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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

R. WAYNE KLEIN, as Receiver, Plaintiff, v. LAGRAND T. JOHNSON, an individual and as trustee of the Yotsuya Family Trust, Defendant.	**PLAINTIFF'S REPLY IN SUPPORT OF 12(b)(1) MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** **(Ancillary to Case No. 2:15-cv-00828)** Civil No. 2:19-cv-00534-DN-PK Judge David Nuffer Magistrate Judge Paul Kohler

R. Wayne Klein, the Court-Appointed Receiver,[1] hereby files this Reply in Support of Motion to Dismiss Defendant LaGrand Johnson's Counterclaims.

ARGUMENT

The Motion is a factual attack on the subject matter jurisdiction this Court has over Defendant's Counterclaims under Rule 12(b)(1).[2] "When reviewing a factual attack on subject

[1] Defined terms have the meaning given in the Motion.
[2] Fed. R. Civ. P. 12(b)(1).

matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations" and "a court has wide discretion to allow" evidence outside the pleadings to resolve the jurisdictional question.[3] Both the *Barton* doctrine and the stay of litigation in the Receivership Order are jurisdictional in nature and properly considered under Rule 12(b)(1).[4]

In the opposition, Defendant argues: (1) leave of court is not required under the *Barton* doctrine because the Receiver acted *ultra vires*; (2) the litigation stay in the Receivership Order does not apply to the Counterclaims against the Receiver because Defendant is not a Receivership Entity; and (3) consideration of the Receiver's immunity from liability is improper at the motion to dismiss stage. Defendant is wrong on all counts. As shown below, dismissal is proper for each of the reasons identified in the Motion.

I. The Counterclaims Must be Dismissed Because Defendant Failed to Obtain Leave of Court.

Defendant does not dispute that the *Barton* doctrine requires leave of the appointment-court before asserting claims against the Receiver. Defendant also does not dispute that he failed to obtain leave before filing the Counterclaims. Instead, Defendant alleges that the Counterclaims fall into the limited *ultra vires* exception of the *Barton* doctrine. In support of his *ultra vires* argument, Defendant offers a total of three sentences:

> "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

[3] *See* *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995) (citation omitted).

[4] *See* *Satterfield v. Malloy*, 700 F.3d 1231, 1234 (10th Cir. 2012); *Receivership Order*, Civil Enforcement Case, Docket No. 491 at ¶ 47, filed November 1, 2018 ("[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.")

> should find the act to be ultra vires and not in furtherance of the appointment as receiver."[5]

This argument, however, does not support a finding that the Receiver acted *ultra vires*.

At the outset it is important to establish that the appointment-court—not the Receiver—issued the order that cancelled IAS shares.[6] Defendant does not address how the Receiver could have acted *ultra vires* in the cancellation of IAS shares when he did not, in fact, cancel the IAS shares.

Even assuming Defendant is correct and the cancellation of IAS shares "depleted the Receivership Estate and destroyed the property of the Defendant and others similarly situated" (which the Receiver disputes), Defendant does not explain—and it is not clear—why such action was outside the scope of the Receiver's duties. Indeed, the Receivership Order expressly allows the Receiver to propose a liquidation plan for IAS and to stop IAS shares from trading.[7] Moreover, when the Receiver was appointed, the Court specifically directed that "the shell entity and its 'public company' status" should be liquidated and not sold."[8]

In *Satterfield v. Malloy*, the Tenth Circuit addressed the scope of the *ultra vires* exception.[9] There, the court found that the exception does not apply if the "claims [are] based on acts that are related to the official duties of the [receiver or] trustee . . . even if the [party or] debtor alleges such acts were taken with improper motives."[10]

Here, Defendant has put forth no substantive argument explaining how the Receiver

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[5] *Opposition to Plaintiff's Motion to Dismiss*, Docket No. 14 at 3, filed September 23, 2019.
[6] *Order Granting Motion for Cancellation of International Automated Systems' Shares*, Civil Enforcement Case, Docket No. 719, filed on July 8, 2019.
[7] *Receivership Order*, Civil Enforcement Case, Docket No. 491 at ¶ 85.
[8] *Id*. at ¶ 85(f).
[9] 700 F.3d 1231, 1234 (10th Cir. 2012).
[10] *Id*.

acted outside his court-appointed authority when the appointment-court cancelled the IAS shares. Moreover, the Receiver did not seize or take possession of Defendant's IAS shares. Instead, the Receiver filed a motion that the appointment-court granted after that motion was fully briefed. Accordingly, the Receiver did not act *ultra vires*.

