Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (15593) Joshua.egan@me.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Attorneys for Defendants

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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **OPPOSITION TO UNITED STATES' MOTION TO FREEZE THE ASSETS OF DEFENDANTS NELDON JOHNSON, RAPOWER3, LLC, AND INTERNATIONAI AUTOMATED SYSTEMS, INC. AND APPOINT A RECEIVER** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants, in opposition to the United States' Motion to Freeze the Assets of Defendants Neldon Johnson, RaPower3, LLC, and International Automated Systems, Inc. and Appoint a Receiver, respond as follows:

The United States' Motion should be denied for the following reasons:

1. The Motion is so vague, lacking in evidentiary support, and insufficient that it fails to adequately disclose any underlying basis for the request and therefore it should be denied.

2. The Motion is predicated on alleged uncertainty of the government's ability to recover a hypothetical, over-inflated, and unreliable "disgorgement" amount without showing that the amount is calculated based on law or the facts of this case.
3. The Motion claims there is a need for hasty relief now, shortly before the trial of this matter on the merits, after several years of litigation, in order to "ensure that Defendants will have the funds to pay any disgorgement" awarded. The Motion utterly fails to support this argument because the government does not mention any actual amount they seek to have disgorged, and fails to make any showing that there is a risk Defendants will be unable to pay in the unlikely event they are able to show entitlement to a specific amount of disgorgement.
4. The Motion misrepresents the business activities and facts in this case. Only RaPower3 sells lenses, not "Defendants" as the Motion incorrectly claims.
5. The Motion seeks to preserve the "status quo" without disclosing that Defendants are in the final stages of solar energy production and, if Defendants are prevented from finishing their work then the government will be able to wrongly claim at trial that the Defendants failed to produce energy. The government's case is altogether dependent upon preventing Defendants from finishing their energy production project, and the "status quo" (if interpreted to mean no further development will be permitted) would interfere with that completion.
6. The Motion assumes the government will prevail on the merits when there is no likelihood of that happening since "Defendants" were not a single entity but differently situated parties who are not factually interchangeable. Neldon Johnson and International Automated Systems, Inc. ("IAS") sell nothing to the public. Only RaPower3 has any part in selling a single product, a Fresnel solar lens, to the public,

and therefore no basis exists for any relief, temporary or permanent, equitable or legal, as against Neldon Johnson and IAS on the government's unproven theories in this case.

7. The Motion is based on an underlying theory that Defendants give tax advice when none of the Defendants have or do give tax advice, nor have they prepared any tax return, including their own. At all times and places Defendants have relied on tax professionals, and recommended that others do so.

8. The Motion requires the government to prove Defendants "knew or should have known" that there was an illegal "tax scheme" involved. Defendants did not know, and presently do not know, and specifically deny that there is any impediment to the tax deductions claimed by purchasers of RaPower3 solar Fresnel lenses. At the time of the sales, Defendants had relied upon tax opinion letters from qualified tax attorneys, and at trial of this case Defendants will rely on tax preparers, IRS Enrolled Agents and CPA/Attorney testimony that the purchasers of the solar Fresnel lenses are entitled to tax deductions associated with their purchases.

9. The Motion is premature and should only be filed after the District Court rules on whether there is grounds for an jurisdiction in this case (Document 257) and following a ruling on the government's Motion for Summary Judgment (Document 251) upon which this motion is dependent as its primary support.

10. The Motion asks for the appointment of a receiver to operate a business which the government has taken the position in this case cannot be operated successfully. The government's expert in this case authored a report stating: "The IAS Solar Dish Technology is not now nor will it ever be a commercial-grade dish solar system

converting sunlight into electrical power or other useful energy."[1] The Motion also states there is "not a legitimate business affair" involved here. (See Document 252, p. 11). Clearly, therefore, the government's interest is not to have a receiver appointed to operate a business, or even to preserve a business, but to interfere with Defendants' ability to continue development of their solar energy technology, and to prevent Defendants from being able to reach a trial on the merits in this case.

11. The Motion contains no proof that any tax preparer relied on Defendants (none of whom are tax preparers and all of whom are laymen) for deciding to claim a tax deduction.

12. The Motion fails to acknowledge that Defendants are engaged in research and development of new solar technology, precisely the work the favorable tax treatment under the IRS Code is intended to stimulate and support.

13. All of the case law upon which Plaintiff relies in their motion is factually and procedurally inapposite to or distinguishable from this case.

INTRODUCTION

Economically viable solar energy is a distant goal not a present economic reality. The field shows promise, but no economically viable system exists and solar energy production is economically insignificant at present. According to the US Department of Energy, solar energy comprises a mere .04% of US energy production.[2] Because solar energy is thought to be renewable, clean and abundant the government is committed to the quest to harness the unrealized potential. The goal remains still distant. To incentivize the expensive and risky development of the elusive workable solar energy technology in an economically viable form,

[1] (See ECF Doc. 253-1 Mancini Report, p. 3).

