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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.	Civil No. 2:15-cv-00828 DN **UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO FREEZE THE ASSETS OF DEFENDANTS NELDON JOHNSON, RAPOWER-3, LLC, AND INTERNATIONAL AUTOMATED SYSTEMS, INC. AND APPOINT A RECEIVER** Judge David Nuffer Magistrate Judge Evelyn J. Furse

The United States seeks an order freezing the assets of defendants Neldon Johnson, RaPower-3, LLC ("RaPower-3"), and International Automated Systems, Inc. ("IAS") to preserve

the *status quo*, and ensure that sufficient funds would be available to satisfy any judgment the Court may enter against these defendants on the United States' disgorgement claim.[1] The United States also requested the Court appoint a receiver and give the receiver power to take custody of these defendants' assets in an effort to ascertain and preserve the *status quo*.[2]

In their opposition, Defendants offer no assurance that they are *not* dissipating or moving assets to avoid paying a potential disgorgement award. Instead, Defendants assert numerous reasons why the motion should be denied.[3] Defendants' primary objection is to the appointment of a receiver, with Defendants hastily and superficially objecting to the asset freeze request. However, Defendants fail to cite convincing facts or legal authority to support their position. Most of Defendants' arguments merely rehash arguments made in prior motions or oppositions, [4] but those arguments are equally unavailing in this context.

Defendants essentially present three non-duplicative arguments: (1) the United States must make a "clear showing" that it will prevail on the merits, and cannot do so either factually or with the cases it relies upon; (2) the motion is premature and is merely an attempt to disrupt

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[1] ECF Doc. No. 252. The United States did not include R. Gregory Shepard and Roger Freeborn in its motion.

[2] *Id.* at 5, 11-15; *see also*, United States' proposed order, ECF Doc. No. 252-35.

[3] ECF Doc. No. 268, at 1-4.

[4] *See, e.g.,* ECF Doc. No. 268, at 7-9 where Defendants regurgitate their "ripeness" arguments from their motion to dismiss for lack of jurisdiction (ECF Doc. No. 257). The United States opposed Defendants' meritless motion to dismiss and addressed why this court has jurisdiction over the case. (ECF Doc. No. 262). *See, e.g.,* ECF Doc. No. 268, at 7-14 where Defendants attempt to argue they did not have "reason to know" because they relied upon "tax opinion letters" or other advice from "qualified tax attorneys, [] tax preparers, IRS Enrolled Agents, and CPA/Attorney[s]." These arguments merely restate the arguments raised by Defendants in their opposition (ECF Doc. No. 265) to the United States' motion for partial summary judgment (ECF Doc. No. 251). However, these arguments are unavailing when the proper legal standard is applied to the facts of this case. The United States refers to its motion for partial summary judgment (ECF Doc. No. 251) and reply in support of its motion for partial summary judgment which set forth the standard and the facts that show it will succeed on the merits of its injunction claims under I.R.C. §§ 7402 and 7408. (ECF Doc. No. 277)

the "final stages" of Defendants' "solar energy production,"[5] and; (3) the United States did not show the amount of assets to be frozen was correct. Because the United States has shown that it will likely prevail on the merits and that relief requested (both the asset freeze and appointment of a receiver) is necessary (and appropriate), the Court should grant the United States' motion.

I. The United States has shown that it is likely to prevail on the merits and that it is necessary or appropriate to freeze Defendants' assets and appoint a receiver.

A. The United States has shown that the relief requested is necessary or appropriate for enforcement of the internal revenue laws.

The United States, as the moving party, bears the burden of showing that it is entitled to the requested relief.[6] In the Tenth Circuit, the showing required by the moving party depends on the nature of the preliminary injunctive relief sought. There are three types of preliminary injunctions that require a "clear showing" that the party requesting the relief will prevail on the merits: (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief it could recover at the conclusion of a full trial on the merits.[7] If a preliminary injunction seeks to alter the *status quo*, the party seeking the injunction must make a "clear showing" that it will prevail on the merits and a reasonable likelihood that the wrong will be repeated. [8] In considering the likelihood that the wrong will be repeated, courts consider: (1) the seriousness of the violation; (2) the degree of scienter; (3) whether the defendant's occupation will present opportunities for future

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[5] ECF Doc. No. 268, at 2.

[6] *See S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1036-1043 (2d Cir. 1990).

[7] *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004). These are the three historically disfavored preliminary injunctions.

