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IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF UTAH, CENTRAL DIVISION

In re **RAPOWER-3, LLC**, Debtor.	Bankruptcy Case No. 18-24865 (Chapter 11) Judge Kevin R. Anderson

RAPOWER-3, LLC'S AMENDED OMNIBUS RESPONSE TO CREDITOR UNITED STATES DEPARTMENT OF JUSTICE, TAX DIVISION'S (1) MOTION TO DISMISS BANKRUPTCY PETITION, OR IN THE ALTERNATIVE, CONVERT TO CHAPTER 7, OR APPOINT CHAPTER 11 TRUSTEE [Dkt. No. 13]; (2) MOTION TO WITHDRAW THE REFERENCE [Dkt. No. 15]; and (3) MOTION FOR PARTIAL STAY [Dkt. No. 18]

Debtor RaPower-3, LLC ("**Debtor**") files this omnibus response (this "**Response**") to Creditor United States Department of Justice, Tax Division's ("**DOJ**") *Motion to Dismiss Bankruptcy Petition, or in the Alternative, Convert to Chapter 7, or Appoint Chapter 11 Trustee* [Dkt. No. 13] (the "**Motion to Dismiss**"), its *Motion to Withdraw the Reference* (the "**Motion to WTR**") [Dkt. No. 15], and its *Motion for Partial Stay* ("**Stay Motion**", and collectively with the Motion to Dismiss and the Motion to WTR, the "**Motions**") [Dkt. No. 18] and, pursuant to 11 U.S.C § 1112, agrees to dismissal of this case. In support of this Response, Debtor states as follows:

INTRODUCTION

The Debtor did not file this bankruptcy case (the "**Case**") to "hide" from Judge Nuffer, as the DOJ alleges, nor to avoid the entry of an order by Judge Nuffer in the pending United States District Court Case (the "**USDC Case**"). Rather, the Debtor filed for one simple reason, to preserve its right to appeal any orders or decisions made by Judge Nuffer in the USDC Case. Debtor also is not forum shopping as the DOJ alleges. Postposition, the Debtor has only taken a position on one issue in the USDC case, namely, whether the District Court should initially consider, and rule upon, the DOJ's motion that the automatic stay of 11 U.S.C. § 362 does not apply to the government. The Debtor believes that this Court, and not the USDC court, should first consider and rule on that question but was very clear in its papers that some actions in the USDC Case may be appropriate.[1] Nevertheless, for the reasons stated below, even this question will be rendered moot if the court dismisses this chapter 11 case as the Debtor now requests.

Debtor does not object to entry of final orders by Judge Nuffer in the USDC Case. Debtor simply wants the right to appeal those orders, and any other rulings, to a higher court. It believes that Judge Nuffer erred and it wants an opportunity to show those errors to an independent body. Furthermore, final appellate resolution of the issues will have a material impact on the nature, extent and amount of the Debtor's liabilities and may obviate the need for

[1] *See RaPower-3, LLC's Limited Objection and Reservation of Rights* [Case Dkt. No. 434] ("**RP3's Limited Objection**") filed in Case No. 2:15-cv-00828-DN-EJF in the USDC Case pg. 3 ("While this reasoning [that § 362(b)(4) applies] may apply to liquidating a claim that can be administered as part of the bankruptcy procedure, the issues pending before this Court [i.e. freezing assets and appointing a receiver over the estate of a bankrupt debtor without bankruptcy court approval] are far broader than that."); *see also* pg. 4 ("While there may be judicial efficiencies that militate in favor of liquidating claims in this Court, the [DOJ] has made no showing that it is entitled to the extraordinary relief that would naturally result from the entry of certain orders it is requesting: namely, that the assets of an existing bankruptcy estate would be frozen by a U.S. District Court, and/or subject to a court-appointed receiver, and completely obstruct the reorganization process of a debtor in bankruptcy."); *see also* pg. 5 ("Although some modified remedy may be appropriate, given the broad nature of the request and the forum in which [the DOJ] is seeking such extraordinary relief, RP3 is obligated to object.").

bankruptcy relief. At the time this Case was filed, however, there was significant risk that the Debtor's appeal rights would not be preserved. In the USDC Case, the DOJ was essentially seeking a broad form of receivership order that, if entered as proposed, would have precluded the Debtor from appealing, would have precluded the Debtor from retaining counsel of its choice in connection with any appeal, and would have deprived the Debtor of fundamental due process. To preserve its appellate rights, to protect the interests of its legitimate creditors and in good faith, the Debtor sought relief in this Court.

During this case, the Debtor has attempted to resolve the issues with the DOJ. On more than one occasion, the Debtor has informed the DOJ that it only seeks the ability to effectively and independently prosecute an appeal through counsel of its choice. These efforts, however, have not resulted in an agreed form of receivership order. The latest form of such an order that the Debtor submitted to the DOJ is attached as Exhibit A. The DOJ has not responded to this proposal.

Although a resolution has not yet been achieved, the Debtor's rehabilitation efforts have been irreparably hampered by the resulting uncertainty concerning these appeal rights. Absent a resolution of this question, the Debtor cannot obtain post-petition funding to continue as a debtor in possession. Initially, the Debtor's goal was to establish its right to appeal, obtain post-petition funding to enable it to prosecute the appeal, retain special counsel and other professionals to represent the Debtor in the appeal and during the Case, and suspend other activities in the Case pending the final outcome of the appeal. If the Debtor prevailed on the appeal, the DOJ claim, and millions of dollars in contingent liabilities would be eliminated. Thereafter, the Debtor could propose a plan of reorganization or propose dismissal. If the Debtor did not prevail on

appeal, then a reorganization would be hopeless, and the Debtor could then either move for dismissal or conversion. Now the prospects of post-petition funding are very dim due to the unresolved nature of the Debtor's appeal rights. Accordingly, to avoid further administrative expenses, the Debtor has elected to seek preservation of its appeal rights solely in the USDC case, to have this bankruptcy case dismissed, and to stay all proceedings in this bankruptcy case with the exception of (a) the pending retention application for the undersigned proposed counsel; and (b) modifying the automatic stay to allow Judge Nuffer to enter orders in the District Court Case.[2] And, dismissal is one of the remedies sought by the DOJ in its Motions. Dismissal also will obviate the need to withdraw the reference, as there will be no case to refer back to Judge Nuffer. Now, however, the DOJ will not stipulate to a dismissal without a finding that the Case was filed in bad faith. The Debtor cannot agree to such a finding because it is not true. .

BACKGROUND FACTS

1. Debtor filed its bankruptcy petition on June 29, 2018.

2. The DOJ filed the Motions on July 27, 2018.

3. Debtor, the DOJ, and the UST had been in discussions related to stipulating to a dismissal of the Bankruptcy Case as recently as August 9, 2018, but such discussions have not resulted in a stipulated dismissal.

STATEMENT OF POSITION

A. The Bankruptcy Petition Was Not Filed in Bad Faith.

Debtor filed its bankruptcy to preserve its rights to appeal orders and rulings entered in

[2] As this court is aware, Local Rule 9013-1(e)(4) prohibits a respondent from making a motion in a response. However, to the extent the Court considers fashioning relief to the Motions other than that specifically prayed for, Debtor is hereby simply informing the Court that it would now stipulate to stay relief.

the USDC Case. It did not file to prevent entry of such an order. In fact, the Debtor fully intended to stipulate to modification of the automatic stay to permit the entry of such orders, subject to preservation of its appeal rights. And, had the DOJ asked for such an order, it would have been entered by stipulation. Instead, the DOJ filed the Motions. Preserving appellate rights is not bad faith. Furthermore, the DOJ's continued refusal to agree to entry of orders in the USDC Case that preserve the Debtor's appeal rights shows exactly why the filing of the petition was proper and in good faith.

There is no rule that prohibits a debtor from exercising remedies available to it to pursue the avenues through which it can survive. In short, as of the filing of the petition, there was a proper reorganization purpose, and the Debtor believed then, and continues to believe now, in its prospects to restructure or eliminate its liabilities through prosecution of an appeal.