[2] *2013 DOE Energy Efficiency and Renewable Energy*, p. 7, attached as Exhibit 1.

the government has determined as a matter of public policy to give tax incentives to stimulate risk-takers to venture into hazarding the challenge of trying to make solar energy work. This case involves the effort to confront and overcome the challenge of developing a viable solution to harness solar energy. Development by Defendants has been technologically challenging and required Neldon Johnson to obtain approximately 29 patents to date (with others contemplated and in the process of being developed for submission to the US Patent Office).[3]

The policy underlying the tax code sections involved in this case was to stimulate the kind of risk-taking that Neldon Johnson has undertaken. For years his research and development has progressed to the point that solar energy production is now possible. Neldon Johnson engineered a new form of Fresnel lens that took an older, established lens and adapted it to make it more efficient and capable to meet environmental challenges. Those lenses were manufactured according to the Johnson design, and thousands of them have been produced. They have been used in the initial test site, and through research and development trials many of them have been destroyed in the testing and proving process. Now thousands of them have been installed for use in solar towers.[4]

Two different methods have been developed and patented. One involves a newly patented photovoltaic system under US Patent 9,812,867. The other involves a new and patented turbine generator. Both are dependent on the Fresnel lenses for gathering usable solar energy, and both systems have required years of extensive research and development testing. In the process of developing the photovoltaic and turbine systems, numerous Fresnel lenses were used and many were destroyed in the process. About 36,000 Fresnel lenses were manufactured for

[3] A list of his patents is attached to Mr. Johnson's Expert Report, and Exhibit 1 of Defendants' Opposition to Plaintiff's Partial Motion for Summary Judgment.

[4] A picture of the tower system now being constructed showing hundreds of fully constructed lens assemblies is attached as Exhibit 1 to Declaration of Neldon Johnson in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment.

RaPower3 and paid for in full by RaPower3. Some of the Fresnel lenses in inventory were sold to the public by RaPower3, but the public sales were less than 25% of the overall inventory of the lenses owned by RaPower3. Those sold to the public do not even come close to approaching the 47,000 number the government claims in their motion. Those sold to the public have a guarantee requiring RaPower3 to replace any broken lens at the sole expense of RaPower3. Numerous lenses have been replaced as a result of the testing done at the Defendants' research site.

This matter is scheduled to go to trial just a few months from now, in April, 2018. Plaintiff's latest tactic is designed to prevent this case from being heard on the merits. It is not intended to preserve or protect any interest, but to destroy the Defendants. The Plaintiff's case is predicated on unproven assumptions and before any legal test of the government's theory has been made before any legal tribunal. Despite the IRS auditing and denying deductions to a large number of taxpayers who have purchased solar lenses from RaPower3, LLC, none of those cases have reached final decision. At present, there are 193 tax court cases relating to an IRS Notice of Deficiency regarding taxpayer claims related to solar energy equipment from RaPower3, LLC.[5] As of this date, the solar equipment cases being handled by Mr. Jones are still pending in the Tax Court and no trial has been scheduled.[6] Mr. Jones is not aware of any solar equipment case involving RaPower3, LLC that has been tried on the merits in the Tax Court, U.S. District Court, or the U.S. Court of Federal Claims.[7] Furthermore, Plaintiff has failed to identify any cases that have been tried on the merits in any of these courts.

[5] See ECF Doc. 257-1, Declaration of Paul W. Jones at ¶ 11. Mr. Jones is licensed attorney who currently represents the litigants in the 193 pending cases. *Id.* at ¶ 4.

[6] Id. at 19.

[7] Id. at ¶ ¶ 19-20.

For this reason, the government's claim of an abusive tax scheme is not ripe for decision in this Court. Until there is a determination that the taxpayer assertion of energy tax credits and business depreciation is "false or fraudulent" then Plaintiff's claims against defendants are merely speculative and not presently wrongful on any level.

RESPONSE TO FACTS:

Plaintiff failed to set out facts to support their motion, but instead refer to what they allege in their Complaint in this case. The Motion is entirely dependent upon "Facts" referred to in another Motion which has yet to be heard. Therefore, Defendants incorporate their opposition to the Motion for Summary Judgment and Answer to the Complaint into this opposition.

ARGUMENT

There are serious impediments to the relief requested by Plaintiff, including the fact that the motion is untimely and unripe, and that Plaintiff cannot meet the burden for the relief sought. A pending Motion to Dismiss for Lack of Jurisdiction (Doc. 257) addresses this and is incorporated into this response. That Motion needs to be resolved before this motion can be considered by the Court.

I. The Motion is so vague, lacking in evidentiary support, and insufficient that it fails to adequately disclose any underlying basis for the request and therefore it should be denied.

Plaintiff's request is so insufficiently supported that it is completely reliant upon Plaintiff's Motion for Partial Summary Judgment to support it. That motion has not yet been decided. Deciding that motion, as well as Defendants' motion to dismiss, are a prerequisite to even considering this Motion. This Motion is therefore unripe and should be denied.

