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

UNITED STATES OF AMERICA,

Plaintiff,

v.

RAPOWER-3, LLC; INTERNATIONAL
AUTOMATED SYSTEMS, INC.; LTB1,
LLC; R. GREGORY SHEPARD; NELDON
JOHNSON; and ROGER FREEBORN,

Defendants.

**REPORT AND RECOMMENDATION
REGARDING THE COURT'S ORDER
RE: CIVIL CONTEMPT OF PACIFIC
STOCK TRANSFER COMPANY**

Civil No. 2:15-cv-00828-DN

District Judge David Nuffer

Wayne Klein, the Court-Appointed Receiver (“Receiver”) of RaPower-3, LLC (“RaPower”), International Automated Systems, Inc. (“IAS”), and LTB1, LLC (“LTB1”), as well as 13 subsidiaries and affiliates (collectively, the “Receivership Entities”), and the assets of Neldon Johnson (“Johnson”) and R. Gregory Shepard (“Shepard”) (collectively “Receivership Defendants”) hereby submits this Report and Recommendation Regarding the Court’s Order Re: Civil Contempt of Pacific Stock Transfer Company (“Report”).

INTRODUCTION

On May 24, 2019, the Court issued the Order Re: Civil Contempt of Pacific Stock Transfer Company (“Order”), which found Pacific Stock Transfer Company (“PSTC”) in civil contempt of court for its failure to comply with requirements of the Corrected Receivership Order.¹ The Receiver submits this Report to inform the Court of events subsequent to the May 2019 Order. Included in this Report is a recommendation as to the amount of a coercive fine that the Court might assess against PSTC for its failure to fully and timely comply with the Order. The recommendation includes an explanation of certain mitigating factors that cause the Receiver to recommend a considerably reduced amount of the fine that would be paid to the Court.

REPORT AND FACTUAL BACKGROUND

PSTC’s Initial Failure to Comply with the Corrected Receivership Order.

1. The Corrected Receivership Order provides that “transfer agents . . . of the Entity Receivership Defendants, as well as those acting in their place, are hereby ordered and directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, or relating to, the Receivership Defendants or Receivership Property.”²

2. The Corrected Receivership Order also states that “agents . . . of the Entity Receivership Defendants . . . shall promptly answer under oath to the Receiver all questions which the Receiver may put to them and produce all documents as required by the Receiver regarding

¹ [Docket No. 677](#).

² [Docket No. 491](#) ¶ 24.

the business of the Receivership Defendants or any other matter relevant to the operation or administration of the receivership or collection of funds due to the Receivership Defendants.”³

3. On November 12, 2018, the Receiver sent a letter to PSTC seeking various documents, records, and information related to PSTC’s role as transfer agent to IAS.⁴ A copy of the Correct Receivership Order was enclosed with the letter.⁵

4. PSTC did not respond to the November 12, 2018 letter.⁶

5. On December 14, 2018, the Receiver issued a subpoena to PSTC commanding the production of documents that he previously requested in the November 12, 2018 letter.⁷ PSTC was personally served with the subpoena on December 14, 2018.⁸

6. On January 15, 2019, PSTC partially responded to the subpoena while at the same time refusing to produce certain records unless “authorized by the shareholder or compelled by a court of competent jurisdiction.”⁹

7. On January 18, 2019, the Receiver sent a letter regarding PSTC’s partial response explaining that he is the only person authorized to act for IAS and that the Corrected Receivership Order requires PSTC to produce the documents requested in the November 12, 2018 letter and subpoena.¹⁰ PSTC did not respond to the Receiver’s January 18, 2019 letter.¹¹

³ *Id.* ¶ 28.

⁴ Order, [Docket No. 677](#) ¶ 3, filed May 24, 2019.

⁵ *Id.*

⁶ *Id.* ¶ 4.

⁷ *Id.* ¶ 5.

⁸ *Id.* ¶ 6.

⁹ *Id.* ¶ 7. Although the letter is dated January 2, 2019, the Receiver did not receive PSTC’s partial response until January 15, 2019.

¹⁰ *Id.* ¶ 9.

¹¹ *Id.* ¶ 10.

The Receiver's Motion and the Court's Order Regarding PSTC's Contempt.

