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.d.egan@gmail.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. 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-EJF **DEFENDANTS RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS INC, LTB1, LLC, GREGORY SHEPHERD AND NELDON JOHNSON'S RULE 62(c) MOTION** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to Rule 62(c) of the Federal Rules of Procedure, the defendants collectively move to stay enforcement of Doc. 444 Memorandum Decision and Order Freezing Assets and to Appoint a Receiver.

I. Argument

Under Rule 62(a), an order appealed in an action for an injunction or a receivership is not subject to an automatic stay unless the court orders otherwise. "[T]o determine whether a stay of an order pending appeal is appropriate, a court must evaluate the following factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[1]

Each factor is addressed in turn.

A. Defendants are likely to succeed on the merits of the appeal opposing the receivership appointment.

1. Plaintiff's Equitable Disgorgement Calculation is Flawed.

A stay of the receivership order is necessary because Defendants are likely to succeed on the merits of their appeal because Plaintiff has overreached in its reasonable approximation calculation against Mr. Johnson. Since the entire purpose of the receivership appointment is to ensure that any disgorgement amount does not become meaningless,[2] the propriety of the underlying disgorgement award is germane to this motion to stay enforcement.

As of the date of this motion, Plaintiff has submitted for the Court's consideration proposing findings of facts, conclusions of law and order ("proposed findings"). In the proposed findings, Plaintiff submits the following[3]:

> 75. By careful derivation of data from a proprietary database (consisting of 18 MB of data, with 13 tables)[4] maintained by defendants, Lamar Roulhac was able to extract data used in analysis of financial transactions. Extracted data was placed into three tabs in an Excel spreadsheet to which an analytical tab was added.

[1] *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999), quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 2119, 95 L. Ed. 2d 724 (1987); *see also* USCS Ct. App. 10 Cir., Cir R. 8.1.
[2] Doc. 414 at pg. 21 ("a receiver is necessary to enforce the internal revenue laws and 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.").
[3] See Proposed Findings on pg. 23-24).
[4] T. 754:19-755:9.

76. The extracted data in the Excel spreadsheet was totaled to show that the total sale price of orders placed with defendants by customers was between 50,025,480.00 to 50,097,672.15.

77. Many of those sale records show the word "full" in the comments field which would tend to show payment in full. The sum of those records is $17,911,507.

78. Some of those record comments show an export to QuickBooks. But no QuickBooks data file was provided by defendants.

79. Amanda Reinken testified that she made an analysis of data provided from defendants showing customers and lenses purchased and found that between 45,205[5] and 49,415 lenses had been purchased. At the usual sales price of $3,500 each, this represents gross sales of between $158,217,500 and $172,952,500. At the stated down payment price of $1,050 each, this would represent revenue of $47,465,250 to $51,885,750. At the lowest possible payment level of $105 per lens, this would represent revenue of $4,746,525 to $5,188,575.

The Proposed Findings go on to state that Mr. Johnson should be jointly and severally liable for $50,025,480.00 which is derived from multiplying the total number of lenses sold at purchase price of $1,050.00. However, such an award is in invitation for error because there is no evidence to support a finding that Mr. Johnson, or any defendant in this matter, retained anything even close to the benefit of $50,025,480.00.[6]

The Plaintiff has conceded that there is no evidence that would support the calculation of this amount in stating that only $17,911.507 can be attributed to payments made in full. *Id*. at ¶

[5] Pl. Ex. 742A.

[6] *See* *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504 (1985) ("[A] finding is clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.")

76-77. On July 22, 2018, this Court echoed this fact in its findings from the bench, stating, "[m]ost customers have never paid the $3500 cost of a lens, *and few have paid the $1050 down payment* which is equal to the first full year tax credit."[7]

Despite these objective evidentiary shortcomings - that do not depend on credibility determinations, and instead rely wholly on documentary evidence -[8] Plaintiff claims that the number of lens sales is a sufficient metric of its reasonable approximation of Mr. Johnson's gains. Such an error is highly vulnerable on appeal because of the weight of evidence against it identified *supra*. This is particularly the case where Courts must govern with caution with respect to disgorgement awards, because any amount in excess of the ill-gotten gain constitutes a penalty.[9] It follows that if the underlying disgorgement order is erroneous, then the justification for a receivership over Mr. Johnson is equally without merit.