Under the law, ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all."[8]

The purpose for the ripeness doctrine is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action.[9] In short, "[r]ipeness doctrine addresses a timing question: when in time is it appropriate for a court to take up the asserted claim."[10] Ripeness issues often arise when a plaintiff seeks anticipatory relief, such as an injunction.

The United States Supreme Court fashioned a two-part test for assessing ripeness challenges to federal regulations. The Court said, in *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967):

> *Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.*[11]

The government complains that the solar tax credit and depreciation deductions that defendants have represented are available to qualified individuals who purchase solar lenses from RaPower3, LLC, is contrary to the clear language of the IRS Code. That has yet to be

---

[8] *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)).

[9] *See Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) ("Our ripeness inquiry focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention.).

[10] *ACORN v. City of Tulsa*, 835 F.2d 735, 738 (10th Cir. 1987) (quotation omitted).

[11] *Abbot Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967).

determined. This is evident based on the fact that none of the taxpayers whose returns have been audited and the deductions disallowed by the IRS have been adjudicated to have violated internal revenue laws or unlawfully evaded the assessment or collection of their federal tax liabilities. In truth, there has never been a judicial determination that the tax benefits related to the technology at issue are not fully and completely appropriate under the tax code.

Defendants have offered the opinion testimony that the IAS solar energy lenses qualify as energy property and purchases are therefore eligible for an energy credit under IRC section 48. See, Expert Witness Report of Kurt O. Hawes, JD, MBA, pp 6-14.[12]

In his report, Mr. Hawes states that, based on his review of transaction documents, online materials and other information related to the sale of solar lenses from RaPower3, LLC to customers and the subsequent lease of the solar lenses by purchasers to LTB1, LLC or any other lessee, combined with his personal inspection of the premises and the structures of the solar towers and lenses, and the relevant statutes, regulations and other legal authorities, "I would recommend to my clients that Solar Lenses purchased from RaPower3 and subsequently leased for use in an Alternative Energy System qualify as "energy property" as defined in Section 48 of the Internal Revenue Code ("IRC")[13] and entitle any purchaser to the energy tax credit under Section 48."[14]

To address the IRS concerns raised in the audit cases and other objections, Mr. Hawes has also rendered an opinion in this case that the IAS solar lenses are placed in service when they

[12] A copy of Mr. Hawes report is attached as Pl. Ex. 651 (Part 1), Kurt Hawes' Expert Report, to Plaintiff's, Memorandum in Support of Motion to Exclude "Expert" Testimony of Kurt Hawes and Richard Jameson filed by Plaintiff USA, as attachment 24.

[13] All statutory references are to the Internal Revenue Code 26 U.S.C., unless otherwise noted.

[14] Pl. Ex. 651 , page 2 (Opinion #1).

are purchased by the taxpayer.[15] Mr. Hawes expresses the opinion that "I would recommend to my clients that credits taken for Solar Lenses purchased be taken in the year that they are leased, as the Solar Lenses are placed in service in the year the Solar Lenses are held out for lease, which for most purchasers is the same year the Solar Lenses are purchased."[16]

Furthermore, Mr. Hawes, based on his review and analysis, would recommend that taxpayer would consider themselves "materially participating in a leasing business" if they leased the Solar Lenses purchased from RaPower3 to LTB1, or any other lessee,[17] and that as a consequence of Opinion #3, he would recommend that taxpayers claim depreciation on their income tax returns for lenses used in their leasing businesses.[18]

The bases for Mr. Hawes' opinions are defended and set forth in his report.[19] Those opinions have been uncontroverted by Plaintiff.

The ONLY expert opinions submitted in this case support that the tax treatment suggested by RaPower3, LLC is justified. RaPower3, LLC has taken careful steps to ensure that each taxpayer/purchaser of solar lenses is obligated to decide for himself/herself whether they qualify for the tax treatment. Until the government can show that those taxpayers do not qualify for the tax treatment they have sought, then there should be no action taken against Defendants for advocating their position. Merely branding it as "an illegal tax scheme" does not come close to proving it to be so. Further, even if the government can meet this challenge, they must show that the Defendant RaPower3 (the only party selling to the public) "knew or should have known"

---

[15] *Id.* at p. 14-15.

[16] *Id.* at page 2 (Opinion #2).

[17] *Id.* (Opinion #3).

[18] *Id.* (Opinion #4).

[19] ECF Doc. 249-24.

that the lens purchasers were not entitled to claim tax benefits. Defendants know no such thing, nor should they.

As further support for Defendant RaPower3's position that taxpayers who purchase RaPower3, LLC lenses are entitled to claim certain tax treatments, IRS "enrolled agent" Richard Jameson has also provided his opinion and analysis to support his conclusions that solar lenses purchased by individual or business entities from RaPower3, LLC qualify under section 48 of the Internal Revenue Code as "energy equipment" and for tax reporting purposes, those people can "claim the energy credit for the year their lens(es) are placed in service."[20]

Moreover, for those taxpayers that assert a solar energy business as part of their purchase of solar lenses from RaPower3, LLC, qualify to deduct depreciation for the use of their solar lenses in a solar energy business on their federal tax returns.[21]

Given the expert opinions in favor of the allowability of tax credits and deductions, it appears that RaPower3 and taxpayers who buy solar lenses from them are entitled to rely on those analyses and the advice of their individual tax preparers to claim legal tax treatment on their individual tax returns. There is no scheme, there is no need to freeze assets, and there is no need to appoint a receiver, especially for the short period of time between when this Court will hear the government's late motion and the time of the trial only months away.