II. The Stay Applies to Defendant's Counterclaims.

Defendant believes that because he is not a Receivership Entity (or possibly an Affiliated Entity) the stay of litigation imposed under the Receivership Order does not apply to him and he is free to sue the Receiver without obtaining leave from the appointment-court. [11] The plain language of the Receivership Order, however, does not limit the stay to Receivership Entities. The Receivership Order states, in relevant part, that the stay applies to "[a]ll 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: the Receiver in his capacity as Receiver".[12] Therefore, ***the only relevant question*** is whether the Counterclaims are civil legal proceedings of any nature involving the Receiver is his capacity as Receiver.

Both Counterclaims solely concern the Receiver's role in the court-ordered cancellation of IAS shares. Defendant makes no argument—and there is no argument—that the Receiver's role in the cancellation of IAS shares was not done in his capacity as Receiver. Whether or not Defendant is a Receivership Entity or was an officer of a Receivership Entity is simply of no import in determining the applicability of the stay to Defendant's Counterclaims against the

[11] *Opposition to Plaintiff's Motion to Dismiss*, Docket No. 14 at 5, filed September 23, 2019.
[12] *Receivership Order*, Civil Enforcement Case, Docket No. 491 at ¶ 44, filed November 1, 2018.

Receiver.

Defendant briefly discusses compulsory or permissive counterclaims and his mistaken view that he is being prevented from litigating his claims. Neither the *Barton* doctrine nor the Receivership Order prevent him from litigating his claims. Instead, both the *Barton* doctrine and the Receivership Order function as gatekeeping tools to ensure that the Receiver is not hindered by claims made against him for the work the court has appointed him to accomplish.[13] If Defendant has claims he wishes to assert against the Receiver the appropriate course of action is to petition the appointment-court for leave to bring the claims against the Receiver. That Defendant—who is still in civil contempt for his "stubborn refusal to comply with the Corrected Receivership Order"—is unwilling to petition the appointment-court underscores the fact that the Counterclaims are yet another attempt to hinder the Receiver in his administration of the Receivership estate.

III. Dismissal is Proper Because the Receiver is Entitled to Immunity.

Defendant does not dispute that a "receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity."[14] Instead, Defendant summarily states that "[t]he fact that [the Receiver] convinced the court that an order should issue allowing the [cancellation] is not basis for a motion to dismiss."[15] Defendant is wrong. The fact that the Receiver sought cancellation by a court order—and did not act without such

[13] *See In re Christensen*, 598 B.R. 658, 665 (Bankr. D. Utah 2019) (describing the *Barton* doctrine as a strictly jurisdictional gatekeeping doctrine).
[14] *Swain v. Seaman*, 505 F. App'x 773, 775 (10th Cir. 2012) (quoting *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir.1978)).
[15] *Opposition to Plaintiff's Motion to Dismiss*, Docket No. 14 at 6, filed September 23, 2019.

authority—is precisely why the Counterclaims must be dismissed under Rule 12.[16]

Receivers are entitled to rely on court orders when administrating a Receivership estate. Indeed, "[t]he fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised"[17] If receivers were not entitled to rely on court orders "[i]t would make the receiver a lightning rod for harassing litigation aimed at judicial orders."[18] Moreover, "a fear of bringing down litigation on the receiver might color a court's judgment in some cases; and if the court ignores the danger of harassing suits, tensions between receiver and judge seem inevitable."[19] "The public interest demands strict adherence to judicial decrees."[20] Defendant's attempt to impose liability upon the Receiver for an order of the appointment-court—especially without argument or citation—is not well taken.

CONCLUSION

For the foregoing reasons and the reasons stated in the Motion, the Counterclaims should be dismissed unless leave is obtained.

DATED this 7th day of October, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr
Jonathan O. Hafen
Jeffery A. Balls

[16] Because the Counterclaims are meritless, dismissal is justified under either Rule 12(b)(1) or 12(b)(6). *See* *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 964 (10th Cir. 1996) (dismissal for lack of subject matter jurisdiction is justified if the claim is "unsubstantial," "devoid of merit" or "frivolous."); *see also* *Jordan-Arapahoe, LLP v. Bd. of Cty. Comm'rs of Cty. of Arapahoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011) ("[t]o survive a 12(b)(6) motion to dismiss, a [counterclaim-plaintiff] must allege that enough factual matter, taken as true, [makes] his claim to relief . . . plausible on its face.") (citation omitted).
[17] *Turney v. O'Toole*, 898 F.2d 1470, 1473 (10th Cir. 1990).
[18] *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. 1978) (quoting *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976).
[19] *Id.*
[20] *Valdez v. City & Cty. of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989).

Michael Lehr
Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **PLAINTIFF'S REPLY IN SUPPORT OF 12(b)(1) MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS** was filed with the Court on this 7th day of October, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr