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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' OPPOSITION TO DEFENDANTS' RULE 62(c) MOTION** Judge David Nuffer Magistrate Judge Evelyn J. Furse

The Court tried this case over 12 days in April and June 2018.[1] The United States presented testimony from 25 witnesses, both live and via deposition designation. Defendants rested their case without calling a single witness, but they thoroughly examined each witness called by the United States, including Defendants Neldon Johnson and R. Gregory Shepard. The Court received more than 650 exhibits into evidence.[2] On June 22, 2018, immediately after closing arguments, the Court made partial findings of fact from the bench, concluding that Defendants engaged in a "massive fraud" for which they would be enjoined and disgorgement would be ordered.[3]

Because of Defendants' attempts to place their assets out of reach of the forthcoming disgorgement order, on June 22, 2018, the United States filed its second motion to freeze Defendants' assets and appoint a receiver.[4] On August 22, 2018, the Court granted that motion ("the Order").[5] The Court froze Defendants' assets and stated that it would appoint a receiver after further proceedings. Defendants filed a notice of appeal for the Order on August 27, 2018.[6] Defendants moved to stay the Order pending appeal.[7] The motion should be denied.

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[1] *See* ECF Nos. 372, 374, 378, 380, 386, 388, 391-93, 396, 409, 415.

[2] ECF No. 416.

[3] T. 2515:5-11, ECF No. 429-1.

[4] ECF No. 414.

[5] ECF No. 444.

[6] ECF No. 445.

[7] ECF No. 448.

I. Facts

The Court made extensive findings of fact and conclusions of law in the Order,[8] and the United States incorporates those findings and conclusions by reference here.

II. Argument

A. The asset freeze is the only aspect of the order that is ripe for appellate review.

Under 28 U.S.C. § 1292(a), a court of appeals has jurisdiction of appeals from (among other things) interlocutory orders affecting an injunction and "[i]nterlocutory orders appointing receivers." The portion of the Order granting the asset freeze is in the nature of an interlocutory injunction order and is properly appealable under § 1292(a). But an appeal on the portion of the Order stating that a receiver will be appointed is premature. The receiver portion of the Order merely instructs the United States to "provide within 30 days, the names of three possible receivers, with information regarding their qualifications, along with a proposed order of the specific powers and responsibilities that the Court should grant to the receiver in this case."[9] The deadline for the United States to submit its proposals for both the receiver and the receiver's powers and responsibilities has not yet passed.

A similar order granting the United States' motion to appoint a receiver and directing the government to file a proposed order appointing one was "premature" according to the Seventh Circuit.[10] The appellate court did not have jurisdiction until the order actually appointing the

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[8] *See generally* ECF No. 444.

[9] ECF No. 444 at 26.

[10] *See United States v. Antiques Ltd. P'shp*, 760 F.3d 668, 670 (7th Cir. 2014).

receiver was entered and appealed.[11] This is not a situation in which the powers of the receiver have been established by an order, but the court has not taken the ministerial step of actually naming the receiver.[12] Here, both the receiver's identity *and its powers* are yet unknown. Accordingly, there is no interlocutory order appointing a receiver to be appealed.[13] Therefore, there should be no stay pending appeal of the receiver portion of the order. Because Defendants have conflated the two aspects of the order, however, we will address the merits of a stay regarding both the asset freeze and the receivership.

B. The Order should not be stayed pending appeal.

An order of injunction (like the asset freeze) and an order for a receivership take effect immediately; there is no automatic stay for an injunction as there may be for other judgments.[14] "A stay is an intrusion into the ordinary processes of administration and judicial review . . . and accordingly it is not a matter of right, even if irreparable harm might otherwise result."[15] "The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final."[16] Here, the parties and the public have had both careful review of the evidence submitted over a 12-day

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[11] *See Antiques Ltd. P'shp*, 760 F.3d at 670-71.

[12] *See Sriram v. Preferred Income Fund III Ltd. P'shp*, 22 F.3d 498, 501 (2d Cir. 1994) (liquidating receiver's power to dissolve entities established; actual receiver not yet named); *Chase Manhattan Bank v. Turabo Shopping Ctr.*, 683 F.2d 25, 26 (1st Cir. 1982) (allowing appeal of appointment of a "still-unnamed receiver with wide powers to supervise operation of the shopping center").

[13] *See* 28 U.S.C. § 1292(a)(2); *Antiques Ltd. P'shp*, 760 F.3d at 670-71.

[14] Fed. R. Civ. P. 62(a)(1) & (c).

[15] *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quotations and citations omitted).

[16] *Nken*, 556 U.S. at 427.

trial and a meaningful decision memorialized in the Order. Defendants hold the burden of showing that the Order should be stayed,[17] but they show no cause why it should be.

Under Fed. R. Civ. P. 62(c) a stay pending appeal should be granted only if: 1) "the stay applicant has made a strong showing that he is likely to succeed on the merits"; 2) "the applicant will be irreparably harmed absent a stay"; 3) "issuance of a stay will [not] substantially injure the [other] parties interested in the proceeding"; and (4) the public interest favors a stay.[18] "The first two factors of the traditional standards are the most critical."[19] The second two factors "merge when the Government is the opposing party."[20] This Court has already evaluated these factors in the Order, and has determined that they favor the asset freeze and receivership.[21]

1. Defendants did not make a strong showing that they are likely to succeed on the merits.

Defendants make only two arguments about the merits of their appeal: 1) that the Court's calculation of the amount of disgorgement is "flawed" and 2) that § 7402(a) does not allow this Court to freeze Defendants' assets and appoint a receiver. Defendants did not make the "strong showing" that they are likely to succeed on the merits of these arguments. In fact, both arguments are destined to fail.

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[17] *Nken*, 556 U.S. at 433-34; *In re Paige*, No. 2:09MC869DAK, 2009 WL 3418156, at *3 (D. Utah Oct. 16, 2009) (Kimball, J.).

[18] *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (noting that the standards for a stay are the same under Fed. R. Civ. P. 62(c) as under Fed. R. App. P 8(a)); *Nken*, 556 U.S. at 434; *accord Wyoming v. United States Dep't of Interior*, No. 18-8027, 2018 WL 2727031, at *1 (10th Cir. June 4, 2018).

[19] *Nken*, 556 U.S. at 434, *quoted in In re Paige*, 2009 WL 3418156, at *3.

[20] *Nken*, 556 U.S. at 434.

[21] ECF No. 444. The Order is now the status quo and it should be preserved over Defendants' attempt to alter it with this motion to stay. *See Evans v. Utah*, 21 F. Supp. 3d 1192, 1211 (D. Utah 2014) (Kimball, J.).

a. The disgorgement calculation is based soundly in the law applicable to disgorgement and the admissible evidence.

The United States provided ample evidence permitting this Court to make a reasonable approximation of the amount of Defendants' wrongful gain.[22] Defendants bore the "risk of uncertainty in calculating net profit."[23] "'Reasonable approximation' will suffice to establish the disgorgement liability of a conscious wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk of uncertainty arising from the wrong. The same disposition against the wrongdoer yields the rule that 'when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.'"[24] In other words, if "the true measure of unjust enrichment is an indeterminable amount not less than 50 and not more than 100, liability in disgorgement will be fixed at 100."[25]

Consistent with this law, and because Defendants failed to produce relevant information and documents in discovery, the United States presented evidence at trial supporting a range of dollar amounts reflecting a "reasonable approximation" of Defendants' ill-gotten gains. As the Order shows, this evidence included information from Defendants' own customer database (entered into evidence through the live testimony of Lamar Roulhac) and from a bank deposit

[22] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i.; *United States v. Stinson*, 239 F. Supp. 3d 1299, 1329 (M.D. Fla. 2017); *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1120-23 (M.D. Fla. 2016).

[23] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i. ; *Stinson*, 239 F. Supp. 3d at 1329; *Mesadieu*, 180 F. Supp. 3d at 1120-23.

[24] *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) *quoted in* Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

[25] Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

analysis (entered into evidence through the live testimony of Amanda Reinken). This Court's findings show that testimony from Roulhac and Reinken adequately explained how they reached their results and both were credible. Other supporting evidence included other documents and oral testimony about how customers paid Defendants to participate in their tax scam and how Defendants passed that money around. Defendants failed to adequately rebut any of this evidence; although they cross-examined each witness called by the United States, they chose to rest their case without calling a single witness. There was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought, but Defendants did not meet their burden to offer credible evidence of the amount of any missing down payments. If Defendants had that evidence, they should have put on a case. The Court was under no obligation to accept Defendants' arguments on this point.

This Court's findings of fact regarding the amount of disgorgement, "whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the [Tenth Circuit] must give due regard to [this Court's] opportunity to judge the witnesses' credibility."[26] "[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. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently."[27] "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must

[26] Fed. R. Civ. P. 52(a)(6).

[27] *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985) (quotation and citations omitted).

govern."[28] Defendants hold the "heavy" burden of demonstrating that this Court's findings are clearly erroneous – a burden made even "heavier if the credibility of witnesses is a factor in the trial court's decision."[29] Defendants have failed to meet their heavy burden and are highly unlikely to succeed on the merits of this argument.

b. Section 7402(a) authorizes orders to freeze assets and appoint a receiver.

Under § 7402(a), "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions . . . 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 power of a district court to appoint a receiver is plain from the statutory text. Even if a particular power is not specifically enumerated in the statute, it is authorized by the statutory language "clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws."[30]

Defendants' attempt to distinguish the facts of this case from the facts of the cases cited by the Court in its opinion is irrelevant. The plain language of § 7402(a) requires only that the appointment of a receiver be "necessary or appropriate for the enforcement of the internal revenue laws." This Court's extensive findings of fact about the Defendants' ongoing and extensive fraud on the U.S. Treasury amply support its conclusion that both freezing Defendants'

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[28] *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017); *Anderson*, 470 U.S. at 573 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

[29] *Coury v. Prot*, 85 F.3d 244, 254 (5th Cir. 1996); *Butler v. Hamilton*, 542 F.2d 835, 838 (10th Cir. 1976).