In addition to the foregoing, The Motion is predicated on alleged uncertainty of the government's ability to recover a hypothetical, over-inflated, and unreliable "disgorgement" amount without showing that the amount is calculated based on law or the facts of this case. The Motion claims there is a need for hasty relief now, shortly before the trial of this matter on the merits, after several years of litigation, in order to "ensure that Defendants will have the funds to

[20] See Expert Report from Richard Jameson, Pl. Exhibit 659, attachment 26 to Plaintiff's, Memorandum in Support to Exclude "Expert" Testimony of Kurt Hawes and Richard Jameson.

[21] Pl. Exhibit 659, at pg. 2.

pay any disgorgement" awarded. The Motion utterly fails to support this argument because the government does not support the amount they seek to have disgorged, and fail to make any showing that there is a risk Defendants will be unable to pay in the unlikely event they are able to show entitlement to a specific amount of disgorgement. The Motion misrepresents the business activities and facts in this case. Only RaPower3 sells lenses, not "Defendants" as the Motion incorrectly claims. The Motion seeks to preserve the "status quo" without disclosing that the Defendants are in the final stages of solar energy production and, if Defendants are prevented from finishing their work then the government will be able to wrongly claim at trial that the Defendants failed to produce energy. The government's case is altogether dependent upon preventing Defendants from finishing their energy production project, and the "status quo" (if interpreted to mean no further development will be permitted) would interfere with that completion. The Motion assumes the government will prevail on the merits when there is no likelihood of that happening since "Defendants" were not a single entity but differently situated parties who are not factually interchangeable. Neldon Johnson and International Automated Systems, Inc. ("IAS") sell nothing to the public. Only RaPower3 has any part in selling a single product, a Fresnel solar lens, to the public, and therefore no basis exists for any relief, temporary or permanent, equitable or legal, as against Neldon Johnson and IAS on the government's unproven theories in this case. The Motion is based on an underlying theory that Defendants give tax advice when none of the Defendants have or do give tax advice, nor have they prepared any tax return, including their own. At all times and places Defendants have relied on tax professionals, and recommended that others do so. The Motion requires the government to prove that Defendants "knew or should have known" that there was an illegal "tax scheme" involved. Defendants did not know, and presently do not know, and specifically deny that there is any impediment to the tax deductions claimed by purchasers of RaPower3 solar Fresnel lenses.

At the time of the sales Defendants had relied upon tax opinion letters from qualified tax attorneys, and at trial of this case Defendants will rely on tax preparers, IRS Enrolled Agents and CPA/Attorney testimony to show that the purchasers of the solar Fresnel lenses are entitled to tax deductions associated with their purchases. Even if that testimony is not persuasive on the deductions, it shows that Defendants had no reason to "know" that there was no tax benefit to purchasers from RaPower3. The Motion is premature and should only be filed after the District Court rules on whether there is jurisdiction in this case (Document 257) and following a ruling on the government's Motion for Summary Judgment (Document 251) upon which this motion is dependent as its primary support. The Motion asks for the appointment of a receiver to operate a business which the government has taken the position in this case cannot be operated successfully. The government's expert in this case authored a report stating: "The IAS Solar Dish Technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy."[22] The Motion also states there is "not a legitimate business affair" involved here. (See Document 252, p. 11). Clearly, therefore, the government's interest is not to have a receiver appointed to operate a business, or even to preserve a business, but to interfere with Defendants' ability to continue development of their solar energy technology, and to prevent Defendants from being able to reach a trial on the merits in this case. The Motion contains no proof that any tax preparer relied on Defendants (none of whom are tax preparers and all of whom are laymen) for deciding to claim a tax deduction. The Motion fails to acknowledge that Defendants are engaged in research and development of new solar technology, precisely the work the favorable tax treatment under the IRS Code is intended to stimulate and support. All of the case law upon which Plaintiff relies in their motion is

[22] (See Mancini Report, p. 3, attached hereto as Ex. 1).

factually and procedurally inapposite to or distinguishable from this case, as set forth more fully below.

These defects prevent the hasty relief the government seeks in this motion.

II. The Court Should Not Freeze Any Assets.

Plaintiffs argue that this Court should freeze the assets of several of the Defendants (RaPower3, LLC, Neldon Johnson, and IAS) to "preserve the status quo" and to appoint a receiver to take over the company to ensure "Defendants will have the funds to pay any disgorgement this Court may award." Without any evidence that Defendants won't have the funds to pay any disgorgement, without an order of disgorgement, without any evidence of the amount of disgorgement Plaintiff urges it is entitled to such dramatic relief. This request is made after the government waited until essentially the last moment before the trial. Plaintiffs ask the Court to destroy these particular Defendants' ability both to continue their progress and their business – and in effect to prevent Defendants from having the ability to present a case at trial. This, too, a couple of months before the trial. It is made of RaPower3, LLC, Neldon Johnson, and IAS alike, though there is no evidence that either Neldon Johnson or IAS has received a benefit from the sale of the lenses. The request is untimely, unripe, and does not meet the burden required to grant such an extraordinary request. Plaintiff admits it is their burden to prove that they are both likely to succeed on the merits and that the asset freeze is necessary. Plaintiffs do not meet either burden.

A. Plaintiff is Not Likely to Succeed on the Merits.

Plaintiff argues it will be able to prove (1) Neldon Johnson, RaPower3, and IAS organized, promoted and sold solar lenses to customers, constituting a plan or arrangement under § 6700; (2) in selling the solar lenses, Neldon Johnson, RaPower3, and IAS made false or fraudulent statements regarding the tax benefits to be derived from purchasing solar lenses,

namely depreciation and solar energy tax credits; (3) Neldon Johnson, RaPower3, and IAS knew or had reason to know the statements they made about the tax benefits were false or fraudulent; and (4) the false or fraudulent statements pertained to material matters.

Plaintiff relies upon its Motion for Partial Summary Judgment, and its putative success, in order to support its argument that it is likely to succeed on the merits. This position is in error as more fully responded to in Defendants' Opposition to Motion for Partial Summary Judgment and Defendants incorporate the arguments included there, herein. In short, Plaintiff's motion for partial summary judgment should be denied because the government cannot overcome that there remain genuine issues of material fact on the central point as to whether defendant "knows or has reason to know" the tax benefits promoted by RaPower3 "is false or fraudulent as to any material matter." Defendants believe, and have always believed, that the tax benefits to the solar energy business they promote are appropriately allowed under the tax code.

Even if Defendants were to concede for purposes of this motion that the solar tax credit and associated depreciation deductions are not applicable for the RaPower3 solar lenses, the question remains whether Defendants knew or had reason to know the promotion of those tax benefits was "false or fraudulent as to any material matter" or any other violation of IRC 6700.

The government's motion fails because the government cannot meet that burden. The facts before the Court demonstrate that Defendants had (and still maintain) a genuine belief that the tax treatment has always been (and remains to this day) available to taxpayers who purchase solar lenses from RaPower3. Furthermore, that belief is reasonable considering Defendants obtained legal advice regarding the availability of the tax benefits and relied on that legal advice. And, of equal or even greater significance, no court has ruled against any taxpayer, finding that the solar tax credit or the associated depreciation cannot be taken by a qualified taxpayer. It is true that the IRS has taken the position in taxpayer audits that the tax treatment is not allowed

under its interpretation of the code. However, the IRS is not the arbiter of what the revenue code means. It must follow the direction of the legislature that sets the rules and the tax court that interprets those rules. And so far, no tax court has ruled against the tax benefits claimed by RaPower3 customers.

Lastly, the government's efforts in its motion and in this case rest on the position that the solar energy technology being developed by RaPower3 has not resulted in the sale of marketable energy on the open market. However, nothing in the Internal Revenue Code requires the sale of solar energy to qualify for the tax benefits.

As more fully explained in Defendants' Opposition to Motion for Partial Summary Judgment, Plaintiff is not likely to succeed on the merits of this case. Having failed to meet this preliminary burden for the injunctive relief it seeks, the motion must be denied.

B. An Asset Freeze is Unnecessary.

Plaintiff argues an asset freeze is necessary because Defendants are likely to "dissipate the assets" belonging to them.[23] Plaintiff argues this is likely merely because family members who work in the business are paid for their labor, and patents have been registered to a company located in Nevis. The patents were registered there long before this motion.

1. Defendants have transferred and spent money – for the purpose of maintaining and progressing their business.

Plaintiff relies upon copies of bank statements of IAS between June, 2016 and January, 2017 and of RaPower3 between June, 2016 and January, 2017[24], to demonstrate that RaPower3 and IAS have been paying their employees and their legal counsel. That does not prove they are transferring their assets. Plaintiff provided the Court with checks to Neldon Johnson from

[23] See. Doc. 252 at pg. 12

[24] See Plaintiff's Ex. 684.

2005[25], a check to NP Johnson Family Limited Partnership from 2012[26], a check from Cobblestone Centre (not a party to this action) to Randy Johnson from 2014[27] and a check to the Howard County Tax Office from 2015 from this same entity[28]. None of these checks relate to anything in this case. They are from years before this action began, written by nonparties or for purposes that are clearly for the benefit of the company. They do not provide this Court any basis to fear that money is being transferred out of the company for the purpose of avoiding this or any other creditor. Payments to employees, including family members, results in the payment of taxes—a benefit to the government altogether unrecognized in the government's case.

The purpose of a freeze – or any preliminary injunction – is to deal with some exigency or emergency. It requires immediate action because something is going to happen immediately. The evidence used in the motion only demonstrates a complete lack of urgency in this case for hasty action. A payment to an employee from 5 years ago doesn't demonstrate the possibility of immediate harm. It shows quite the opposite. Hyperbole is not proof, but hollow rhetoric.