8. On February 19, 2019, the Receiver filed a motion from an order to show cause regarding PSTC's violations under the Corrected Receivership Order.¹²

9. The Court took the Receiver's motion under advisement and ordered a copy of the motion to be served on PSTC.¹³ The motion was served on PSTC as directed by the Court.¹⁴

10. On April 26, 2019, the Court held an evidentiary hearing on the motion.¹⁵ PSTC did not submit a response to the Receiver's motion and did not attend the April 26 hearing.¹⁶

11. At the hearing, the Court made findings on the record that PSTC was in contempt of the Corrected Receivership Order.¹⁷

12. On May 24, 2019, the Court issued the Order holding PSTC in civil contempt of court.¹⁸

13. The Order required PSTC to provide the information requested by the Receiver and to "turn over to the Receiver all paper and electronic information of, or relating to, IAS, RaPower, LTB1, Johnson, or Shepard" as previously required in the Corrected Receivership Order.¹⁹

14. The Order mandated that PSTC produce the records and information to the Receiver no later than June 10, 2019 and imposed a coercive fine of \$2,000.00 per day for each day after June 10, 2019 until PSTC was in full compliance with the Court's orders.²⁰

¹² [Docket No. 576](#).

¹³ Order Taking Motion for Order to Show Cause under Advisement, [Docket No. 588](#), filed March 5, 2019.

¹⁴ Notice of Service, [Docket No. 595](#), filed March 13, 2019.

¹⁵ See Minute Order, Docket No. 619, filed April 26, 2019.

¹⁶ See Order, [Docket No. 677](#), filed May 24, 2019.

¹⁷ Minute Order, Docket No. 619, filed April 26, 2019.

¹⁸ [Docket No. 677](#).

¹⁹ *Id.*, Order ¶ 2.

²⁰ *Id.*, Order ¶ 3-4.

15. The Order also entitled the Receiver to reasonable fees and costs expended in relation to the motion for order to show cause.²¹

16. The Order was served on PSTC on June 4, 2019 by the United States Marshals Service.²²

17. On June 25, 2019, the Court ordered that PSTC pay \$6,160.40 of the Receiver's fees and costs in related to the Order.²³

PSTC's Conduct after the Entry of the Order.

18. PSTC did not produce any information or otherwise respond to the Order by the June 10, 2019 deadline set by the Court.²⁴

19. On June 24, 2019, PSTC sent the Receiver an email with a cover letter and attachments. In the email, PSTC stated that “[t]here is no new information to include in these reports that was not previously provided. Additionally, PST has provided all available information to the receiver in response to the requests provided to our office.”²⁵ Further, in the cover letter PSTC once again stated that it “maintains that its policy and procedure [sic] does not allow for the release of confidential shareholder information requested by a Receiver or other court-appointed agent of a company without the update of officer contact information.”²⁶

20. The email, however, provided hundreds of pages of new documentation that had not been produced to the Receiver prior to June 24, 2019.²⁷

²¹ *Id.*, Order ¶ 6.

²² U.S. Department of Justice, Process Receipt and Return, attached hereto as Exhibit A.

²³ Docket No. 702.

²⁴ Declaration of Wayne Klein (“Declaration”), ¶ 6, attached hereto as Exhibit B.

²⁵ See June 24, 2020 Email from PSTC to counsel for the Receiver, attached hereto as Exhibit C.

²⁶ *Id.*, Cover Letter at 2.

²⁷ Declaration, ¶ 8.

21. The Receiver responded to PSTC's June 24 email that same day and indicated that he would follow up after a review of the documents was conducted.²⁸

22. On July 1, 2019 counsel for the Receiver and PSTC communicated via telephone regarding the Receiver's requests for information and the document production requirements of the Court's orders.²⁹

23. During the call, counsel for the Receiver reiterated that the Order requires PSTC to turn over all paper and electronic information of, or relating to, IAS, RaPower, LTB1, Neldon Johnson or Shepard.³⁰

24. On approximately July 11, 2019, counsel for PSTC contacted the Receiver regarding the Receiver's information requests and PSTC's production requirements under the Order.³¹

25. PSTC and the Receiver, through counsel, were in communication from July through October. During that time, PSTC made two additional productions of information to the Receiver. The first set of information was produced on August 14, 2019, and the second on October 10, 2019.³² PSTC also paid the Receiver \$6,160.40 in reasonable fees as ordered by the Court.³³

26. The document productions by PSTC on August 14 and October 10 included documents that had not been previously produced to the Receiver that were required to be produced under the Court's orders.³⁴

²⁸ June 24, 2020 Email from counsel for the Receiver to PSTC, attached hereto as Exhibit D.

²⁹ See Email from counsel for the Receiver to PSTC, July 9, 2020, attached hereto as Exhibit E.