[8] *S.E.C. v. Traffic Monsoon, LLC*, 245 F.Supp.3d 1275, 1296 (D. Utah 2017).

violations; and (4) whether defendant has recognized his wrongful conduct and gives sincere assurances against future violations.[9] The United States has made a clear showing that it will prevail on the merits of its claims.[10]

In arguing that the United States must make a "clear showing" that it will succeed on the merits, Defendants focus on four provisions of our proposed order. They claim these provisions amount to "mandatory" relief because they would require Defendants to cede control of their business operations to the receiver and cooperate with the receiver.[11] The United States contends however, that an asset freeze and the appointment of a receiver (with the powers proposed) are necessary to ascertain and preserve the *status quo*.[12] The appointment of a receiver is ancillary to the main relief requested by the United States, an asset freeze. As such, the United States must only show a greater than fifty percent chance of likelihood that it will succeed on the merits. [13]

In determining the *status quo* for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties and not solely to the parties' legal

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[9] *Id.* at 1302-03 (citing *SEC v. Pros Int'l, Inc.*, 994 F.2d 767, 769 (10th Cir. 1993).

[10] ECF Doc. No. 252; ECF Doc. No. 251.

[11] ECF Doc. No. 268, 18-21; ECF Doc. No. 252-35, at 15-20. Defendants do not explicitly address the standard required for an asset freeze, but seem to imply that the United States must make a clear showing for the asset freeze in addition to the appointment of a receiver. *See* ECF Doc. No. 268, at 14-17.

[12] Because of Defendants' extreme reticence in this case to cooperate and further evidence of their refusal to cooperate with the government, the United States requested a receiver so that the receiver would have powers to ascertain the *status quo* and ensure that Defendants maintain it. *See e.g.*, ECF Doc. 252, at 14, n. 58

[13] That being said, to the extent that the Court determines the United States must make a clear showing and has not done so, that does not necessarily negate the requested relief sought by the United States. Instead, the Court could impose less onerous elements in the appointment of a receiver or eliminate the provisions that Defendants take issue with in the proposed order. It is within the Court's discretion to modify the order, s*ee SEC v. Traffic Monsoon*, 245 F.Supp.3d 1275, 1303 (D. Utah 2017), and consistent with appellate court reviews of receivership orders in which they modify the orders to permit them to comply with the bounds of the trial court. *United States v. Ross*, 302 F.2d 831, 835 (2d Cir. 1962); *United States v. O'Connor*, 291 F.2d 520 (2d Cir. 1961).

rights.[14] And "although mandatory injunctions [] *generally* alter the status quo, that is not always the case."[15] Where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, a mandatory injunction can restore the *status quo*.[16] Here, even if the proposed powers of the receiver require "mandatory" compliance by Defendants, that compliance is needed to restore and maintain the *status quo*. In light of Defendants' claims that they are in the "final stages" of their "solar energy production," [17] the threat of dissipation is acutely present. Permitting Defendants to waste or expend assets under the guise of "business operations" alters the *status quo* and should not be permitted. Especially when Defendants have been telling customers for more than a decade that they are in the "final stages," and will be producing something in short order.[18] This is exactly what promoters say when selling their schemes. Moreover, the fact that Defendants know they have never produced anything from their "solar energy production" facility is dispositive on the issue that Defendants *knew* or had reason to know that the statements they were making about tax benefits were false. Defendants cannot claim that they were reasonable in their "belief" when telling customers they were in the trade or business of leasing lenses for the production of solar energy when they know full well there has

[14] *Schrier v. University of Co.*, 427 F.3d 1253, 1260 (10th Cir. 2005)

[15] *Id.*, (quoting *O Centro*, 389 F.3d at 979).

[16] *Schrier*, 427 F.3d at 1260 (citing 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948, at 135 (quoting *Porter v. Lee*, 328 U.S. 246, 251 (1946)).

[17] ECF Doc. No. 268 at 4-6, 11-14, 16, 26; *see also*, ECF Doc. No. 266, at ¶ 6 wherein Johnson states that "[i]in the last six months there has been substantial progress toward completion of hundreds of solar arrays installed and now ready to be assembled onto towers. Two hundred tower bases have been delivered to the RaPower[-]3 manufacturing site and are ready to be assembled on land I own. That is work in current process [sic] and, while actively under construction, not yet finished." This increase in construction in a project that is more than a decade old, and only commenced once this litigation was well underway shows that Defendants will continue to alter the *status quo* and dissipate or convert assets if the United States' motion is not granted.