2. Patents are Assigned to Companies in Nevis.

Defendants admit that for business reasons unrelated to this case, prior to the initiation of this lawsuit patents were assigned to companies in Nevis. Defendants' business is international and several foreign companies have expressed interest in purchases from Defendants. There is no exigency or emergency shown by registering patents years prior to this case. Indeed, if examined carefully, with the exception of one assignment, which occurred in June, 2015, all of the assignments occurred prior to this matter having begun. There have been no assignments or

[25] See Plaintiff's Ex. 646.

[26] See Plaintiff's Ex. 647.

[27] See Plaintiff's Ex. 650.

[28] See Plaintiff's Ex. 649.

transfers since 2015. This is hardly a basis to demonstrate an immediate possibility of harm. The argument overreaches the facts and defies common sense.

Plaintiff has previously called Defendants' business a "sham enterprise." They argue there is no value in it – only a tax scheme. If there is no value, then what does it matter that a valueless patent was assigned to an Nevis company? The government's case is inconsistent. If the patent has value and must be protected, then the business likewise has value, and should be protected, not be destroyed by a receiver working for the government who thinks the business should end.

C. The Disgorgement Amount is Baseless.

Plaintiff argues that it will be entitled to a disgorgement amount of $47,461,050 based upon a calculation of the total number of lenses manufactured. They take the total number of lenses, despite the fact that only a fraction of those have been sold by RaPower3 to the public. Using the total number of lenses manufactured for RaPower3 (45,201) and multiplying it by $1,050 (the maximum amount of a penalty that could possibly be imposed) the government claims $47,461,050 should be disgorged. 26 USC 6700(a)(2)(B) provides with regard to the maximum penalty that could be assessed if Plaintiff were successful "with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity." There have not been 45,201 transactions. That number of lenses may have been manufactured and paid for by RaPower3, but only a fraction of those have been sold to customers. The false and inflated number used by the government is an extreme exaggeration. Plaintiff offers no evidence to support this amount.

III. Plaintiff must demonstrate a "clear showing" that it will prevail on the merits before a receiver can be appointed.

Courts have long recognized that appointing a receiver is an extraordinary remedy.[29] This remedy is so serious that such an order – as a matter of right— is subject to an immediate interlocutory appeal with the circuit court.[30] While the court has authority under 26 U.S.C.S. § 7402 to appoint a receiver, that authority is limited to situations where an appointment is "necessary and appropriate for the enforcement of internal revenue laws."[31]

Glaringly absent from Plaintiff's motion is any citation to the burden it must satisfy to appoint a receiver in this matter.[32] Instead, Plaintiff only cites the burden it must overcome to obtain an asset freeze, ignoring authority from the same case that discusses the burden for appointing a receiver. For the reasons discussed below, Plaintiff must demonstrate by a "clear showing" that it will prevail on the merits before a receiver can be appointed.

In *Traffic Monsoon*, an SEC enforcement action involving an alleged Ponzi scheme, the government sought to freeze assets and have a receiver appointed.[33] The district court observed that when the SEC seeks a preliminary injunction pending trial, it must show the likelihood of prevailing on the merits and a reasonable likelihood that the wrong will be repeated.[34] "The degree to which [the government] must prove these two elements depends on the nature of the

---

[29] *United States SEC v. Universal Express, Inc.*, 2007 U.S. Dist. LEXIS 65009, at 37 (S.D.N.Y. Aug. 30, 2007); (appointment necessary where defendants have continued to "flout numerous aspects of the internal revenue laws and the injunction" and where court is not persuaded that defendants can remedy "their historic noncompliance or repay their substantial outstanding tax judgement without close supervision or support."); *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 38 (D.D.C. 2014); *United States SEC v. Levine*, 671 F. Supp. 2d 14, ¶ 61 (D.D.C. 2009) (appointment receiver necessary where defendants have continued to violate court orders and there is "no one who is responsible, wiling, and able to manage a company in compliance with federal security laws.)

[30] *See* 28 U.S.C.S. 1292(a)(2).

[31] 26 U.S.C.S. § 7402(a).

[32] Plaintiff relies on *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275 (D. Utah 2017) for the proposition that Plaintiff need only show that the "probability of prevailing is better than fifty percent" when the movant request an asset freeze to preserve the status quo. See ECF Doc. No. 252 at pg. 9.

[33] *Traffic Monsoon*, at pg. 31.