B. Dismissal of this Case Is Appropriate

Even though the Debtor has a good faith basis for being in bankruptcy, the Debtor *now* believes, given its inability to secure debtor in possession financing, that dismissal is appropriate and in the best interests of creditors.

Currently there are insufficient assets in the bankruptcy estate to reasonably fund a Chapter 11 or Chapter 7 case. Although the Debtor's revenue has been eliminated by the injunction entered in the USDC Case, the Debtor is complying with the injunction. But, Debtor has been unsuccessful in obtaining debtor-in-possession financing given the current circumstances. In addition, unless and until an appellate court reverses Judge Nuffer's decisions, it will be impossible for the Debtor, or a trustee, to collect outstanding accounts receivable. Thus, absent reversal on appeal, the Debtor will not have a source of revenue to fund the

administrative expenses of an estate under either Chapter 11 or Chapter 7, regardless of who is managing such an estate. Until the appeal process runs its course, there is no incentive for any party to pay contingent debts that are owed to the Debtor or to provide any form of alternative post-petition financing. The Debtor's assets (comprised of cash, contract rights, and stock in International Automated Systems, Inc.) would be of insufficient and questionable value to secure any such financing. The only incentive an outside third party would have to provide such a contribution is the belief that Debtor will win its appeal and resume operations. Such financing certainly will not take place if a trustee is appointed or if the case is converted. The only viable way for the Debtor to succeed is to prevail on an appeal, eliminate the DOJ claim and its other contingent liabilities, and resume operations outside of bankruptcy.

Section 1112 directs the Court to dismiss a Case for cause if doing so is in the best interest of the estate. Here, the Debtor cannot pursue a reorganization until it prevails on an appeal. It cannot obtain post-petition financing during the pending of an appeal. And, if it prevails on an appeal, then there will be no need for a reorganization or other bankruptcy relief because a successful appeal will eliminate the substantial claim of the DOJ, validate the Debtor's operations, and make its accounts receivable collectable. Thus, the cause justifying dismissal is the substantial or continuing loss to or diminution of the estate, and the absence of a reasonable likelihood of rehabilitation under §1112(b)(4)(A). It is not because of any bad faith, or improper motive, on the part of the Debtor.

C. The Court Should Stay the Proceedings in this Bankruptcy Case, With the Exception of Snell & Wilmer L.L.P.'s Retention Application, Pending Determination of the Motion to Dismiss and Motion to Withdraw the Reference.

The DOJ has asked for a stay of all proceedings until such time as the Motion to Dismiss

may be considered by this Court. With the exception of the *Application of RaPower-3, LLC for Order Authorizing the Employment and Retention of Snell & Wilmer L.L.P. as General Bankruptcy Counsel for Debtor* [Dkt. No. 9] (the "**S&W Employment Application**"), Debtor agrees that such a stay is appropriate. The Snell & Wilmer Employment Application is set for hearing on August 14, 2018, with an objection deadline of August 13, 2018, and Debtor does not anticipate a significant enough expenditure of estate resources to warrant staying that important proceeding. The Debtor needs counsel in this Case. Staying the other proceedings will allow the important issue of the dismissal to be resolved first, potentially obviating the need to address other issues in this case.

D. Debtor Consents to Lifting Any Stay That May Be in Place to Allow Judge Nuffer to Enter His Orders in the District Court Case.

The Debtor does not object to the entry of orders in this Case permitting Judge Nuffer to enter orders in the USDC Case. While Debtor does not believe its appellate rights are adequately protected by the pending proposed orders, the Debtor's litigation counsel will address those matters with Judge Nuffer outside of bankruptcy. The Debtor is unable to retain special counsel in this Case to address those questions because it cannot obtain post-petition financing. Moreover, as indicated by the attached proposed receivership order[3], the Debtor is only seeking to preserve its appeal rights. Appointment of a receiver in the USDC Case with control over all assets and all other decisions, will protect the interests of legitimate creditors, pending resolution of an appeal of Judge Nuffer's orders.

[3] *See* Exhibit A.

CONCLUSION

The Debtor asserts that it is entitled to challenge the findings made and orders entered in the USDC Case. This is Debtor's reason for being before this Court. The Debtor has worked hard to comply fully with the reporting requirements imposed upon it to date. Debtor simply wants the power to control an appeal of orders and rulings entered in the USDC Case because it believes those decisions are erroneous. Successful prosecution of an appeal will allow the Debtor to survive and thrive as an operating company outside of bankruptcy. Appointment of a receiver in the USDC Case will preserve the Debtor's estate during the pendency of any appeal. Thus, dismissal should be granted because it is cost effective, and protects the interests of creditors, not because of any alleged bad faith on the part of the Debtor.

DATED this 10th day of August, 2018.

SNELL & WILMER L.L.P.

/s/ *Jeff Tuttle*
David E. Leta
Jeff D. Tuttle

Proposed Counsel for RaPower-3, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2018, I electronically filed the foregoing document with the United States Bankruptcy Court for the District of Utah by using the CM/ECF system. I further certify that the parties of record in this case as identified below, are registered CM/ECF users and will be served through the CM/ECF system.

- Erin Healy Gallagher erin.healygallagher@usdoj.gov, Russell.S.Clarke@usdoj.gov
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- United States Trustee USTPRegion19.SK.ECF@usdoj.gov

By U.S. mail – I further certify that on August 10, 2018, I caused the foregoing document to be sent by United States mail, first class postage prepaid, to the following at the addresses set forth below:

Gregory W. Lyman
425 North Orchard Dr #15
North Salt Lake, UT 84054

/s/ Joyce Kyle

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**STIPULATED ORDER FREEZING ASSETS AND APPOINTING A RECEIVER** Civil No. 2:15-cv-00828 DN District Judge David Nuffer Magistrate Judge Evelyn J. Furse

Plaintiff and Defendants agree to the entry of this order (this "Stipulated Order"), including as to against RaPower-3, LLC ("RaPower") upon the bankruptcy court granting the dismissal of RaPower's chapter 11 bankruptcy case,[1] which voluntary request for dismissal shall be made pursuant to the terms of this Stipulated Order.

On November 23, 2015, the United States filed its complaint against Defendants, seeking to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since on or before 2010.[2] The United States also seeks disgorgement of Defendants' ill-gotten gains from the promotion of their abusive tax scheme.[3]

The United States previously moved for an order freezing the assets of Defendants Neldon Johnson, RaPower-3, and IAS's assets and for an order appointing a receiver on

[1] Utah Bankruptcy Court Case No. 18-24865 (the "Bankruptcy Case").

[2] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

[3] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

November 17, 2017.[4] On March 2, 2018, the United States' motion was denied without prejudice in part because the United States relied upon the facts set forth in its motion for partial summary judgment including the "disputed material facts as to Defendants' knowledge at the time they made certain statements."[5] The Motion for Partial Summary Judgement was also denied in that same order.[6] Trial is now completed. The Court made extensive findings on the record at the end of trial;[7] intends to enter detailed Findings of Fact and Conclusions of Law including a disgorgement order; and has already entered an interim injunction based on summary findings[8] and a preservation order.[9] On the basis of the evidence adduced at trial, as laid out below,[10] ~~,~~ the United States' motion is granted. ~~but at this time only as to Defendants other than RaPower 3, LLC, which is in bankruptcy.[11] The effect of that bankruptcy filing on this case is currently being briefed.[12]~~

Contents

[4] ECF Doc. No. 252. The United States did not include Shepard in its original motion to freeze defendants' assets.

[5] ECF Doc. No. 318, at 4.

[6] *Id*.

[7] ECF Doc. No. 409, filed June 21, 2018.

[8] Initial Order and Injunction After Trial, ECF Doc. No. 413, filed June 22, 2018.

[9] ECF Doc. No. 419, filed June 27, 2018.

[10] Nothing contained in this Order constitutes an admission by the Defendants regarding the truth or accuracy of any of the Court's findings, conclusions or rulings in this case, and Defendants reserve their right to challenge the same on ~~reserve their right to include any dispute related to these stated facts or arguments on~~ appeal.