[18] ECF Doc. No. 252, at 16-52, 56-72.

been no production of *anything* since the scheme began.[19]

Because the relief requested restores and preserves the *status quo*, the United States need only show that the probability of prevailing is better than fifty percent. Requiring this showing is also consistent with another internal revenue code provision regarding the appointment of a receiver, 26 U.S.C. § 7403(d).[20] Courts appointing receivers under § 7403(d) have only required the government to make a *prima facie* showing that a substantial tax liability probably exists and that the Government's collection of tax may be jeopardized if a receiver is not appointed.[21] The showing required by 26 U.S.C. § 7403(d) is consistent with the showing the United States contended it must make and did make in its motion and opening brief.

Further, the appointment of a receiver is explicitly authorized by statute.[22] In other contexts where an equitable remedy has been codified in the internal revenue code, the traditional equitable factors need not always be shown.[23] Thus, because the United States has

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[19] *Id.*; ECF Doc. No. 265, at 37, Response to Statement of Material Fact ¶ 233 wherein Defendants admit that Johnson has no concrete plan to connect his purported solar energy production to the electrical grid by the end of 2017, such that a third party could purchase electricity generated; ECF Doc. No. [SJ REPLY]

[20] Under 26 U.S.C. § 7403(d), a receiver can be appointed solely to enforce a lien or can be appointed with all the powers of a receiver in equity upon certification by the Secretary during the proceeding that it is in the public interest.

[21] *See United States v. O'Connor*, 291 F.2d 520, 525 (1961) (citing *United States v. Peelle Co.*, 224 F.2d 667, 669 (2d Cir. 1955; 9 Mertens, Law of Federal Income Taxation, Supp. (1960) p. 41, and the cases cited; and, *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960)).

[22] *See, e.g., United States v. Pettyjohn*, 84 F.Supp. 423, 425 (1949) (action brought under predecessor statute of 26 U.S.C. § 7403 to enforce the government's lien through the use of a receiver "is a statutory proceeding").

[23] *United States v. Buttorff*, 761 F.2d 1056, 1063 (5th Cir. 1985); *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983) ("The legislative process has already taken these [equitable] factors into consideration in its decision to address the promotion of abusive tax shelters …"); *accord United States v. Stover*, 650 F.3d 1099, 1106 (8th Cir. 2011) (traditional equitable factors need not be discussed when an injunction is authorized by statute like 26 U.S.C. § 7408 and the statutory elements have been satisfied); *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000); *see also United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

shown that the relief here is "necessary *or* appropriate,"[24] the Court should not require a heightened showing. The United States has further demonstrated that the harm to Defendants in issuing this preliminary relief is far outweighed by the public interest[25] in enforcing the internal revenue laws and stopping Defendants' abusive solar energy scheme. Regardless, the United States has demonstrated that injunctive relief is appropriate and is thus able to make the required showing for the requested relief.[26]

B. Legal authority supports the relief requested.

Defendants attempt to distinguish the cases cited by the United States, focusing on superficial details that do not make the reasoning in those cases any less applicable to the instant case.[27] The common theme in the cases cited by the United States is that the courts in those cases, underwent an analysis of what is "necessary *or* appropriate to enforce the internal revenue laws" based on the facts and circumstances of the case. This is the same analysis the Court must undertake in this case where the United States seeks the relief under 26 U.S.C. § 7402. Further, there are sufficient similarities between this case and the cited cases to make the latter

[24] The United States need only show necessary *or* appropriate under 26 U.S.C. § 7402, but has in fact shown it is both necessary *and* appropriate in this case. ECF Doc. No. 251, ECF Doc. No. 252.

[25] *See*, *United States v. First National City Bank*, 379 U.S. 378, 383 (1965) ("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") (internal quotation omitted), as discussed in ECF Doc. No. 252, at 7-9.

[26] The fact that the United States has left for trial the full extent of the gravity of harm caused by Defendants' conduct and the scope of the injunction we claim is appropriate does not alter the fact that the United States has shown it will prevail and is entitled to the requested relief. Defendants seem to take issue with the fact that the United State did not include a separate statement of material facts in its motion but instead relied upon the facts enumerated in its motion for partial summary judgment. However, as Defendants have not disputed most of the facts cited by the United States, including them in this motion would not change the outcome. *See* ECF Doc. No. 265.