2. The District Court erred determining that 26 USC § 7402(a) alone provides sufficient authority to issue an injunctive order freezing Defendants' asset and appointing a receiver.

At present, there is no controlling decision that has defined the appropriate standard for issuing injunctive relief under Section 7402, particularly one that abandons the four-part test to merit an injunction applied in the 10th Circuit. The authority upon which the Court relied is both factually and procedurally inapposite to the facts of this case. *United States v. Latney's Funeral Home* involved appointment of a receiver as a remedy in a civil contempt, not a violation of 26 USC § 6700, and only after the defendant had failed repeatedly to comply with an injunction issued

[7] Trial Tr. at pg. 2522:20-22 (emphasis added).
[8] *Anderson*, 470 U.S. at 574 (Special deference to be paid to credibility determinations.); see also Rule 52(a)(6) (*Setting Aside the Findings*. Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give **due regard** to the trial court's opportunity to judge the witnesses' credibility.) (emphasis added).
[9] *SEC v. Orr*, No. 11-2251-SAC, 2012 U.S. Dist. LEXIS 54155, at *17 (D. Kan. Apr. 17, 2012) (citing *SEC v. ETS Payphones, Inc*., 408 F.3d 727, 735 (11th Cir. 2005) ("[T]he power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.")).

in that case.[10] *United States v. Bartle*,[11] also a civil contempt case, appointed a receiver only after the defendant had failed numerous times to comply with court orders and voluntarily make payment. *Florida v. United States* appointed a receiver only after the record showed that a substantial tax liability probably existed and that the Government's collection of the tax may be jeopardized if a receiver was not appointed.[12] Notably, they largely dealt with civil contempt, where a litigant's non-compliance with court orders was properly before the court. In sum, none of these cases outright relied solely on a statutory grant of authority, but instead considered factors included in or factors analogous to the four-part tests applied in the 10th Circuit.

It is worth noting that the Proposed Findings admit and acknowledged that the Defendants have complied with post-trial court orders (i.e., tax information remained on the internet "until this court ordered them to remove it"). This post-trial compliance is in stark contrast to the conduct of defendants in the above-cited cases where a receiver was found to be necessary and appropriate.

B. The Defendants will be irreparably harmed unless the receivership is stayed.

At present, the defendants are unable to conduct any business unrelated to the appeal in this case because of the order appointing a receiver. Consequently, their legitimate businesses are disrupted, including the further development of systems that involve solar process heat to create electricity using, among other things, Stirling engines. This in turn impairs defendants' ability to raise revenue that can pay any disgorgement order that is upheld on appeal.

C. The issuance of a stay shall not irreparably harm other parties.

A stay would not irreparably harm other parties, particularly if a bond is ordered. Additionally, other parties would benefit from legitimate business activities that would generate

[10] *United States v. Latney's Funeral Home, Inc.*, 41 F. Supp. 3d 24, 37 (D.D.C. 2014).
[11] *United States v. Bartle*, 159 F. App'x 723, 725 (7th Cir. 2005).
[12] *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

revenue that the defendants are currently incapable of carrying out due to the receivership order. Furthermore, this Court has already issued an injunction against marketing the system in conjunction with tax credits or other tax based relief. Statements have been placed on all social media and websites affiliated with the Defendants identifying this injunction. To the extent this Court is concerned about individual taxpayers abusing these credits, that can no longer happen due to any marketing or encouragement by any of these Defendants. The alleged harm to the treasury is fixed. No further harm can come to it because these Defendants have been enjoined from any further encouragement to claim tax benefits.

D. The public interest lies in stay of the proceedings.

Defendants' activities that are impaired by the receivership include the hamstrung development of technology that would benefit the public, including affordable access to renewable energy. If the receivership order is stayed allowing the defendants to continue technology development unfettered from a receiver, the energy product shall be brought to market sooner than it would otherwise.

Conclusion

For the reasons stated above, Defendants that the order appointing a receive in this matter be stayed pending appellate adjudication of the issues before the 10th Circuit Court of Appeals in this matter.

Dated this 6th day of September, 2018.

NELSON SNUFFER DAHLE & POULSEN

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

Joshua D. Egan
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC, LTB1, LLC, GREGORY SHEPHERD AND NELDON JOHNSON'S RULE 62(c) MOTION** 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/ Steven R. Paul .
Attorneys for Defendants