~~[11] Utah Bankruptcy Court Case No. 18-24865.~~

~~[12] United States' Motion to Vacate, In Part, the July 5, 2018 Order, docket no. 429, filed July 13, 2018; Order Taking under Advisement [429] Plaintiff's Motion to Vacate Stay, docket no. 430, filed July 13, 2018.~~

~~**For purposes of this Stipulation only, the parties stipulate and agree as follows:**~~

I. Statement of Facts[13]

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower-3, LLC, International Automated Systems, Inc. and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.[14]

2. Johnson claims to have invented certain solar energy technology that involves solar thermal lenses placed in arrays on towers.[15]

3. In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on "the R&D Site" near Delta, Utah, in Millard County.[16]

4. Johnson also directed that IAS install solar lenses in those towers.[17]

[13] These facts are included as part of the Stipulated Order, but Defendants reserve their right to challenge and ~~include any~~ dispute the same ~~related to these stated facts~~ on appeal.

[14] ECF Doc. No. 22 ¶ 12; Pl. Ex. 579, Deposition Designations for Neldon Johnson, vol. 1 ("Johnson Dep., vol. 1"), 36:1-39:12, 46:3-47:3; 52:20-57:1; 74:1-14; 77:4-87:12.

[15] Johnson Dep., vol. 1, 87:16-91:1; 134:19-135:2; 139:23-144:19; Pl. Ex. 504; Pl. Ex. 509, Video 12_4_38-5_15; Pl. Ex. 509, Video 12_4_00-4-23.

[16] Pl. Ex. 581, Deposition Designations for International Automated Systems, Inc. ("IAS Dep."), 162:1-165:9; 171:10-173:20; Pl. Ex. 532 at 6; Pl. Ex. 531.

5. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[18]

6. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[19]

7. Johnson drafted some promotional materials to describe the arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[20]

8. Johnson showed IAS salespeople these descriptive materials about the structure of the transaction, the purported technology, and the federal tax benefits that Johnson said a customer could lawfully claim when he bought a lens from IAS.[21]

9. He told IAS's initial salespeople what he understood the tax laws to mean.[22]

10. R. Gregory Shepard has been an IAS shareholder since the mid-1990s.[23] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[24]

11. Shepard's information about Johnson's purported solar energy technology came from Johnson or members of Johnson's family, and Shepard's own observations on his site visits over the years.[25]

(…continued)

[17] IAS Dep. 62:15-64:1.

[18] Pl. Ex. 682, Deposition Designations for RaPower-3, LLC ("RaPower-3 Dep."), Dep. 36:4-39:8.

[19] IAS Dep. 145:21-146:9; Pl. Ex. 463; RaPower-3 Dep. 140:9-143:4; Pl. Ex. 504.

[20] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[21] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[22] Johnson Dep. vol. 1, 240:18-241:10; 247:11-248:12; RaPower-3 Dep. 117:22-119:11; Pl. Ex. 473.

[23] Pl. Ex. 685, Deposition Designations for R. Gregory Shepard ("Shepard Dep."), 43:19-46:1.

[24] Shepard Dep. 70:14-71:22; Pl. Ex. 463.

12. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[26]

13. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[27] XSun Energy,[28] and RaPower-3, LLC.[29]

14. Johnson created RaPower-3 in 2010. He is it manager and the sole decision-maker for the company.[30]

15. Once formed, RaPower-3, rather than IAS, sold solar lenses to individuals.[31]

16. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.[32]

17. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[33]

(…continued)

[25] Johnson Dep., vol. 1, 209:11-210:3, 211:16-215:23; Shepard Dep. 36:6-40:23, 46:2-57:5, 183:14-187:13; Pl. Ex. 8A; RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[26] Johnson Dep., vol. 1, 279:19-22; IAS Dep. 162:1-165:9; 194:6-20; Pl. Ex. 531.

[27] Johnson Dep., vol. 1, 82:8-83:6; LTB1 Dep. 78:22-79:5; 79:12-80:9; IAS Dep. 38:10-40:6, 45:4-17.

[28] *See generally* Pl. Ex. 355; IAS Dep. 47:2-19; Johnson Dep., vol. 1 79:8-81:7.

[29] RaPower-3 Dep. 32:16-33:14, 44:4-14, 45:9-10.

[30] RaPower-3 Dep. 32:16-33:14.

[31] RaPower-3 Dep. 32:16-33:14; IAS Dep. 23:22-25:22; Pl. Ex. 462; Pl. Exs. 8A, 25, 91-95, 119, 121, 174, 181, 346, 462, 464, 473, 511, 512, 531-533, 555, 587, 613-615, 637-639, 760, 762; Rowbotham Testimony, Trial Tr. 910:24-927:7; Williams Testimony, Trial Tr. 982:3-983:23; 985:4-990:12; 991:6-994:15; Olsen Testimony, Trial Tr. 1060:11-25; 1070:11-1074:7; 1078:20-1081:23; Jameson Testimony, Trial Tr. 1221:15-22; 1224:13-1225:25; 1226:6-1228:10; 1237:8-16.

[32] RaPower-3 Dep. 32:16-33:14; 36:4-39:8.

[33] Pl. Ex. 8A at 9; Pl. Ex. 749.

18. Johnson directed RaPower-3 to create a site online (https://rapower3.net) where a customer can access and sign a contract to buy lenses and sign other transaction documents that Johnson provides (described below).[34]

19. Among other things, Shepard created the website www.rapower3.com[35] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[36]

20. Shepard gets paid for his work with RaPower-3 through his company, Shepard Global.[37]

21. On the RaPower-3 website, Shepard describes the solar energy technology (including the solar lenses) and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the website with the transaction documents.[38] Shepard also uses the IAUS and RaPower-3 Forum and emails to communicate with RaPower-3 members and prospective members.[39]

22. Shepard also organizes groups of people to visit the R&D Site, the site where component parts of the purported solar technology system are manufactured (the "Manufacturing

[34] RaPower-3 Dep. 39:9-41:2; Pl. Ex. 511; Pl. Ex. 673, Deposition Designations for LTB1, LLC ("LTB1 Dep."), 39:6-25; Pl. Ex. 61.

[35] Shepard Dep. 25:22-26:8; Pl. Ex. 459; Pl. Exs. 1, 5, 19, 20-21, 24-25, 34, 352, 419, 674, 676, 678-80, 714-724, 796.

[36] Shepard Dep. 286:5-24.

[37] Jameson Testimony, Trial Tr. 1294:15-1301:3; M. Shepard Testimony, Trial Tr. 1412:18-1415:16.

[38] Pl. Ex. 688, Deposition Designations of Roger Freeborn ("Freeborn Dep."), 23:2-24:14; Pl. Ex. 490; Pl. Ex 689, Deposition Designations for Peter Gregg ("Gregg Dep."), 56:20-57:13.

[39] Shepard Dep. 286:5-289:13; Pl. Ex. 481.

Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[40]

23. Shepard directs customers to use tax return preparers who are part of the solar energy scheme, like John Howell in Wichita Falls, Texas; Kenneth Alexander in Florida; and Richard Jameson in St. George, Utah.[41]

24. From 2009 through 2016, RaPower-3 had received at least $25,874,066 from its role in the solar energy scheme.[42]

25. From 2008 through 2016, IAS has received at least $5,438,089 from its role in the solar energy scheme.[43]

26. From 2011 through 2016, XSun Energy has received at least $1,126,888 from its role in the solar energy scheme.[44]

27. From 2010 through 2016, SOLCO I has received at least $3,434,992 from its role in the solar energy scheme.[45]

28. From 2005 through February 28, 2018, all lens-selling entities have received at least $32,796,196.

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[40] *E.g.*, Pl. Exs. 21, 419 at 1; Johnson Dep., vol. 1, 87:23-89:10; Pl. Ex. 509, Video 12_4_00-4_23.

[41] Pl. Exs. 242-245; Pl. Ex. 597; Gregg Dep. 121:14-25; Pl. Ex. 606; Pl. Ex. 334.

[42] Pl. Ex. 735; Reinken Testimony, Trial Tr. 863:18-866:18; 866:19-868:24; *see also*, Pl. Exs. 742B, 749.

[43] Pl. Ex. 738; Pl. Ex. 852, at 59; Buck Testimony, Trial Tr. 257:7-258:20; 271:9-272:12; 293:1-294:11; 312:5-15; Pl. Ex. 371; Pl. Ex. 507, at 20, 35; Johnson Testimony, Trial Tr. 1812:4-12.

[44] Pl. Ex 741; Johnson Dep., vol. 1, 79:8-81:7; 82:8-10; IAS Dep. 47:2-19; Pl. Exs. 208, 355, 356, 510, 743, at 11.

[45] Pl. Ex. 739; Reinken Testimony, Trial Tr. 863:18-866:18; 870:3-871:7; Johnson Dep., vol. 1, 82:8-85:2; IAS Dep. 38:10-40:6; 45:4-21; LTB1 Dep. 78:22-79:5; 79:12-80:9;81:12-21; Pl. Exs. 38, 325, 495, 545. Reinken Testimony, Trial Tr. 863:18-866:18; 871:10-872:14.

29. Testimony at trial showed that the total sales price of lenses ~~which appears to have been paid~~ is at least $50,025,480.[46]

30. From 2008 through 2016, Shepard received $702,001 from his role in the solar energy scheme.[47]

31. While selling the solar lenses, Defendants told customers they could buy "lenses" and claim tax benefits.[48]

32. While they sold solar lenses and organized efforts to sell solar lenses, Defendants told their customers that if they bought a solar lens and signed the transaction documents Defendants provide, their customers were in the "trade or business" of "leasing" solar lenses.[49]

33. According to Defendants, because their customers are in the trade or business of leasing solar lenses, their customers are allowed to claim on their federal income tax returns a business tax deduction for depreciation on the solar lenses and a solar energy tax credit.[50]

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[46] Exhibit 749.

[47] Pl. Exs. 411, 445; G. Shepard Testimony, Trial Tr. 1596:5-1598:21; Jameson Testimony, Trial Tr. 1296:19-1301:3.

[48] Oveson Testimony, Trial Tr. 377:21-378:3; Rowbotham Testimony, Trial Tr. 928:14-929:10; 957:17-19; Williams Testimony; Trial Tr. 1022:4-14; 1099:16-1102:15; Olsen Testimony, Trial Tr. 1089:21-1090:15; RaPower-3 Dep., 155:4-166:18; Shepard Dep. 250:13-251:13; Aulds Dep. 42:11-44:22; 54:15-55:14; 57:17-60:15; Freeborn Dep. 71:2-20; Gregg Dep. 127:19-128:8; 136:4-6, 10-14; 137:3-12; 147:5-148:10; 149:1-7; Lunn Dep. 164:12-171:1; Pl. Exs. 1, 30, 32, 43, 49, 93, 125, 214, 294, 348, 492, 496, 499, 501, 532.

[49] *E.g.*, Pl. Ex. 32. Occasionally, Shepard has claimed that customers have been "in the solar energy business." Shepard Dep. 243:11-244:3; Pl. Ex. 43 at 1 ("AM I REALLY IN THE SOLAR ENERGY BUSINESS? Yes."). But in recent years, Shepard has made it clear that "We should not consider ourselves in an 'energy' business. We are buying lenses and leasing them – THAT is our business – LEASING – NOT producing energy …" Pl. Ex. 32.

[50] Pl. Ex. 1 at 2-3 ("Tax Question" Nos. 45). A collection of Johnson's statements: IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 531 at 3; *see also* Pl. Ex. 532 at 7-10. A collection of Shepard's statements: Pl. Ex. 93 (as a result of purchasing a lens, "the investor gets his $9,000 back in the form of a Tax Credit, plus the depreciation which adds extensive value over a six year period plus the income from power produced by the Solar Pod."); Shepard Dep. 148:21-149:25; *e.g.*, Pl. Ex. 125 (letter from Shepard telling a customer that he is "qualif[ied] … for the Internal Revenue Service solar energy tax credit" because RaPower-3 "put [their lenses] into service").

34. Defendants told customers that IAS, RaPower-3, or LTB "placed in service" or "put into service" their solar lenses in the year that the customers purchased the lenses.[51]

35. Starting in 2010, RaPower-3 sold lenses for a price of $3,500 per lens.[52] Johnson determined the price that RaPower-3 would charge for the lenses.

36. Customers started purchasing lenses via the internet at rapower.net. On that site, a potential customer enters the number of lenses he wishes to purchase, and the website "figures" the amount the customer owes and the amount of the customer's down payment.[53]

37. The site also provides all transaction documents for customers to sign electronically: an Equipment Purchase Agreement, an Operations & Maintenance Agreement ("O&M"), and, at times in the past, a bonus contract.[54]

38. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[55]

39. Over the years, Defendants told customers about Johnson's purported solar energy technology and the progress being made by Defendants.[56] Defendants emphasized progress being made despite their knowledge that the system was not up and running.[57]

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[51] Pl. Ex. 1 at 3 ("Tax Question" No. 7); Pl. Exs. 44, 57, 104-105, 123-125, 176, 185, 313, 588; *see also*, Pl. Ex. 472.

[52] Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition Designations for Robert Aulds ("Aulds Dep.") 141:3-13; 146:17-147:5.

[53] Aulds Dep. 141:3-13.

[54] RaPower-3 Dep. 39:18-41:2; Aulds Dep. 141:3-13.

[55] RaPower-3 Dep. 39:9-41:2; *e.g.*, Pl. Exs. 119, 181, 511; Aulds Dep. 141:3-13; 146:17-147:5; Gregg Dep. 55:19-56:13; Howell Dep. 39:17-40:4; 95:3-5; 134:14-135:22; Zeleznik Dep. 67:3-12; Pl. Ex. 693, Deposition Designations for Frank Lunn, IV ("Lunn Dep.") 114:11-115:4.

[56] *E.g.*, Pl. Ex. 185 at 1; Johnson Dep., vol. 1, 173:11-177:16; Pl. Exs. 16 & 17. Johnson gave these white papers to Shepard. Johnson Dep., vol. 1, 185:15-23; Shepard Dep. 126:9-128:5. Shepard made them available to the public on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Exs. 441, 491; RaPower-3 Dep. 140:4-143:17; Pl. Ex. 504; Shepard

40. From the start, Defendants have told their customers that they can "zero out" their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and solar energy tax credit for the lenses.[58]

41. Defendants knew that when they made statements to customers and prospective customers about the tax benefits and their purported solar lens leasing "trade or business," that the only way a customer has ever "made money" from buying a lens is from the tax benefits; no customer has earned money from rental income or income from a bonus contract.[59]

42. LTB, which by contract was to operate and maintain the solar energy project and specifically the lenses, has never done anything; it has never had a bank account, any employees, or any revenue.[60]

43. Defendants told customers to expect income from the "lease" of their lenses, but Defendants know that no customer has been paid for the use of his or her lenses.[61]

(…continued)

Dep. 199:10-204:14; Pl. Ex. 471; Shepard Dep. 250:13-252:21; Pl. Ex. 72; Pl. Ex. 109 at 1-3; *see also* Freeborn Dep. 95:3-98:1; Pl. Ex. 425 at 1. Johnson dep., vol. 1, 211:16-215:23; Shepard Dep. 36:6-40:23, 183:14-187:13; Pl. Ex. 8A; Pl. Ex. 676; Gregg Dep. 57:18-59:12; Pl. Exs. 298-299; Pl. Ex. 26; 93; 216, 246, 270, 329, 348.

[57] J. Anderson Testimony, Trial Tr. 617:25-618:9; Pl. Ex. 602; Ruling on Plaintiff's Motions in Limine, Trial Tr. 2107:2-9; Pl. Exs. 6; 292; 411, at 10-11; 412, at 9; 413, at 6; 414, at 10; 415, at 7; 416, at 7; 509, Video 12_4_38-5_15; 509, Video 18_4_09-4_25; 526; 901; Johnson Testimony, Trial Tr. 1990:13-16; Shepard Dep. 204:15-207:8.

[58] Johnson Dep., vol. 1, 247:11-248:12; Pl. Ex. 490 at 9-10; IAS Dep. 162:1-165:9; Pl. Ex. 531. According to Shepard, "the greater one's tax liability, the greater will be the depreciation benefit." Pl. Ex. 24 at 1; *see also*, Pl. Ex. 20 at 2; Lunn Dep. 188:18-189:20; Pl. Ex. 24, 43, 48, 70, 71, 85, 88, 109, 133, 142, 158, 181, 207, 214, 220, 325, 438, 474, 490, 496, 497, 501, 532, 597, 674, 718, 721, 722, 777.

[59] Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commission on solar lens sales is also "functional." Freeborn Dep. 82:16-85:17; Pl. Ex. 246. But the multi-level marketing component of RaPower-3 is not connected to lens ownership. RaPower-3 Dep. 33:8-34:9. A distributor need not buy a lens in order to sell lenses for RaPower-3. *Id*; Johnson Testimony, Trial Tr. 2242:8-2251:18.

[60] LTB Dep. 10:10-11:1; 14:7-16:7; 18:2-9; 42:10-43:5; 69:6-74:21; 90:19-91:8; Pl. Ex. 464; Johnson Testimony, Trial Tr. 2246:7-2247:19

44. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[62]

45. Based on the advice and information provided by attorneys or accountants they spoke with about the solar energy scheme, Defendants knew or had reason to know that the purported tax benefits were not permissible under the Internal Revenue Code.[63]

46. Defendants also knew or had reason to know that the purported tax benefits from their solar energy scheme were not permissible under the Internal Revenue Code because others also disagreed with their assertions about tax benefits available from the solar lenses, including: customers' or prospective customers' tax preparers/CPAs, the Internal Revenue Service, the Oregon Department of Revenue, the Oregon Tax Court Magistrate Division, and the Department of Justice.[64]

(…continued)

[61] Shepard Dep. 34:18-35:24; 67:1-12; 76:23-82:18; 93:17-94:13; Pl. Ex. 279 at 1; Pl. Ex. 602 at 1-2; Pl. Ex. 465; Johnson Dep., vol. 1. 230:4-11; Pl. Exs. 10, 19, 48, 49, 61, 70A, 142, 151, 159, 217, 246, 283, 341, 465, 724, 796; Rowbotham Testimony, Trial Tr. 933:19-935:15; Williams Testimony, Trial Tr. 1000:9-1001:7; Olsen Testimony, Trial Tr. 1074:8-1078:16; 1086:12-1087:6; Jameson Testimony, Trial Tr. 1238:3-24; 1241:6-11; 1241:17-1245:1; 1280:21-1282:20; 1310:18-1312:9; M. Shepard Testimony, Trial Tr. 1406:12-1407:2; 1574:21-1575:14; G. Shepard Testimony, Trial Tr. 1734:9-1738:23.

[62] *E.g.*, Pl. Ex. 683, Deposition Designations of John Howell ("Howell Dep."), 211:11-213:14 (aware of 150 cases in Tax Court); Shepard Dep. 250:17-251:3.

[63] Pl. Exs. 23, 73, 135, 141, 185, 231, 370, 373, 374, 449, at 2; 450, at 4; 452, at 2; 477, 480, 547, 570, 574, 582; Freeborn Dep. 95:3-13; Dr. Mancini Testimony, Trial Tr. 75:4-15; 85:24-86:12; 90:5-94:7; 96:17-20; 105:9-107:6; Shepard Testimony, Trial Tr. 1692:25-1693:5; 1723:15-22; 1728:4-1729:25; 1730:18-1731:3; Buck Testimony, Trial Tr. 267:24-269:22; 270:3-271:4; Oveson Testimony, 331:11-23; 334:18-336:3; 341:20-342:25; 343:1-2, 6-8; 343:21-344:10; 344:21-346:19; 347:18-348:13; 352:24-355:21; 356:7-357:14; 358:13-361:2; Shepard Dep. 266:2-267:1; J. Anderson Testimony; Trial Tr. 613:12-618:9; 620:1-621:24; 622:19-623:20; 630:20-632:10; 632:17-633:1.

[64] *Id.*; *see also*, ECF Doc. No. 2; *Peter C. Gregg v. Department of Revenue*, 2014 WL 5112762 (Or. Tax. Magistrate Div. 2014); *Kevin M. Gregg v. Department of Revenue*, 2017 WL 5900999 (Or. Tax Magistrate Div. 2017); *Matthew D. Orth v. Department of Revenue*, 2017 WL 5904611 (Or. Tax Magistrate Div. 2017).

47. When a customer notifies Shepard that they are under audit, Shepard typically directs the customer to Enrolled Agents John Howell or Richard Jameson to represent the customer before the IRS.[65] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[66]

48. Shepard has also advocated for customers under audit before the IRS.[67] He has given customers the arguments to make before the IRS and documents to submit while under audit.[68]

49. Johnson is paying the attorneys' fees for all customers whose tax benefits have been disallowed on appeal by the IRS and who have filed petitions in Tax Court.[69]

50. Defendants have caused serious harm to the United States Treasury as a result of their solar energy scheme.[70] Defendants' customers claimed at least $14,207,517 of improper tax refunds as a result of Defendants' scheme for tax years 2013 through 2016.[71]

51. To date, Johnson, Shepard, IAS and RaPower-3 continue to organize sales of solar lenses, and participate (directly and indirectly) in the sale of solar lenses.[72]

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[65] Gregg Dep. 151:7-25; Pl. Exs. 333-34; Howell Dep. 183:11-184:8; 211:11-212:10; Pl. Ex 348.

[66] *See, e.g.,* Howell Dep. 221:16-223:18; Pl. Exs. 605, 608, 637.

[67] Pl. Ex. 10.

[68] Pl. Ex. 49; Pl. Ex. 697, Deposition Designations for Brian Zeleznik ("Zeleznik Dep."), 184:18-185:17; 211;4-214:4 and *compare, e.g.,* Pl. Ex. 81 (document written by Brian Zeleznik to the IRS in response to his audit) *with* Pl. Ex. 89 (email from Shepard to Zeleznik with a sample document to use with the IRS); *see also*, Pl. Ex. 163 at 1-2; Pl. Ex. 231; Pl. Ex. 340 (*id.* at 2 ("You can hand write notes or even copy the above [arguments] down by hand and read it word for word [to an auditor]. Just don't give [an auditor] this email.")).

[69] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23; Zeleznik Dep. 142:7-143:1; Jameson Testimony, Trial Tr. 1249:14-1250:1.

[70] Pl. Ex. 750; Howell Dep. 186:3-190:23; 193:22-194:10; 194:19-200:20; Zeleznik Dep. 152:10-15, 152:22-159:5; Gregg Dep. 102:7-103:25; 104:24-105:4; 105:15-106:2; 112:7-124:9; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14; Olsen Testimony, Trial Tr. 1136:14-1137:18; 1139:8-1145:12; Williams Testimony, Trial Tr. 1022:18-1028:14; Jameson Testimony, Trial Tr. 1282:21-1289:11; 1289:15-1293:18; 1304:4-1306:8; 1307:2-1308:17.

[71] Pl. Ex. 750; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14.

52. They are not deterred from promoting the scheme, not by the IRS' disallowance of their audited customers' depreciation deductions and solar energy tax credits or by the complaint filed in this case or by the announced result in the case.[73]

II. The injunctive relief requested by the United States – in the form of an asset freeze and appointment of a receiver – is necessary or appropriate to enforce the Internal Revenue Laws.[74]

Under 26 U.S.C. § 7402, this Court has the authority to impose an asset freeze and appoint a receiver to take control of Defendants IAS and RaPower-3's assets and business operations..[75] Section 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws.[76] Courts have exercised this broad authority under § 7402(a) in a variety of contexts, including ordering disgorgement of ill-gotten gains against a tax return preparer engaged in fraudulent return preparation,[77] appointing receivers to assist in collection of

(…continued)

[72] Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Exs. 424, 426, 539, 679, 731-33.

[73] Shepard Dep., 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25; Jameson Testimony, Trial Tr. 1229:11-14; M. Shepard Testimony, Trial Tr. 1526:19-21

[74] These arguments are included as part of the Stipulated Order, but Defendants reserve their right to challenge and ~~include any~~ dispute the same ~~related to these arguments~~ on appeal.