[27] ECF Doc. No. 268, at 21-26.

persuasive. For example, noncompliance[28] or evidence of fraud, malfeasance, or risk of dissipation – are all factors that impact whether a receiver may be necessary. Defendants ignore the fact that their conduct in this case is similar.[29] Defendants' focus that they admitted liability for disgorgement is a distraction; the potential to be liable for disgorgement is sufficient to support, and is generally the primary purpose behind, an asset freeze.[30]

II. The United States' motion is timely.

Defendants claim that the motion is premature, incorporating their argument from their motion to dismiss for lack of jurisdiction[31] that because no "solar equipment case involving RaPower[-]3, LLC [] has been tried on the merits in the [United States] Tax Court, U.S. District Court, or the U.S. Court of Federal Claims," the instant case is not ripe for decision.[32] As we have explained, this argument is nonsensical.[33] Further, Defendants fail to inform this Court that three state-level decisions have expressly disallowed their customers' depreciation deductions and solar energy tax credits.[34] Defendants attempt to avoid the inevitable logical conclusion in this case – that the United States will prevail – arguing that their motion to dismiss for lack of

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[28] ECF Doc. No. 268, at 23 attempting to distinguish *Latney*, *Bartle* and *Florida* because there is no evidence of 'historic noncompliance with court order,' by Defendants.

[29] Discussed in the United States' motion, ECF Doc. No. 252, at 14, n. 58.

[30] Discussed in the United States' motion, ECF Doc. No. 252, at 8.

[31] ECF Doc. No. 257.

[32] ECF Doc. No. 268, at 6-7, citing Declaration of Paul W. Jones filed with Defendants' Motion to Dismiss for Lack of Jurisdiction at ECF Doc. No. 257-1. Defendants have attempted to mislead the Court in their opposition, claiming that "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." ECF Doc. No. 268 at 9.

[33] ECF Doc. No. 262; ECF Doc. No. 277.

[34] ECF Doc. No. 277; s*ee Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *10 (Or. T.C. Nov. 30, 2017); *Orth v. Dep't of Revenue*, No. TC-MD 160075R, 2017 WL 5904611, at *10 (Or. T.C. Nov. 30, 2017); *Peter Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014).

jurisdiction and the United States' motion for partial summary judgment must be resolved first. However, in the context of the United States' request to consider this motion with the motion for partial summary judgment, [35] this argument is merely a distraction.

Defendants claim that "[t]here 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 trial only months away." However, this is an appropriate procedural time for this motion – when the United States can make, and has made, a clear showing that it will prevail on the merits. Trial is approximately four months from now; Defendants can easily dissipate or relocate their assets between now and trial or a final judgment. Defendants have the means and motivation to dissipate the assets and frustrate any disgorgement awarded to the United States.[36] Defendants have continually obstructed discovery in this case[37] and have also refused to take responsibility for their actions. Instead, Defendants have made nuanced changes to their conduct in response to some of the United States' allegations and assert that they will continue their scheme until the Court orders them to stop. Defendants have shown time and time again that they will frustrate enforcement of the internal revenue laws, hide assets from the United States and otherwise flout the internal revenue laws when it suits them. As such, the motion is timely and necessary.

III. The amount of the asset freeze is appropriate.

[35] *See* ECF Doc. No. 252, at 5, n. 18.

[36] Discussed in ECF Doc. No. 252, at 11-13. Defendants have continually obstructed or evaded discovery in the case and in other contexts involving the United States. *See also*, ECF Doc. No. 252 at 14, n. 58; *Johnson, et al. v. United States*, 2:15-cv-742 (D. Utah) (consolidated cases filed by Johnson and his controlled entities to quash IRS administrative summonses).

[37] *Id.*

Defendants have a long history of transferring assets to related parties throughout this litigation. More importantly, however, is the transfer of assets that occurred after they became aware of the IRS investigation into their conduct by no later than June 2012, including the transfer of patents to Nevis.[38] Defendants' actions since June 2012 show that they have been hiding assets from the IRS, and intentionally not filing any or accurate tax returns on behalf of the entities owned or controlled by Johnson.[39] Defendants argue that the Court should ignore these transfers (patents to Nevis and payments from their "solar energy production" business) are not the type of "transfers" a Court should consider when considering an asset freeze. However, these transfers show Defendants' eagerness to place assets out of reach.[40] Especially in light of the glaringly absent assurance from Defendants that they aren't dissipating or otherwise moving assets outside of this Court's jurisdiction. Defendants' evasive tactics demonstrate that an asset

