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

R. WAYNE KLEIN, as Receiver,

Plaintiff,

v.

GLEND A E. JOHNSON, an individual,

Defendant.

**MEMORANDUM IN OPPOSITION TO
DEFENDANT’S MOTION TO STAY
PROCEEDINGS**

Civil No. 2:19-cv-00625-DN-PK

District Judge David Nuffer
Magistrate Judge Paul Kohler

R. Wayne Klein, the Court-Appointed Receiver of RaPower-3, LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”), their subsidiaries and affiliates,¹ and the assets of Neldon Johnson (“Johnson”) and R. Gregory Shepard (“Shepard”),² (the “Receiver” or “Plaintiff”) in the case styled as *United States v. RaPower-3, LLC, et al.*,

¹ Collectively, unless stated otherwise, RaPower, IAS, LTB1, and all subsidiaries and affiliated entities are referred to herein as “Receivership Entities.” The subsidiaries and affiliated entities are: Solco I, LLC (“Solco”); XSun Energy, LLC (“XSun”); Cobblestone Centre, LC (“Cobblestone”); LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership (“NPJFLP”); Solstice Enterprises, Inc. (“Solstice”); Black Night Enterprises, Inc. (“Black Night”); Starlite Holdings, Inc. (“Starlite”); Shepard Energy; and Shepard Global, Inc (“Shepard Global”).

² Collectively, RaPower, IAS, LTB1, Shepard, and Johnson are referred to herein as “Receivership Defendants.”

Case No. 2:15-cv-00828 (D. Utah) (Nuffer, J.) (the “Civil Enforcement Case”), hereby files this Memorandum in Opposition to Defendant’s Motion to Stay Proceedings.

INTRODUCTION

Receivership Defendants were operated as an abusive tax fraud.³ The United States alleged, and the Court found, among other things, that the Receivership Defendants operated a massive tax fraud.⁴ The whole purpose of the Receivership Entities was to enable funding for Neldon Johnson and his family.⁵ Receivership Defendants transferred monies to Defendant in furtherance of this massive tax fraud. The transfers to Defendant were without any legally recognized value. The Receiver seeks to recover, for the benefit of the Receivership Estate, the amounts improperly transferred to Defendant. Defendant seeks to stay this proceeding pending the resolution of the appeal in *United States of America v. RaPower-3, LLC, et al.*, (Civil No. 15-828-DN). Defendant, however, has not carried its difficult burden to establish the propriety of a stay.

ARGUMENT

This court has broad discretion in managing its docket and considering requests for stay.⁶ “The party seeking a stay generally faces a difficult burden.”⁷ Defendant is required to “make a

³ See *Findings of Fact and Conclusions of Law*, Civil Enforcement Case, [Docket No. 467](#), at 1 (“FFCL”), filed Oct. 4, 2018.

⁴ *Amended and Restated Judgment*, Civil Enforcement Case, [Docket No. 507](#), filed Nov. 13, 2018; see also FFCL. The Receivership Defendants have filed notices of appeal, which are pending.

⁵ FFCL at 128.

⁶ See, e.g., [White Knuckle, IP, LLC v. Electronic Arts Inc.](#), 1:15-cv-00036-DN-BCW, 2015 WL 5022579, at *1 (D. Utah Aug. 24, 2015).

⁷ *Id.* (quoting [SWEPI, LP v. Mora Cnty., N.M.](#), Case No. CIV 14–0035 JB/SCY, 2014 WL 7474084, at *15 (D.N.M. Dec. 19, 2014)).

strong showing of necessity because the relief would severely affect the rights of others.”⁸ “The underlying principle clearly is that ‘the right to proceed in court should not be denied except under the most extreme circumstances.’”⁹ Defendant “must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility the stay for which he prays will work damage to someone else.”¹⁰ Here, there is more than a fair possibility of harm to the Receiver and Defendant cannot make out a clear case of hardship or inequity in being required to litigate. Moreover, because Defendant asserts a strong defense on the merits, the litigation should proceed on the merits of this case. If Defendant is correct that he provided reasonably equivalent value to Receivership Defendants in exchange for the payments he received, this case could be decided on grounds completely independent of issues that are on appeal.