[75] Under 26 U.S.C. § 7402(a), the district courts "shall have jurisdiction to make and issue in civil actions, writs and orders of injunction, [ ] orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

[76] *See Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957) ("It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws."); *United States v. Kaun*, 633 F. Supp. 406, 409 (E.D. Wisc. 1986) ("By its very terms, this statutory provision authorizes the federal district courts to fashion appropriate, remedial relief designed to ensure compliance with both the spirit and the letter of the Internal Revenue laws – all without enumerating the many, particular methods by which these laws may be violated or their intent thwarted."), *aff'd on other grounds*, 827 F.2d 1144 (7th Cir. 1987); *see also United States v. ITS Financial, LLC*, 592 Fed. Appx. 387, 397 n.6 (6th Cir. 2014).

[77] *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla., March 6, 2017).

federal tax liabilities or otherwise ensure compliance with the internal revenue laws,[78] and freezing a defendant's assets.[79] The statute alone provides sufficient authority to issue an injunctive order freezing Defendants' assets.

Examination of the typical factors in imposing equitable relief before final adjudication is not necessary but demonstrates the propriety – and necessity – of this action. In the Tenth Circuit, a party seeking a preliminary injunction must show 1) that there exists a substantial likelihood that the movant will prevail on the merits; 2) that the movant will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and 4) that the injunction would not be adverse to the public interest.[80] The Court finds that while 26 U.S.C. § 7402(a) provides explicit authority for the relief requested, the United States, as the moving party, also meets its burden under the preliminary injunction standard for the relief requested.[81]

A. The United States has succeeded on the merits.

For injunctive relief to be warranted under § 7408, the United States must prove by a preponderance of the evidence that (1) Defendants organized an entity, plan, or arrangement;

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[78] *See, e.g., United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014) (receiver appointed under broad authority of section 7402(a) to oversee company's finances, prevent company from pyramiding employment taxes, and ensuring that company timely filed tax returns); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005) (district court did not abuse its discretion in appointing a receiver when defendant owed more than $1 million in delinquent taxes and engaged in a series of transactions to move assets and commingle funds in an attempt to thwart the government's collection efforts); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960) ("'Though the precise limits of judicial discretion to appoint a receiver under Sections 7402(a) and 7403 of the 1954 [Internal Revenue] Code are not defined, where the record shows that a substantial tax liability probably exists, and that the Government's collection of the tax may be jeopardized if a receiver is not appointed, the appointment will be made.'") (quoting Mertens, Law of Federal Income Taxation, Vol. 9, § 49.222, 1960 Cum. Supp. p. 41).

[79] *United States v. First National City Bank*, 379 U.S. 378 (1965).

[80] *In re Qwest Communications Intern., Inc. Securities Litigation*, 243 F.Supp.2d 1179, 1185 (D. Colo. 2003) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)); *see also*, Fed. R. Civ. P. 65.

[81] *Lundegrin*, 619 F.2d at 63.

(2) Defendants made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement; (3) Defendants knew or had reason to know those statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct. Alternatively, for injunctive relief to be warranted under § 7402, the United States must prove that an injunction is necessary ***or*** appropriate to enforce the internal revenue laws.[82] As the Court has found, the United States has proven that it is entitled to an injunction under 26 U.S.C. §§ 7402 and/or 7408. The evidence adduced at trial shows that Defendants organized the solar energy scheme; [83] that Defendants made false or fraudulent statements about the tax benefits to be obtained from purchasing a solar lens; [84] and that Defendants knew or had reason to know that their statements were false or fraudulent pertaining to a material matter,[85] namely the tax benefits of depreciation and solar energy tax credits. Further, Defendants have testified that they have no intention of ceasing their activity related to and sales of solar lenses. An injunction is necessary to prevent recurrence of Defendants' conduct.

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[82] 26 U.S.C. § 7402(a) (emphasis added).

[83] *E.g.*, Pl. Ex. 2, Pl. Ex. 511; Pl. Ex. 579,Johnson Dep., vol. 1, 228:10-234:17; Pl. Ex. 682, RaPower-3 Dep., 39:9-41:2; *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000) *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n. 1 (7th Cir. 2013); *see also United States v. Stover*, 650 F.3d 1099, 1107 (8th Cir. 2011) (The organizing, promoting, or selling element of § 6700 "should be defined broadly, and is satisfied simply by selling an illegal method by which to avoid paying taxes." (quotations omitted).); *United States v. Benson*, 561 F.3d 718, 722 (7th Cir. 2009); *United States v. Alexander*, 2010 U.S. Dist. LEXIS 40108, at *13-14 (D.S.C. 2010) *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

[84] *E.g.*, Pl. Ex. 24, Pl. Ex. 32, Pl. Ex. 93, Pl. Ex. 125, Pl. Ex. 214, Pl. Ex. 294, Pl. Ex. 492, Pl. Ex. 496, Pl. Ex. 531, Pl. Ex. 532; *see United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, *9.

[85] *E.g.*, Pl. Ex. 40 at 8, Pl. Ex. 279, Pl. Ex. 246, Pl. Ex. 531, Pl. Ex. 532 at 6; *Stover*, 650 F.3d at 1108-09; *United Energy Corp.*, 1987 WL 4787, *9; *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985); *Campbell*, 897 F.2d at 1320-22 (statements about material matters include those that directly address the tax benefits purportedly available to a participant in a tax scheme and those that concern factual matters that are relevant to the availability of tax benefits.); *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

Disgorgement is also necessary or appropriate to enforce the internal revenue laws. Defendants profited from their scheme in the millions of dollars through money from the United States Treasury that was funneled through their customers. Defendants should not be permitted to retain their ill-gotten gains. The United States has shown that a reasonable approximation of their proceeds is at least $50,025,480. This Court has found that an injunction will issue and that disgorgement will be ordered. Thus, the United States has already succeeded on the merits.

B. The United States will suffer irreparable injury if an order granting the asset freeze and appointing a receiver is not issued.

The United States Treasury has already been greatly harmed by Defendants' scheme. Defendants continue to sell lenses to this day, and Defendants' customers continue to claim the tax benefits related to those lenses. If the injunctive relief requested is not granted, Defendants will have full unfettered access to the funds illicitly obtained to the detriment of the United States.[86] Defendants' entire scheme was geared to "zero-out" a customer's tax liability. Defendants requested customers make a down payment for their solar lenses of $1,050 per lens. The customers paid this with a $105 "upfront fee" and were asked to pay the remaining amount *after* they received their tax refunds.[87] Defendants funded their entire scheme through funds that were "redirected" or diverted from the United States Treasury to their pockets though the money first went through the hands of their customers. The United States will not be able to recover all of the improper refunds paid to Defendants' customers. Defendants have been dissipating assets since they learned of the criminal investigation by the Internal Revenue Service no later than

[86] *See United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla., March 6, 2017); *Manor Nursing Centers*, 458 F.2d at 1104 ("The effective enforcement of the federal securities law requires that the SEC be able to make violations unprofitable. The deterrent effect of a Commission enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.").

[87] Pl. Ex. 511; Shepard Dep. 150:17-153:21, 154:9-156:17; Pl. Exs. 119, 147, 265, 267.

June of 2012[88] and throughout the course of this litigation.[89] Defendants have moved assets into foreign jurisdictions[90] and both Johnson[91] and Shepard[92] have taken steps to frustrate the collection of a potential disgorgement award. Without the relief requested, Defendants will continue in their attempt to frustrate the collection of any disgorgement this Court may award and thus irreparably injure the United States.

C. The balance of harm to the United States in not issuing the injunctive relief outweighs the harm to be caused to Defendants by issuing the requested relief.

In evaluating this factor, courts look to whether the freeze itself will cause such disruption of defendants' *legitimate* business affairs that the assets would be destroyed. [93] Here,

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[88] RaPower-3 Dep., vol. 197:13-199:6.

[89] Pl. Ex. 684, true and correct copies of bank statements of defendants Neldon Johnson, RaPower-3 and IAS showing some of the activity and transfers that have occurred during the pendency of this litigation; *see also*, Pl. Ex. 646, Pl. Ex. 647, Pl. Ex. 648, Pl. Ex. 649, Pl. Ex. 650; Johnson Dep., vol. 2, 202:17-220:16.

