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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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R. WAYNE KLEIN, as Receiver,  
Plaintiff,

v.

MATTHEW SHEPARD, an individual,  
Defendant.

**MEMORANDUM DECISION AND  
ORDER GRANTING PLAINTIFF'S  
MOTION TO DISMISS DEFENDANT'S  
COUNTERCLAIMS**

Case No. 2:19-cv-00533-DN-PK

District Judge David Nuffer

Magistrate Judge Paul Kohler

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Plaintiff R. Wayne Klein was appointed as receiver in *United States v. RaPower-3, LLC, et al.*, Case No. 2:15-cv-00828-DN-EJF (D. Utah) (“*RaPower-3*”), over RaPower-3, LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”), their subsidiaries and affiliates (collectively, the “Receivership Entities”), and the assets of Neldon Johnson and R. Gregory Shepard.<sup>1</sup> As the receiver in *RaPower-3*, Plaintiff moved to cancel IAS shares.<sup>2</sup> That motion was granted.<sup>3</sup>

For the benefit of the receivership estate, Plaintiff subsequently initiated this case to recover funds that are alleged to have been improperly transferred to Defendant from the Receivership Entities.<sup>4</sup> Defendant asserted counterclaims against Plaintiff for inverse

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<sup>1</sup> Corrected Receivership Order (“*RaPower-3* Receivership Order”), [ECF no. 491](#) in *RaPower-3*, filed Nov. 1, 2018.

<sup>2</sup> Receiver’s Motion for Order Canceling Shares of International Automated Systems, Inc. (“Motion to Cancel IAS Shares”), [ECF no. 682](#) in *RaPower-3*, filed May 27, 2019.

<sup>3</sup> Order Canceling International Automated System Inc.’s Shares (“IAS Cancellation Order”), [ECF no. 719](#) in *RaPower-3*, filed July 8, 2019.

<sup>4</sup> Complaint, [docket no. 2](#), filed July 26, 2019; Amended Complaint, [docket no. 13](#), filed Sept. 9, 2019.

condemnation and a *Bivens* violation of due process relating to the cancellation of the IAS shares.<sup>5</sup>

Plaintiff now seeks dismissal of Defendant’s counterclaims under [FED. R. CIV. P. 12\(b\)\(1\)](#) (“Motion”).<sup>6</sup> Because subject matter jurisdiction over Defendant’s counterclaims is lacking, Plaintiff’s Motion<sup>7</sup> is GRANTED. Defendant’s counterclaims<sup>8</sup> are DISMISSED without prejudice.

### STANDARD OF REVIEW

Plaintiff moves to dismiss Defendant’s counterclaims under [FED. R. CIV. P. 12\(b\)\(1\)](#),<sup>9</sup> which is “jurisdictional in nature.”<sup>10</sup> In responding to the Motion, Defendant argues that “[u]nder the standards of review for a motion to dismiss . . . the allegations of the counterclaim must be taken as true and the court must draw all reasonable inferences in favor of the non-moving party.”<sup>11</sup> Defendant is mistaken. Defendant identifies the standard of review for a motion under [FED. R. CIV. P. 12\(b\)\(6\)](#),<sup>12</sup> which differs from the standard of review on Plaintiff’s Motion made under Rule 12(b)(1).

A Rule 12(b)(1) motion to dismiss may take one of two forms: The motion may be a facial attack that “questions the sufficiency of the complaint;”<sup>13</sup> Or, the motion may be a factual

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<sup>5</sup> Answer, Jury Demand and Counterclaim (“Counterclaim”) at 11-15, [docket no. 6](#), filed Aug. 19, 2019.

<sup>6</sup> Plaintiff’s 12(b)(1) Motion to Dismiss Defendant’s Counterclaims (“Motion”), [docket no. 14](#), filed Sept. 9, 2019.

<sup>7</sup> *Id.*

<sup>8</sup> Counterclaim at 11-15.

<sup>9</sup> Motion.

<sup>10</sup> *Satterfield v. Malloy*, 700 F.3d 1231, 1234 (10th Cir. 2012).

<sup>11</sup> Opposition to Plaintiff’s Motion to Dismiss (“Response”) at 7, [docket no. 15](#), filed Sept. 23, 2019.

<sup>12</sup> *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

<sup>13</sup> *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995).

attack that “challenge[s] the facts upon which subject matter jurisdiction depends.”<sup>14</sup> When the challenge to the complaint is a facial challenge, “a district court must accept the allegations in the complaint as true.”<sup>15</sup> However, on a factual challenge, the court is *not* required to accept the complaint’s allegations as true and “may not presume” that they are true.<sup>16</sup> A factual Rule “12(b)(1) motion is considered a ‘speaking motion’ and can include references to evidence extraneous to the complaint.”<sup>17</sup> And the court enjoys “wide discretion to . . . resolve disputed jurisdictional facts.”<sup>18</sup>

Plaintiff’s Motion is a factual challenge under Rule 12(b)(1) because it challenges the facts underlying the purported jurisdiction over Defendant’s counterclaims.<sup>19</sup> Plaintiff argues that the counterclaims are barred under the *Barton* doctrine and the *RaPower-3* Receivership Order.<sup>20</sup> Plaintiff also argues that he is immune from suit as a receiver.<sup>21</sup> Defendant argues in response that the *Barton* doctrine barring jurisdiction does not apply because Plaintiff’s actions were *ultra vires*.<sup>22</sup> Defendant also argues that the issue of Plaintiff’s immunity is not properly raised on a motion to dismiss.<sup>23</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1003.

<sup>17</sup> *Wheeler v. Hurdman*, 825 F.2d 257, 259 n.5 (10th Cir. 1987).

<sup>18</sup> *Id.*

<sup>19</sup> Motion at 3-11.

