time of a freeze order constituted assets of the corporate defendant, and therefore were subject to turnover. *See Princeton Economic*, 84 F.Supp.2d at 446; *see also Credit Bancorp*, 109 F.Supp.2d at 144-45 (concluding that funds held in trust ““at the hour of the signing of the freeze order”” constituted funds of the corporate defendant and were subject to turnover under a freeze order (quoting *Princeton Economic*, 84 F.Supp.2d at 446)).

At first glance, *Princeton Economic* and *Credit Bancorp* suggest that the Lien Funds constitute property of the Receivership Estate, because the funds remained in NSDP’s client trust account at the time of the Affiliate Entities Order—what should have been the effective asset freeze order concerning XSun and SOLCO I. The Lien Funds, however, are not property of the Receivership Estate. Due to the November 1, 2018 asset freeze, which did not directly implicate XSun and SOLCO I, NSDP kept the Lien Funds in its trust account out of an abundance of caution. It therefore did not transfer the Lien Funds to its operating account as it had previously done with the Earned Funds. Thus, the proposition in *Princeton Economic* and *Credit Bancorp* that funds remaining in trust at the time of a freeze order constitute property of the receivership estate does not apply. Instead, NSDP maintains a proper lien over the Lien Funds.

“An attorney shall have a lien for the balance of compensation due from a client on any money or property owned by the client that is subject of or connected with work performed for

the client, including . . . any funds held by the attorney for the client, including any amounts paid as a retainer to the attorney by the client” Utah Code Ann. § 38-2-7(2)(b). “An attorney’s lien commences at the time of employment of the attorney by the client.” *Id.* § 38-2-7(3). Because NSDP held the Retainer in its trust account, it maintained a valid attorney’s lien over the Lien Funds.² Those funds are therefore not a part of the Receivership Estate.

In the Affidavit of Non-Compliance, the Receiver suggests that NSDP’s entitlement to the Lien Funds stems from work performed on behalf of Receivership Defendants. (*See* Doc. No. 812, p. 5, n. 18 (“I believe that Nelson Snuffer’s claim of entitlement to these funds is based on work it has performed pursuing the appeal on behalf of Receivership Defendants and also submitting other court filings on behalf of Receiver Defendants, Affiliates, Glenda Johnson, Randale Johnson, and LaGrand Johnson.”). NSDP claims entitlement to both the Earned Funds and the Lien Funds for work performed on behalf of the Receivership Defendants, including entities other than XSun and SOLCO I. None of the Court’s orders prohibit this. The Court previously ruled that the Receivership Defendants were entitled to defend the case with counsel of their choice and to pursue any related appeals. (*See* Doc. No. 444, p. 28). The Court did not preclude XSun and SOLCO I from paying the legal fees of other defendants in the case. Both XSun and SOLCO I have interests that are directly threatened or impaired by the proceedings against the other parties. Indeed, the Court was asked to include both XSun and SOLCO I in the initial Judgment, but the Court refused to do so. Notwithstanding the Court’s refusal to do so, both XSun and SOLCO I anticipated that the proceedings against the other Defendants would

² The Receiver agreed in the stipulation previously filed with the Court that NSDP’s transfer of the balance of the Retainer to the Receiver would not affect NSDP’s lien. (*See* Doc. No. 844, pp. 2-3).

likely threaten their interests. The only restriction the Court imposed on XSun and SOLCO I in paying for the defense of other Defendants is that any payment must not come from property of the Receivership Estate. As discussed, XSun and SOLCO I deposited the Retainer from their own funds before the Court entered the Affiliate Entities Order. Those funds are not property of the Receivership Estate.³ Excising any fees incurred after the entry of the Affiliate Entities Order from the Lien Funds would violate the Court's order permitting the parties, including XSun and SOLCO I, the right to an appeal.

In sum, XSun and SOLCO I were entitled to pay over the Earned Funds and the Lien Funds without interference from the Receiver.

CONCLUSION

The Court should deny the Receiver's request in favor of awaiting rulings on the pending appeals. If the Court is disinclined to wait for a ruling on the appeals, the Court should nonetheless dismiss the Receiver's request in favor of litigating the propriety of the Retainer in the Receiver's separate case against NSDP. In the alternative, NSDP is entitled to the Earned Funds and a valid attorney's lien in congruity with the Court's orders.

DATED this 20th day of February, 2020.

KIPP AND CHRISTIAN, P.C.

/s/Michael F. Skolnick

MICHAEL F. SKOLNICK

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Attorneys for Intervenor Nelson, Snuffer, Dahle & Poulsen, P.C.

³ The Receiver's argument that NSDP's attorney's lien violates the freeze order fails for a similar reason. (*See* Doc. No. 812, p. 6, ¶ 21). The Retainer was deposited before the entry of the Affiliate Entities Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2020, I served the foregoing **NELSON, SNUFFER, DAHLE & PAULSEN, P.C.'S OPPOSITION TO THE RECEIVER'S AFFIDAVIT OF NON-COMPLIANCE** on the following via ECF as follows:

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