³⁰ *Id.*

³¹ Declaration, ¶ 11.

³² *Id.* ¶ 12.

³³ *Id.* ¶ 14.

³⁴ *Id.* ¶ 13.

27. Since the October production, the Receiver and PSTC have engaged in discussions regarding the next steps and the submission of this Report.³⁵

RECOMMENDATION

As shown above, PSTC did not fully comply with the Order by June 10, 2019. Indeed, in PSTC's June 24, 2019 email to the Receiver it reiterated that it would not produce categories of information to the Receiver unless and until the Receiver met certain conditions, while at the same time stating that it had provided "all available information" in response to the Receiver's requests.³⁶ Moreover, counting the June 24, 2019 production, PSTC produced three separate sets of documents to the Receiver after the June 10 deadline, each containing new documents that had not been previously produced to the Receiver and that were required to be turned over under this Court's orders.³⁷ Accordingly, the Court is entitled to assess on—and receive from—PSTC a \$2,000.00 per day coercive fine for every day between June 10, 2019 and October 10, 2019 when it was not in full compliance with the Order.³⁸

Notwithstanding PSTC's failure to fully comply with the Order until months after the June 10, 2019 deadline, the Receiver does not believe a fine should be assessed for the full amount of delinquent time. Instead, the Receiver recommends a reduced fine amount of \$10,000.00 in full satisfaction of the coercive fine set forth in the Order. This recommendation is

³⁵ *Id.* ¶ 15.

³⁶ See Notes 25-26, *supra*.

³⁷ Declaration, ¶¶ 7-13.

³⁸ In this case, any fine imposed by the Court is payable to the Court—not to the Receivership Estate. See *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 631 (1988) ("for civil contempt the punishment is remedial If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, **though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.**" (emphasis added)); see also *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1438, 1443 (10th Cir. 1998) ("Courts have upheld as civil fines intended to coerce, as long as the offending party can avoid them by complying with the court's order.")

based primarily on three factors. First, after PSTC engaged counsel in this matter—who first contacted the Receiver on approximately July 11, 2019—the Receiver believes that PSTC has attempted in good faith to comply with the Court’s orders.³⁹ Second, PSTC paid \$6,160.40 to the Receiver in reasonable fees expended by the Receiver in bringing the motion for order to show cause and related proceedings. Finally, it is the Receiver’s understanding that the employee who was primarily responsible for PSTC’s failure to comply with the Court’s orders prior to July 11, 2019 is no longer employed by the company and that her departure was at least partially due to her handling of this matter.

Based on these factors, the Receiver believes a \$10,000.00 coercive fine is appropriate and takes into account both the amount of time after June 10, 2019 when PSTC was not in full compliance with the Court’s orders and the efforts undertaken by PSTC to achieve full compliance in this matter.

As noted above, the Receiver and counsel for PSTC have engaged in various communications over the last few months in an attempt to make a joint recommendation to the Court. To that end, the Receiver provided a draft of this Report to PSTC before filing and PSTC has authorized the Receiver to state the following: While PSTC does not admit or otherwise affirm any of the factual characterizations or representations made by the Receiver in the Report and reserves the right to submit a response to the Report if the Court is inclined to assess a fine amount greater than \$10,000.00, in an effort to move forward and bring this matter to a close

³⁹ There is a question as to why it took three separate productions over the course of a few months for PSTC to produce all of documents in its possession related to Receivership Defendants. However, the Receiver believes it is plausible that PSTC did not understand the scope of documentation in its possession or that it did not fully understand the scope of the Court’s requirements. In any event, the Receiver does not believe that after July 11, 2019 PSTC was purposefully withholding documents from him.

PSTC does not object to the amount the Receiver recommends.

The Receiver does not object and consents to PSTC submitting a response to this Report in the event the Court is inclined to assess a fine amount greater than \$10,000.00 and reserves the right to reply in response to PSTC's submission.

DATED this 16th day of April, 2020.

PARR BROWN GEE & LOVELESS

/s/ Michael S. Lehr

Jonathan O. Hafen

Michael S. Lehr

Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **REPORT AND RECOMMENDATION REGARDING THE COURT'S ORDER RE: CIVIL CONTEMPT OF PACIFIC STOCK TRANSFER COMPANY** was electronically filed with the Clerk of the Court through the CM/ECF system on April 16, 2020, which sent notice of the electronic filing to all counsel of record.

/s/ Michael S. Lehr