<sup>20</sup> *Id.* at 7-11.

<sup>21</sup> *Id.* at 11.

<sup>22</sup> Response at 2-6.

<sup>23</sup> *Id.* at 6-7.

## DISCUSSION

### **Defendant’s counterclaims are barred by the *Barton* Doctrine and the *RaPower-3* Receivership Order**

Plaintiff argues that Defendant’s counterclaims should be dismissed because Defendant did not obtain leave to bring them.<sup>24</sup> The United States Supreme Court held in *Barton v. Barbour* that “before suit is brought against a receiver[,] leave of the court by which he was appointed must be obtained.”<sup>25</sup> The *Barton* doctrine bars claims based on a receiver’s actions arising from their official duties, out of a concern that allowing receivers to be vulnerable to suit would render the courts unable to “preserve and distribute” relevant property.<sup>26</sup>

Defendant contends that the *Barton* doctrine does not apply if a receiver acted *ultra vires*.<sup>27</sup> But Defendant does not clarify which specific acts were outside of Plaintiff’s court-appointed authority. In the *RaPower-3* Receivership Order, the court ordered Plaintiff to “provide a recommendation” regarding whether IAS should be “liquidated or dissolved.”<sup>28</sup> The Receivership Order further directed that, should liquidation be appropriate, “the Receiver shall propose a liquidation plan.”<sup>29</sup>

Plaintiff followed this directive and drafted a plan of liquidation<sup>30</sup> and moved for the cancellation of IAS shares.<sup>31</sup> The liquidation plan was adopted<sup>32</sup> and the court—not the

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<sup>24</sup> Motion at 7-11.

<sup>25</sup> *Barton v. Barbour*, 104 U.S. 126, 128 (1881).

<sup>26</sup> *Id.* at 136.

<sup>27</sup> Response at 2-3.

<sup>28</sup> Receivership Order ¶ 85.

<sup>29</sup> *Id.*

<sup>30</sup> Receiver’s Accounting, Recommendation on Publicly-Traded Status of International Automated Systems, and Liquidation Plan, [ECF no. 552](#) in *RaPower-3*, filed Dec. 31, 2018.

<sup>31</sup> Motion to Cancel IAS Shares at 1.

<sup>32</sup> IAS Cancellation Order at 1.

Plaintiff—cancelled the IAS shares.<sup>33</sup> Plaintiff’s acts were not *ultra vires*. They were within the scope of Plaintiff’s court-appointed authority. Therefore, the *Barton* doctrine applies to Defendant’s counterclaims. And because Defendant did not seek leave to file the counterclaims in *RaPower-3*, the *Barton* doctrine bars the counterclaims.

Additionally, and separate from the *Barton* doctrine, the court in *RaPower-3* ordered that ancillary “actions of any nature involving [] the Receiver in his capacity as Receiver” are “stayed until further order of this Court.”<sup>34</sup> That stay of actions has not been lifted as to Defendant’s counterclaims. Therefore, Defendant’s counterclaims violate the stay of actions imposed in *RaPower-3*.

Because the *Barton* doctrine bars Defendant’s counterclaims, and because the counterclaims violate the stay of actions imposed in *RaPower-3*, subject matter jurisdiction over the counterclaims is lacking.

**Defendant fails to address how Plaintiff is not immune from suit or how orders entered in *RaPower-3* may be challenged in this separate action**

Defendant’s counterclaim for inverse condemnation alleges a violation of constitutional rights by the cancellation of the IAS shares under a takings theory.<sup>35</sup> Defendant’s counterclaim for a *Bivens* violation alleges that the cancellation of the IAS shares violated Defendant’s due process rights.<sup>36</sup> Plaintiff argues that Defendant cannot succeed on either counterclaim because the cancellation of the IAS shares was court ordered and because Plaintiff is immune from suit.<sup>37</sup>

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<sup>33</sup> *Id.* at 5.

<sup>34</sup> *RaPower-3* Receivership Order ¶ 44.

<sup>35</sup> Counterclaim at 12-13. Argument that IAS shareholders would lose property that they valued was raised in *RaPower-3*. Opposition to Receiver’s Motion for an Order Canceling Shares of International Automated Systems Inc. at 3, [docket no. 690](#) in *RaPower-3*, filed June 7, 2019. That argument was rejected. IAS Cancellation Order at 2 n.7.

<sup>36</sup> Counterclaim at 13-14.

<sup>37</sup> Motion at 7-11.

Defendant's counterclaims effectively seek collateral review of judicial orders entered in *RaPower-3* relating to Plaintiff's authority as a receiver and the cancellation of IAS shares. But "a receiver who faithfully and carefully carries out the orders of his appointing judge must share the judge's absolute immunity."<sup>38</sup> This is the case even where constitutional violations are alleged.<sup>39</sup> Defendant fails to address how Plaintiff, acting as a receiver under court authority, is not immune from suit. And Defendant cites no legal authority that this separate action may challenge orders entered in *RaPower-3*. Therefore, subject matter jurisdictional over Defendants' counterclaims is lacking.

### ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion<sup>40</sup> is GRANTED. Defendant's counterclaims<sup>41</sup> are DISMISSED without prejudice for lack of subject matter jurisdiction.

Signed December 9, 2019

BY THE COURT



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David Nuffer  
United States District Judge

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<sup>38</sup> *Swain v. Seaman*, 505 F. App'x 773, 775 (10th Cir. 2012) (unpublished) (quoting *T & W Inv. Co. v. Kurtz*, 588 F.2d 801, 802 (10th Cir. 1978)).

<sup>39</sup> *Id.*

<sup>40</sup> Docket no. 14, filed Sept. 9, 2019.

<sup>41</sup> Counterclaim at 11-15, docket no. 6, filed Aug. 19, 2019.