[38] ECF Doc. No. 252, at 12, note 50, citing ECF Doc. No. 252-32, Pl. Ex. 682, RaPower-3 Dep., 197:13-199:6. Defendants attempt to distract from the real possibility of assets being moved offshore by claiming that the United States can't possibly be concerned with patents if Defendants' operations are a sham. However, the fact remains that Defendants are receiving monies from customers and transfer monies to various entities and individuals at Johnson's whim. Based on the purported contracts between IAS and RaPower-3 for RaPower-3 to pay royalties to IAS (or assignee of the patent) for the sale of the lenses that Johnson could easily attempt to move monies overseas under the guise of the Royalty Agreement. This is a real risk, given that Defendants never produced the supposed agreement or otherwise provided documentation of payments made between the entities. Further, Johnson's testimony that he can make RaPower-3 pay whoever he wants clearly demonstrates that he can and will move money to suit his needs or wants without regard to the consequences (including any tax consequences). *See*, ECF Doc. No. 252-32, Pl. Ex. 682, RaPower-3 Dep., 69:18-80:25; 101:19-103:19; ECF Doc. No. 252-21, Pl. Ex. 581, IAS Dep., 23:22-34:2; 45:3-62:10.

[39] *See, Johnson, et al. v. United States*, 2:15-cv-742 (D. Utah) (consolidated cases filed by Johnson and his controlled entities to quash IRS administrative summonses); *Johnson v. Commissioner*, Docket No. 24142-17 (U.S. Tax Court, filed November 20, 2017); *Johnson v. Commissioner*, Docket No. 13853-17 (U.S. Tax Court, filed June 20, 2017); *DCL16BLT, Inc. v. Commissioner*, Docket No. 24118-17 (U.S. Tax Court, filed November 20, 2017), DCL16BLT, Inc. is the parent company of RaPower-3; *International Automated Systems, Inc. v. Commissioner*, Docket No. 24135-17 (U.S. Tax Court, filed November 20, 2017); ECF Doc. No. 252-32, Pl. Ex. 682, RaPower-3 Dep., 69:18-80:25; 101:19-103:19; *see also*, discussion regarding evasion of discovery in this case, ECF Doc. No. 252, at 14, n. 58.

[40] *See, e.g., Monteleone v. Leverage Group*, 2008 WL 4541124, at *7 (E.D.N.Y. 2008) (finding evidence of dissipation in transfers to related entity); *Red Head, Inc. v. Fresno Rock Taco, LLC*, 2009 WL 37829, at *5 (N.D. Cal. 2009) (loans to affiliated entities may be evidence of "secreting or dissipating assets").

freeze is necessary.

Defendants also argue, without support, that the $47,461,050 proposed by the United States as the appropriate amount of the asset freeze is "baseless" and is not supported by 26 U.S.C. § 6700 or the facts.[41] However, Defendants are incorrect on both accounts. First, "disgorgement" is not the same as or dependent on a civil penalty under 26 U.S.C. § 6700 that may be determined or assessed in the future.[42] To establish the disgorgement amount, the United States need only show a reasonable approximation of the profits casually connected to the violation.[43] Second, the United States' approximation based on Defendants' own records is reasonable and is therefore appropriate. [44] Defendants ignore their own evidence and provide nothing to contradict the fact that it shows 45,201 lenses have been sold.

IV. Conclusion

For the foregoing reasons, the United States request that this Court grant its motion, consistent with its proposed order, to freeze Defendant's assets and appoint a receiver under 26 U.S.C. § 7402(a).

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[41] ECF Doc. No. 268 at 18.

[42] *See* ECF Doc. No. 31, ECF Doc. No. 32, ECF Doc. No. 33, and ECF Doc. No. 43, involving Defendants' jury demand; ECF Doc. No. 2, ¶ 2 where the United States requested that Defendants disgorge all "gross receipts" they have received from any source as a result of their scheme. The penalty computation in 26 U.S.C. § 6700 is entirely different than the relief requested.

[43] *S.E.C. v. First City Fin. Corp*., 688 F. Supp. 705, 727 (D.D.C. 1988), *aff'd*, 890 F.2d 1215, 1231 (D.D.Cir. 1989)).

[44] *See*, ECF Doc. No. 252, at 13, n. 54. Defendants produced Pl. Ex. 669 (see ECF Doc. No. 242, ECF Doc. No. 246) pursuant to Court order on October 16, 2017 through counsel who stated: "It identifies solar lens customer names and sales and serial number of lenses." The sum of 45,201 lenses comes from adding the numbers of lenses in Pl. Ex. 669 listed as bought by purchaser in each transaction. The United States intends to present this evidence at trial and may present additional evidence as to the appropriate amount of disgorgement.

Dated: January 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin R. Hines
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Trial Attorney