[34] Id.

injunction it seeks."[35] If the injunction is merely to maintain the status quo, such as an asset freeze, it can be issued upon a showing that "the probability of [the government] prevailing is better than fifty percent."[36] "However, a mandatory injunction that alters the status quo or a particularly onerous injunction may be issued only upon a "clear showing' that [the government] will prevail."[37] After reviewing the injunctive relief the government requested, the district court concluded that it required a clear showing of both the likelihood of success on the merits and that violations would continue absent an injunction because the receivership order "contains at least one element of mandatory relief: an order that Mr. Scoville 'provide any information to the Receiver that the Receiver deems necessary.'"[38]

In this case, Plaintiff's proposed order includes not one but several onerous elements of mandatory relief. They include (but are not limited to) the following:

1. The receiver would have "all powers, authorities, rights and privileges possessed by the owners, members, shareholders, officers, directors, managers and general and limited partners of RaPower3, LLC and IAS 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." All trustees, directors, officers, managers, employees, investment advisors, attorneys and other agents are dismissed and their powers suspended. This includes all authority with respect to the defendants' "*operations* and assets".[39]

---

[35] Id.

[36] Id. at pg. 32.

[37] Id.

[38] Id.

[39] See ECF Doc. No. 252-35 at ¶ ¶ 5-6.

2. No person, but the Receiver, would possess any authority to act by or on behalf of RaPower3 or IAS.[40]
3. The receiver would also "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.'"[41]
4. The order would compel cooperation and assistance of the "Receivership Defendants" with whatever the Receiver does in performance of his/her duties.[42]

The proposed order goes well beyond preserving the status quo. It strips all authority from the Defendants to operate their business or complete the work presently underway. It compels Defendants to cooperate and assist the Receiver in all aspects of his/her performance or face civil contempt. It gives complete authority to the Receiver to take any action which could have been taken by anyone with authority prior to the entry of the Order. Because Plaintiff requests relief that includes these and other onerous elements, the Court should require Plaintiff more than a probability of fifty percent: it should require Plaintiff to demonstrate a "clear showing" that Plaintiff will prevail on the merits.[43]

IV. The case law upon which Plaintiff relies is factually and procedurally inapposite to this case.

A. Plaintiff's series of authority is distinguishable from this case.

Plaintiff relies on a series of decisions where appointing a receiver was considered "necessary and appropriate" under 26 U.S.C.S. § 7402.[44] However, as explained below, these

---

[40] Id.at ¶ 7.

[41] Id. at ¶ 8(e).

[42] Id. at ¶ 10.

[43] *See* *Traffic Monsoon*, 245 F. Supp. 3d 1275, pg. 32 ("However, a mandatory injunction that alters the status quo or a particularly onerous injunction may be issued only upon a "clear showing" that the SEC will prevail.")

[44] *See* ECF Doc. No. 252 at pgs. 7-8, 13-15.

authorities are distinguishable both factually and procedurally from this case and therefore do not support Plaintiff's argument that appointing a receiver is necessary and appropriate in this case. Each is addressed in turn.

1. *United States v. Latney's Funeral Home.*

In *United States v. Latney's Funeral Home*[45], the district court appointed a receiver only ***after*:**

(1) the court acknowledged that the defendants had consented to a preliminary injunction (issued under § 7402) that precluded defendants from committing further violations of the Internal Revenue Code,

(2) the court determined that the defendant owed over $1 million in unpaid payroll taxes and civil penalties through the government's unopposed motion for summary judgment;

(3) the court found the defendant (by clear and convincing evidence) in civil contempt for failing to adhere to the terms of the stipulated preliminary injunction and after considering defendant's defenses of an inability to comply and good faith and substantial compliance; and

(4) the court held that the facts before it justified the "extraordinary remedy" of appointment a receiver because "ample evidence" that the defendants "continued to flout numerous aspects of the internal revenue laws and the Injunction…" and was "not persuaded that Defendants can remedy their historic noncompliance or repay their substantial outstanding tax judgments without close supervision and support."[46]

In the current matter, the circumstances could not be more dissimilar. First, unlike *Latney's Funeral Home*, defendants here are not subject to a preliminary injunction preventing them from pursuing the conduct of their regular business operations. Second, unlike *Latney's Funeral Home*, the court has not made a determination of any tax liability against the defendants. Third, *Latney's Funeral Home* is procedurally dissimilar: the Defendants are not subject to the judgment and ruling of an unopposed summary judgment nor are they subject to a civil contempt related non-payment of obligations arising from such an order. Finally, the defendant in that case

[45] *Latney's Funeral Home*, 41 F.Supp.3d at 27.

[46] Id.

clearly owed payroll taxes, withheld them from their employees checks, and failed to remit the payment to the government. Here there is a dispute over whether Defendants owe anything or can ever be proven to have violated the law.

In sum, Plaintiff has failed to provide a clear showing by "ample evidence" that the defendants have "continued to flout numerous aspects of the internal revenue laws." There is no evidence of "historic noncompliance" with court orders, neither has Plaintiff established that the Defendants have both a duty to repay a substantial outstanding tax judgment and that Defendants would require "close supervision or support" to pay such an obligation.