A. The Receiver Stands to be Harmed if the Litigation is Stayed.

As set forth above, the legal standard tilts away from granting a stay where, as here, the rights of others are implicated.¹¹ There are two immediate and real harms the Receiver could suffer as a result of a stay. First, is the harm that would result to the Receiver from the loss of evidence and documents relating to the case during a stay. Although Defendant asserts there is no risk of dissipation of evidence and the Receiver has all evidence in his possession, they blatantly ignore that Receivership Defendants have refused to comply with Corrected

⁸ *Id.*

⁹ *Id.*

¹⁰ [Landis v. N. Am. Co., 299 U.S. 248, 255 \(1936\).](#)

¹¹ See [Commodity Futures Trading Comm’n v. Chilcott Portfolio Mgmt., Inc., 713 F.2d 1477, 1484 \(10th Cir. 1983\)](#) (“[W]here a movant seeks relief that would delay court proceedings by other litigants he must make a strong showing of necessity because the relief would severely affect the rights of others.”).

Receivership Order and produce documents and other items to the Receiver.¹² This has made the receivership “significantly more difficult than usual.”¹³ Indeed, the government has recently sought additional sanctions due to the failure of certain Receivership Defendants to comply with the Contempt Order in producing documents and providing information to the Receiver.¹⁴ Simply put, the Receiver does not know if he has all information and documents relating to the claims because of the Receivership Defendants’ failure to comply with the Corrected Receivership Order.

Additionally, there will be evidence unique to the recovery lawsuit against Defendant that will relate to the claims and defenses of the parties. Discovery may need to be conducted into the defenses asserted by Defendant. The Receiver should be allowed to proceed with discovery on all relevant issues. A stay would prejudice the Receiver’s right to conduct such discovery and would allow time for the dissipation of evidence or the risk that memories will fade or witnesses will be unavailable. Because of this there is at least a fair possibility of harm that weighs heavily against granting a stay.

The second potential harm is the potential that assets and monies the Receiver seeks may be dissipated during the court of the stay. The Receiver is authorized and empowered to “take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property.”¹⁵ In connection with this charge to prevent dissipation of assets, the Receiver was also given power “[t]o bring legal

¹² See Civil Contempt Order, [Docket No. 701](#).

¹³ *Id.*

¹⁴ Civil Enforcement Case, [Docket No. 754](#).

¹⁵ Civil Enforcement Case, [Docket No 491](#) at ¶ 13(g).

actions based on law or equity . . . as the Receiver deems necessary or appropriate in discharging his duties as Receiver.”¹⁶ A stay would prevent the Receiver from carrying out this charge, and could allow the dissipation of assets the Receiver seeks to recover from this Defendant. As such, the Motion should be denied.

B. Defendant Cannot Make a Clear Case of Hardship or Inequity.

Where, as here, harm to others from a stay is a fair possibility, “[t]he right to proceed in court should not be denied except under the most extreme circumstances.”¹⁷ The hardship that a movant must show needs to be something beyond simply the costs of litigation. Put simply, “being required to [litigate] a suit, without more, does not constitute a ‘clear case of hardship or inequity’ within the meaning of *Landis*.”¹⁸ *Lincoln General Insurance Co.* is particularly instructive on this point. In that case, the plaintiff, sought a stay pending the outcome of an appeal relating to insurance coverage. In moving for a stay, plaintiff argued “it would suffer hardship in the form of litigation expenses if it were required to move forward with [the] case,” and that those costs might have been “rendered unnecessary” by other events that might occur during the requested stay.¹⁹ The court denied the requested stay because “unnecessary financial burden alone does not constitute a clear case of hardship.”²⁰

In sum, the financial burden arising from continued litigation is not sufficient to grant a stay. This rule makes good sense; otherwise, a stay would always be justified because a movant

¹⁶ *Id.* at ¶ 13(1).

¹⁷ [Commodity Futures](#), 713 F.2d at 1484 (citation omitted).

¹⁸ [Lockyer v. Mirant Corp.](#), 398 F.3d 1098, 1112 (9th Cir. 2005); [Lincoln Gen. Ins. Co. v. Ryan Mercaldo LLP](#), No. 13-CV-2192 W (DHB), 2015 WL 12672145, at *3 (S.D. Cal. Sept. 14, 2015).