[30] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

assets and appointing a receiver to control them is "necessary or appropriate" to enforce the internal revenue laws, both under the statutory text of § 7402(a) and under the traditional equitable factors for imposing an injunction.[31] This includes the power to freeze a defendant's assets as "may be necessary or appropriate for the enforcement of the internal revenue laws."[32]

2. Defendants will not be irreparably harmed absent a stay.

When the potential injury to a defendant from a stay is an injury of its own making, a stay is not warranted.[33] As this Court has already concluded, Defendants knew, and had reason to know, time and time again, that their actions were unlawful. The asset freeze and receivership are the consequences that flow from Defendants' own choices to engage in ongoing and extensive fraud on the U.S. Treasury. The only harm to Defendants is of their own making.

Incredibly, Defendants reprise the worn-out "WE ARE JUST ABOUT READY TO FLIP THE SWITCH"[34] argument in asserting (without factual support) that they are harmed by the receiver portion of the Order. They claim that they "are unable to conduct any business," and therefore Defendants' "legitimate businesses are disrupted, including the further development of systems that involve solar process heat to create electricity."[35]

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[31] ECF No. 444 at 13-15.

[32] 26 U.S.C. § 7402(a); *accord United States v. First National City Bank*, 379 U.S. 378, 379-85 (1965) (affirming, under the authority of § 7402(a), "a temporary injunction enjoining [a bank] from transferring any property or rights to property [belonging to a customer] now held by it or by any branch offices within or without the United States" to prevent further dissipation of the customer's assets in the face of jeopardy tax assessments).

[33] *Unishippers Glob. Logistics, LLC v. DHL Exp. (USA), Inc.*, No. 2:08CV894 DAK, 2008 WL 5212539, at *1 (D. Utah Dec. 12, 2008) (Kimball, J.) (denying stay pending appeal in part because "while DHL may suffer injury, and perhaps even irreparable injury if the preliminary injunction is not suspended, the court finds that such injury is of DHL's own making, arising from DHL's decision to breach its Contract with Unishippers.").

[34] Pl. Ex. 329 at 1.

[35] ECF No. 448 at 5.

This Court has already found that "Defendants have no legitimate business."[36] Neldon Johnson has no scientific credibility.[37] Defendants have no expertise that could result in any sort of viable solar energy technology, have no operational solar energy technology, and have no possibility of creating revenues.[38] *These* factors (along with the Court's findings and conclusions that Defendants engaged in tax fraud), *not* the not-yet-ordered receivership, are the cause of Defendants' business "disruption."

3. A stay would substantially injure the United States and otherwise harm the public interest.

Allowing Defendants to avoid the status quo of the asset freeze and receivership order will only allow them more time to dissipate or hide assets.[39] This will substantially injure both the United States and the public interest. Defendants operated "a hoax funded by the American taxpayer" due to "[D]efendants' deceptive advocacy of abuse of the tax laws."[40] "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."[41] Both the United States and the public interest will suffer substantial harm without the asset freeze.

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[36] ECF No. 444 at 18. Further, Defendants' own motion to reopen evidence, filed September 14, 2018, shows that, despite the asset freeze, they are continuing to use assets in their interminable, hopeless attempts to show "progress" toward some kind of energy production. *Compare* ECF No. 448 at 5 ("[D]efendants are unable to conduct any business unrelated to the appeal in this case because of the order appointing a receiver.") *with* ECF No. 451 at 2-3 (claiming that the lenses "have been successfully used to generate independently measurable electricity").

[37] T. 2104:22-2107:10, 2515:14-18.

[38] T. 2515:14-2525:8.

[39] *See* ECF No. 444 at 17-18.

[40] T. 2516:2-3.

[41] ECF No. 444 at 19.

Defendants' conclusory arguments to the contrary merit no weight. First, they glancingly propose a bond to protect the United States during a stay pending appeal, but offer no specifics about the bond. There is no showing that any Defendant can post a bond, much less one in an amount that would protect the total disgorgement amount of $50 million in a meaningful way – especially in light of Defendants' past efforts to hamper collection of their assets. As this Court has already found, without an asset freeze, "Defendants will have full unfettered access to the funds illicitly obtained to the detriment of the United States."[42] Second, Defendants' claim that the United States and the public would be served by a stay so that their "legitimate business" can work to provide "affordable access to renewable energy" is absurd in the face of this Court's findings after a 12-day bench trial, for the reasons stated *supra* in section II.D.

III. Conclusion

For all of the reasons this Court ordered an asset freeze and receivership in the first place, this Court should deny a stay of the Order pending Defendants' appeal. There is no interlocutory order appointing a receiver that may be appealed. Defendants have not made a strong showing that they are likely to succeed on the merits; they will not be irreparably harmed absent a stay; and both the United States and the public interest will be substantially injured if a stay pending appeal is imposed.

[42] ECF No. 444 at 16-17.

Dated: September 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018 the foregoing UNITED STATES' OPPOSITION TO DEFENDANTS' RULE 62(c) MOTION and its supporting documents 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.

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