[90] Johnson Dep., vol. 2, 37:22 – 38:5; Neldon Johnson assigned the rights to six patents to Black Night Enterprises, Inc., #6 Solomon's Arcade, Main Street, Charleston, Saint Kitts and Nevis (see USPTO Patent Assignment Search, search by assignee name: "Black Night"). The assignments were executed between April 2013 and June 2015 and recorded on June 16, 2015. See USPTO assignment search for Neldon Johnson, https://assignment.uspto.gov/patent/index.html#/patent/search/result?id=neldon%20johnson&type=patAssignorName.

[91] For example, Neldon Johnson has transferred patents to Nevis and has ownership interests in multiple foreign entities, *supra*. Further, Neldon Johnson testified that if a "government agency caus[ed] problems," then certain assets would revert back to the foreign company. Trial Tr. 2175:4-16. Johnson has structured his affairs in a convoluted manner and in such a way as to obstruct the United States' discovery of ownership interests and assets. *E.g.*, ECF Doc. No. 53, ECF Doc. No. 55, ECF Doc. No. 56, ECF Doc. No. 57, ECF Doc. No. 58, ECF Doc. No. 59, ECF Doc. No. 138, ECF Doc. No. 140, ECF Doc. No. 143, ECF Doc. No. 160, ECF Doc. No. 161, ECF Doc. No. 203, ECF Doc. No. 206, ECF Doc. No. 209, ECF Doc. No. 210, ECF Doc. No. 212, ECF Doc. No. 213, ECF Doc. No. 218, ECF Doc. No. 219. Permitting Defendants more time to engage in their solar energy scheme and moving assets while the case has been submitted and decision and judgment is forthcoming will only cause further injury to the United States.

[92] In March 2017, during this litigation, R. Gregory Shepard transferred his property right in his personal residence to a trust in the name of his wife. Pl. Ex. 914, 915, 916 (attached); *see also*, U.C.A. § 78B-5-503(7); U.C.A. § 78B-5-512. Pl. Ex. 914, 915, and 916 are certified copies of documents filed with the Salt Lake County Recorder and are self-authenticating. Fed. R. Evid. 902(4).

[93] *SEC v. Prater*, 289 F. Supp. 2d 39, 54 (D. Conn. 2003) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972)) (emphasis added).

Defendants have no legitimate business. Defendants' solar energy scheme is an abusive tax scheme and not a legitimate business. Defendants do not operate the solar energy scheme – or any of the entities involved in the solar energy scheme – in a businesslike manner. Defendants do not have any revenue or income aside from the sale of solar lenses. There is no harm to Defendants in prohibiting them from using ill-gotten gains to fund their technology experimentation and their personal expenses, including offshore arrangements that will be difficult to collect against. The United States however, and the taxpaying public, will continue to be harmed by the probable dissipation of Defendants' assets. The United States has a compelling interest in enforcing the tax laws and ensuring that persons promoting abusive tax schemes do not profit from their unlawful behavior.[94] As such, the balance of harms weighs in favor of the United States and for relief to be granted.[95]

D. An injunction will benefit, not disserve, the public interest.

The public interest is served by issuing the injunctive relief requested by the United States. The public has an interest in enforcement of the tax laws.[96] Taxpayers have an interest in being protected from suffering the results of other taxpayers improper tax benefits. Defendants' activities do a disservice to the taxpaying public, undermining confidence in the fair

[94] *See Bull v. United States*, 295 U.S. 247, 259 (1935) (Taxes are the life-blood of government and their prompt and certain availability an imperious need.).

[95] *See United States v. Buddhu*, 2009 WL 1346607, at *5 (D. Conn. 2009) ("While the [defendants] will be denied the right to earn a livelihood preparing income tax returns, the harm to them is substantially outweighed by the harm to which their clients are subjected by having fraudulent tax returns prepared in their names.")

[96] *United States v. Anderson*, 2010 WL 1988100, at *3 (D.S.C. 2010); *accord HedgeLender*, 2011 WL 2686279, at *10 (E.D. Va. 2011) (Promoting an abusive tax shelter that caused millions of lost tax revenue "is a significant harm to society because it promotes noncompliance with federal tax laws and is a great cost to the public."); As the Senate Report regarding the enactment of § 6700 observed, "[t]he widespread marketing and use of tax shelters undermines public confidence in the fairness of the tax system and in the effectiveness of existing enforcement provisions." S. Rep. No. 97- 494, Vol I at 266.

administration of the internal revenue laws, and have cost the United States' Treasury over $14 million. Defendants should not be permitted to profit from their illicit activities. The public interest is also served in ensuring that Defendants do not dissipate assets that can be used to satisfy any disgorgement award this Court may order or otherwise compensate those harmed by Defendants' abusive tax scheme.[97]

E. A receiver is necessary or appropriate to effect the asset freeze.

This Court has explicit statutory authority to appoint a receiver pursuant to 26 U.S.C. § 7402(a) as may be necessary or appropriate for the enforcement of the internal revenue laws.[98] Second, the appointment of a receiver is authorized by the inherent equitable power of a federal court.[99] The Court finds that the appointment of a receiver is necessary and appropriate in this case. Defendants' solar energy tax scheme involves false or fraudulent statements regarding tax benefits and the possible dissipation of assets.[100] Given Defendants' reluctance to cooperate in discovery regarding assets and ownership structure[101], a receiver is necessary to enforce the

[97] When the public interest is involved, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First National City Bank*, 379 U.S. 378, 383 (1965) (quoting *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).

[98] 26 U.S.C. § 7402(a); *see also, United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

[99] *See SEC v. Vescor Capital Corp.*, 599 F3d. 1189, 1193-94 (10th Cir. 2010) (the district court has broad powers and wide discretion to determine relief and supervise receiverships); *United States v. Bartle*, 159 F. App'x 723, 725 (7th Cir. 2005); *Consolidated Rail Corp. v. Fore River Railway Co.*, 861 F.2d 322, 326-27 (1st Cir. 1988) (court may exercise discretion to appoint receiver upon considering fraudulent conduct, relative risks of harm, inadequacy of legal remedies, chance of success on merits, likelihood of irreparable injury, etc.); *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994) (federal court has inherent power to appoint receiver to manager defendant's assets pending litigation); *National Partnership Investment Corp., v. National Housing Development Corp.*, 153 F.3d 1289, 1291 (11th Cir. 1998) (appointment of receiver in equity is an ancillary remedy); *see also* Fed. R. Civ. P. 66.

[100] *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994).

[101] ECF Doc. No. 218.

internal revenue laws and identify~~determine and corral~~ the assets Defendants have, regardless of their location. This is appropriate to ensure that any disgorgement that may awarded will not be rendered meaningless.

The United States shall provide, within 30 days, the names of three possible receivers as well as a proposed order detailing the powers and responsibilities that the United States proposes the Court vest within the receiver. The Court may appoint from that list or otherwise. The proposed order should include all powers conferred upon a receiver under the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and any additional equitable powers that the United States requests, to the extent such powers are consistent with the other terms and conditions of this Stipulation.

For purposes of this Stipulation only, the parties stipulate and agree as follows:~~:~~

Unless otherwise ordered by the Court,[102] the proposed order shall provide:

1. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers and general and limited partners of Defendant IAS and, subject to entry of a final order of the bankruptcy court dismissing the Bankruptcy Case, Defendant RaPower~~-3, LLC ("Receivership Defendants")~~ under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and this Court.

[102] The parties may move for modification of these terms.

2. The Receiver shall have the following general powers and duties:

a) To use reasonable efforts to identify ~~determine~~ the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, accounts, trusts, funds, securities, credits, stocks, bonds, effects, goods, chattels, intangible property, real property, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (""Receivership Property");

b) To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;

c) To manage, control, operate and maintain the Receivership Property and hold in his/her possession, custody and control all Receivership Property, pending further Order of this Court;

d) To use Receivership Property for the benefit of the Receivership, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his/her duties as Receiver;

e) Subject to the Appellate Rights set forth and reserved herein, ~~T~~to take any action which, prior to the entry of this Order, could have been taken by the officers,

directors, partners, managers, members, shareholders, trustees and agents of the Receivership Defendants;

f) Subject to the Appellate Rights set forth and reserved herein, ~~T~~to engage and employ persons in his/her discretion to assist him in carrying out his/her duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, or forensic experts;

g) To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;

h) The Receiver is authorized to issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure;

i) Subject to the Appellate Rights set forth and reserved herein, ~~T~~to bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver;

j) Subject to the Appellate Rights set forth and reserved herein, ~~T~~to pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates; and,

k) To take such other action as may be approved by this Court.