¹⁹ *Id.*

²⁰ *Id.*; see also [Abassi v. BAE Sys. Info.](#), No. 10CV1745 BEN AJB, 2010 WL 4443340, at *2 (S.D. Cal. Nov. 1, 2010) (recognizing that “[b]eing denied the possibility of greater efficiency is not a sufficient hardship or inequity”).

seeking a stay could always point to expenses associated with continued litigation.

Nor is it sufficient to say that the Court will have to expend some resources on this case in the absence of stay. While Defendant asserts without explanation that “[i]t would be far easier for the court to manage each individual case discovery once the Court of Appeals has issued a ruling,” numerous courts have recognized that judicial economy is an insufficient basis for granting a stay where the rights of another would be prejudiced.²¹ Accordingly, neither financial burden nor judicial economy presents a compelling basis to stay this action, and the Receiver is entitled to proceed with this case.

Additionally, Defendant’s arguments that such costs may be rendered unnecessary is premised on Defendant’s assumption that the Court of Appeals will reverse the Judgment entered in the Civil Enforcement Case. Defendant asserts the Court of Appeals “is clearly concerned about the evidentiary basis for the Judgment” and expresses its biased view that the oral argument “demonstrates a strong likelihood that the Judgment in the underlying case will be reversed.” As such, Defendant has failed to make any showing, let alone a strong one, that the case will be reversed on appeal.

The Receiver believes that reversal is unlikely given the evidence presented at trial and the standard of review on appeal. During the Civil Enforcement Case, this Court made extensive findings and relied upon ample evidence provided by the United States. The evidence provided by the United States allowed this court to make a “reasonable approximation” of the amount of the wrongful gain.

²¹ See, e.g., *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (“[W]hile it is the prerogative of the district court to manage its workload, case management standing alone is not necessarily a sufficient ground to stay proceedings.”).

“Reasonable approximation” will suffice to establish the disgorgement liability of a conscious wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk of uncertainty arising from the wrong. The same disposition against the wrongdoer yields the rule that ‘when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant’s wrong, the upper limit will be taken as the proper amount.’²²

As this Court noted in the FFCL, “[Receivership] Defendants – who are the ones in possession of the best evidence of a reasonable approximation of their gross receipts – failed to rebut the United States’ evidence of this reasonable approximation, and introduced no credible evidence of their own on the point.”²³

This Court’s findings of fact regarding the amount of disgorgement, “whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the [Tenth Circuit] must give due regard to [this Court’s] opportunity to judge the witnesses’ credibility.”²⁴ Not only is reversal unlikely, but the premise of Defendant’s motion—that a stay should be granted to await the results of the appeal—is an improper collateral attack on the Court’s findings, judgment, and Receivership Order. The Receivership Defendants did not obtain a stay of the judgment from this Court, pending appeal, or obtain a stay from the Tenth Circuit. Instead, Defendant now seeks to use a collateral proceeding to obtain a stay of some of the Receiver’s actions. Such a backdoor effort to achieve what was not obtained through the front door, by parties with the most interest in a stay, should be denied.

Moreover, even assuming the Tenth Circuit makes the unlikely finding that the disgorgement amount is clearly erroneous, there no indication that the underlying findings of

²² [Gratz v. Claughton](#), 187 F.2d 46, 51-52 (2d Cir. 1951) quoted in Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

²³ Civil Enforcement Case, [Docket No. 467](#), at 132.

²⁴ [Fed. R. Civ. P. 52\(a\)\(6\)](#).

fraud will be set aside. In fact, at the oral argument, which Defendant asserts “demonstrates a strong likelihood that Judgment in the underlying case will be reversed”, the Tenth Circuit did not ask any questions regarding the evidence or basis for the districts court’s finding of a “massive tax fraud.” If we are to read tea leaves, as Defendant is now asking this Court to do, there seems to be little to no chance that the findings of fraud—which ultimately are what the Receiver is relying upon in this ancillary action—will be set aside.

CONCLUSION

Because a stay is harmful for the Receiver, and Defendant has not presented a case, let alone a compelling one, that it would suffer a hardship if it were required to litigate this case, Defendant’s Motion to Stay Proceedings should be denied.

DATED this 6th day of November, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Jeffery A. Balls

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of November 2019, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS** was served via CM/ECF on the following:

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