2. *United States v. Bartle.*

United States v. Bartle[47], an unpublished 7th Circuit decision[48], is also factually and procedurally inapposite to the facts of this case. In *Bartle*, the district court appointed a receiver only after:

(1) the court ordered the defendant to pay an agreed upon amount of $1,378,420;

(2) the defendant had failed to make a single payment;

(3) the parties entered into a subsequent agreement that required the defendant to make installment payments to disclose to the government monthly statements;

(4) the district court heard evidence that the defendant from 2001 to 2004 had shuffled over $1 million among various accounts to thwart the government's collection efforts, and fraudulently underreported his receipts and failed to pay the government $435,000 as required by the order;

(5) the defendant admitted to "fudging" his statements to the government;

(6) the court discussed "at length" with the parties "inability to secure Bartle's finances under the control of a court-appointed third-party; and

(7) even at this point, the court withheld appointing a receiver until the defendant ignored a subsequent payment modification and filed for bankruptcy.[49]

---

[47] 159 Fed. Appx. 723 (7th Cir. 2005) (unpublished non-precedential decision).

[48] Rule 32.1 of the Seventh Circuit prohibit citation to its unpublished non-precedential decisions issued before 2007.

[49] *United States v. Bartle*, 159 Fed. Appx. at 724-25.

The 7th Circuit Court of Appeals upheld the appointment of the receiver on review.[50] It acknowledged that "a receiver is especially appropriate 'in cases involving fraud and the possible dissipation of assets since the primary consideration in determining whether to appoint a receiver is the necessity to protect, conserve administer property pending final disposition of the suit.'"[51] After noting that the district court had policed defendant's "shenanigans" over several years, listened to his excuses, and ultimately determined that the defendant was untrustworthy and intentionally avoiding the government's collection of its judgment, the panel concluded the district did not abuse its discretion in appointing a receiver.[52]

The facts in *Bartle* are glaringly dissimilar. Again, Defendants to date have not been assessed or ordered to pay any amount. Additionally, Plaintiff has not shown Defendants are incapable of following a court order requiring them to pay any amount, that Defendants have "fudged" statements to the government, or breached subsequent agreements to fulfill payment obligations. There is no present obligation for Defendants here to pay anything. Defendants dispute the claims and are prepared to defend them at trial. No agreed amount or default on payment of an agreed amount exists here. In short, this case provides guidance that strongly suggests the government is NOT entitled to a receiver in this case.

Additionally, the matters are procedurally inapposite, since *Bartle* involved (once again) enforcement for non-compliance of a final court order prior to appointment of a receiver.

3. *Florida v. United States.*

[50] Id.at 725.

[51] Id (internal citation omitted)

[52] Id.

Florida v. United States[53] is also factually and procedurally distinguishable. In *Florida*, the 8th Circuit affirmed the district court's appointment of a receiver, satisfied with the district court's judgement that (1) the Government made a prima facie case for some substantial tax liability, (2) further established that the tax liens were established for such liability, and (3) pursuant to applicable statutory procedure. This case has limited utility because unlike *Latney's Funeral Home* and *Bartle*, the court did not engage in any depth of analysis supporting its conclusion. Instead, it largely deferred to the district court's findings and conclusions.

4. *United States v. First Nat'l City Bank*.

Finally, *United States v. First Nat'l City Bank*[54] is factually distinguishable from this case. In *First National*¸ the IRS had ***already assessed*** $19,000,000 against a Uruguayan corporation, served notices of levy and federal tax lien to the bank in New York whose branch in Uruguay which held funds belonging to the Uruguayan corporation.[55] The IRS failed to personally serve the corporation, but had successfully served the bank.[56] The "narrow issue" before the court was whether the United States "may by injunction *pendente lite* protect whatever rights [the corporation] may have against [the bank.]"[57] The corporation had demonstrated both its willingness and ability to dissipate assets prior to issuance of the injunction by (1) a statement by the corporation's attorney that "[it] would likely liquidate its holdings in the United States, and send the money out of the country" if the IRS persisted in attempting to collect taxes, and (2) the corporation was largely successful in liquidating its assets and transferring the funds out of

53 285 F.2d 596, 602 (8th Cir. 1960)

54 379 U.S. 378 (1965)

55 Id. at 379.

56 Id. at 386.

57 Id at 381.

county,[58] and some of the funds were actually proven to have been transferred on the day the government filed its complaint. [59]

The government's cited authority does not justify appointing a receiver, but instead teach that the request at present cannot be justified. It is a tactic intended to interfere with a business that is in the final stages of producing solar energy. If that happens prior to the upcoming April trial, the government's case will be dismissed. Sensing this peril to their position, the government is attempting a "hail Mary" pass to interfere with Defendants' progress.

/ / /

/ / /

/ / /

[58] Id. at 386.

[59] Id.

CONCLUSION

Neither the circumstances, timing, or the law justify a freeze of assets or appointment of a receiver in this case. Plaintiff's motion should be denied.

Dated this 17th day of December, 2017.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OPPOSITION TO UNITED STATES' MOTION TO FREEZE THE ASSETS OF DEFENDANTS NELDON JOHNSON, RAPOWER3, LLC, AND INTERNATIONAL AUTOMATED SYSTEMS, INC. AND APPOINT A RECEIVER** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
X Electronic Service via Utah Court's e-filing program

/s/ Denver C. Snuffer, Jr.
Attorneys for Defendants