3. The Receivership Defendants are directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Property;

such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

4. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver which would interfere with or prevent the Receiver from performing his/her duties.

5. The Receivership Defendants shall cooperate with and assist the Receiver in the performance of his/her duties.

6. The Receiver shall promptly notify the Court and counsel for the United States of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

7. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with his/her fiduciary obligations in this matter.

8. The Receiver and his/her agents, acting within the scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

9. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities.

10. Within 60 days from the entry of the order appointing the Receiver, the Receiver shall file and serve an accounting of the Receivership Estate, reflecting (to the best of the Receiver's knowledge) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates. The Receiver shall also detail his/her efforts in locating assets and what, if any, additional efforts need to be undertaken to provide a full accounting of each Receivership Estate to this Court.

11. The Receiver's fees shall be paid by the Receivership Defendants or from the Receivership Estates upon approval of the Court, with prior notice and opportunity for the United States to respond to any fee application.

12. The Receiver shall distribute the estate to:

a. First Priority: The Internal Revenue Service, up to $14,207,517. This payment shall be paid in full before any distributions to the Second Priority claims.

b. Second Priority: The taxpayers who file claims with the Receiver with sufficient evidence of:

i. Their investment and all amounts received by payment or credit from Defendants including rental payments, bonus payments, salaries, distributions, and commissions and overrides or similar payments due to multilevel marketing; and

ii. The resolution of all the taxpayer's issues with the Internal Revenue Service.

Payments to claimants shall be made on a pro rata basis of the amount paid by the claimant to Defendants less all amounts received by the claimant from Defendants.

~~The~~ The appointment of a Receiver shall not deprive any Defendant of the right to appeal this Court's findings, conclusions and decisions in the above-captioned case or otherwise defend this action through counsel of Defendants' own choice ~~(the "Appellate Rights").~~, and n~~N~~othing in this Stipulated Order~~ion~~ is intended to limit any Defendants' right to seek appellate review of this Court's rulings, orders, decisions and judgments (the "Appellate Rights").

13.

~~Subject to bankruptcy court approval,~~ RaPower~~Defendants~~ stipulates and agrees to forthwith file an appropriate motion, and to seek entry of an appropriate final order from the bankruptcy court, dismissing ~~dismiss~~ the Bankruptcy Case~~bankruptcy proceedings currently pending is this jurisdiction, case no. 18-bk-24865-kra~~.

14.

III. Order

~~-~~Based on the stipulation of the parties, IT IS HEREBY ORDERED that the United States' second motion to freeze the assets of Defendants Neldon Johnson, International Automated Systems, Inc. and R. Gregory Shepard and to appoint a receiver is GRANTED and IT IS HEREBY ORDERED THAT:

1. This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of the following Defendants: Neldon Johnson ("Johnson"),

International Automated Systems, Inc. ("IAS", and R. Gregory Shepard ("Shepard"). ~~(collectively, the "Receivership Defendants")~~.

2. RaPower forthwith shall move for and seek immediate ~~stipulate to the~~ dismissal of the Bankruptcy Case and agrees to request that the bankruptcy court stay all further proceedings in the Bankruptcy Case, including the meeting of creditors scheduled for August 9, 2018, pending resolution of the dismissal motion~~;~~

3. Upon the dismissal of the Bankruptcy Case, this Court shall immediately take exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of RaPower (collectively with Johnson, IAS, and Shepard, the "Receivership Defendants").

~~2.~~ 4. The United States shall provide within 30 days, the names of three possible receivers along with a proposed order of the specific powers and responsibilities that the Court should grant to the receiver in this case.

~~3.~~ 5. Except as otherwise provided herein, all Assets of the Receivership Defendants are frozen until further order of this Court ("Receivership Assets"). Accordingly, all persons and entities with direct or indirect control over any Receivership Assets, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing such assets. This freeze shall include, but not be limited to Receivership Assets that are on deposit with financial institutions such as banks, brokerage firms and mutual funds, shares of stock, and any patents or other intangible property.

~~4.~~ 6. The Receivership Defendants~~,~~ and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order

by personal service, facsimile service, or otherwise, and each of them, shall hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any assets, funds, or other properties (including money, real or personal property, securities, choses in action or property of any kind whatsoever) of the Receivership Defendants. This applies to Receivership Assets~~assets~~ currently held by Receivership Defendants or under their control~~, whether held in the name of any Receivership Defendant or for their direct or indirect beneficial interest wherever situated~~. The Receivership Defendants shall direct each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding such assets, funds, or other properties of any Receivership Defendant to hold or retain within their control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.

~~5.~~ 7. Except as it relates to the Defendants' Appellate Rights, ~~T~~the trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Defendants are restrained except as they may act in the ordinary course of business and shall not exercise their powers or take action inconsistent with this order. They are notified that upon appointment of the Receiver they shall likely be dismissed~~.~~ and have no authority with respect to the Receivership Defendants' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver.

~~6.~~ 8. The Receivership Defendants are directed to preserve all paper and electronic information of, and/or relating to, the Receivership Assets.

~~7.~~ 9. As to Receivership Defendants Neldon Johnson and R. Gregory Shepard, their assets shall be frozen but each Defendant shall be allowed to withdraw on a monthly basis, monies for basic living expenses based on the IRS national standards as follows:

IRS National Standards	Neldon Johnson	R. Gregory Shepard
Housing & Utilities (Based on location)	$1,347.00	$1,806.00
Food, Clothing & Other Expenses	$1,202.00	$1,202.00
Out of pocket health costs	$114.00	$114.00
Transportation (National Standard)	$497.00	$497.00
Monthly Total	**$3,160.00**	**$3,619.00**

10. To the extent that any Receivership Defendant requests the use of Receivership Assets, such application shall be made to the Court. After the appointment of a Receiver, requests for the use of funds shall be made to the Receiver and any party may dispute the Receiver's decision by filing a motion with this Court.

11. As part of the Appellate Rights retained by Defendants pursuant to this Stipulated Order:

a) Defendants' rights to appeal this order and all other orders entered in this case is not affected by the appointment of a receiver and nothing in this Stipulated O~~o~~rder shall be construed~~is intended~~ to limit any Defendant's right to seek appellate review of this C~~c~~ourt's rulings, decisions, orders and judgments;~~.~~

b) Defendants may retain legal counsel of their choosing to prosecute and defend any appeals of this Court's rulings, decisions, orders, and judgments, including but not limited to, any stay of this Court's orders during the pendency of any appeal.

c) Defendants and their attorneys retained to assist them in prosecuting or defending any appeal shall retain independent authority to make their own decisions related to the appeal (e.g. strategy, etc.) and any receiver appointed pursuant to this Stipulated Order shall have no authority to limit or interfere with such independent authority held by Defendant.

d) Any and all communications between Defendants and their attorneys shall remain subject to the attorney client privilege, as well as the attorney work product privilege, and shall not be subject to discovery by or disclosure to the Court or to the Receiver or to the Receiver's retained professionals and advisors.

e) Defendants may use Receivership Assets to fund a trust (the "Appellate Trust") sufficient to pay the reasonable costs and attorney's fees ~~during th~~ of prosecuting and defending any~~e~~ appeal.

f) The Appellate Trust may also be funded from any non-Defendant outside sources.

~~Defendants may use legal counsel of their choice to appeal this court's rulings, decisions, orders and judgments, including but not limited to, any stay of this court's orders during the pendency of any appeal.~~

~~8.~~ 12. The appointed receiver shall immediately be dismissed and have no further power or control of a Defendant's assets upon payment in full of the judgment entered against that Defendant.

Dated August 7, 2018~~August 6, 2018~~.

BY THE COURT:

_____
David Nuffer
United States District Judge