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 REPLY MEMORANDUM IN SUPPORT OF RULE 62(c) MOTION [DOC. 448]** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants hereby collectively respond to Plaintiff's opposition to Defendants' motion to stay enforcement of Doc. 444 Memorandum Decision and Order Freezing Assets and to Appoint a Receiver. For the reasons stated herein and in Defendants' memorandum [Doc. 448], the motion to stay enforcement should be granted.

I. REPLY TO PLAINTIFF'S ARGUMENTS AGAINST STAY

Plaintiff's argument against the stay can be reduced to their view that Defendants' do not deserve the benefit of the stay because they are bad people. The Plaintiff's argument ignores the test for granting a stay during appeal. Under Rule 62(a) a court must evaluate the following factors in determining whether to grant a stay:

> (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]

Plaintiff claims that factors 3 and 4 are essentially the same when the government is a party.[2] Of course the government's interests and the public's interest often diverge, particularly when the government overreaches and misuses and violates procedure and law, as in this case.

A. The Appealability of the Asset Freeze/Appointment of Receiver Order.

Plaintiff first argues that the only properly appealable order is the asset freeze order. *Id.* at 3. It argues that because the Court has not named a receiver and specifically spelled out the receiver's powers, the second part of the Order is not ripe for appeal. *Id.*

The Memorandum Decision and Order being appealed is 28 pages long and dedicates half those pages to setting out the facts justifying the asset freeze order and basis for appointing a receiver, then dedicates an additional 14 pages to why appointment of a receiver is necessary.

The Order sets out the need to enjoin Defendants' conduct based on findings and conclusions after trial, then proceeds directly to why the appointment of a receiver is critical. The last 12 pages of the Order seek to justify why a receiver is necessary: to prevent dissipation of

[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] Plaitniff's Brief [Doc. 455] page 5.

assets (p.16-17); "frustrate the collection of any disgorgement this Court **may** award"; and to prevent Defendants from conducting any further business (p.18).

In fact, pages 20-25 set out exactly what the government wants from the Court as far as the powers of the receiver. Those powers are substantially similar to the powers requested in Plaintiff's proposed order naming a receiver (See Doc. No. 456-4). All of these are final, and although they contain provisions that ought to be altered by the Court, they are presently appealable as final.

Under 28 U.S.C. § 1292(a), a court of appeals has jurisdiction over appeals from interlocutory orders granting injunctive relief 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) as is the order appointing a receiver, despite the language that the specific powers of the receiver are to be detailed in a subsequent order. The injury exists and can/should be addressed now. If the appeal is successful, then the earlier the mischief is ended, the better.

2. Defendants are Likely to Succeed on the Merits of their Appeal because Plaintiff has Overreached in its Reasonable Approximation of Damages Against Mr. Johnson and Other Defendants.

Since the entire purpose of the receivership appointment is to ensure that any disgorgement amount does not become meaningless,[3] the propriety of the underlying disgorgement award is one central consideration for this motion to stay enforcement.

So long as Plaintiff persists in claiming the largest number it can imagine is the correct amount of disgorgement, Defendants will succeed on appeal. Furthermore, so long as Plaintiff persists in claiming Defendant Johnson should be jointly and severally liable for $50,025,480.00,

[3] 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 be awarded will not be rendered meaningless.").

Defendants will succeed on appeal. There is no evidence to support a finding that Mr. Johnson or any Defendant received even close to $50 Million.[4] Likewise, there is no basis for joint and several liability in an equitable disgorgement of unjust enrichment.

The Plaintiff has conceded that there is no evidence that would support the calculation of this amount in stating that only about $17 Million can be verified as full payment for lenses (Proposed Findings of Fact, at ¶ 76-77.) The Court has recognized this fact as well.[5]

The multiplication and conjecture used by Plaintiff are not a reasonable approximation of the "ill-gotten gain." Plaintiff could have retained an expert, disclosed a calculation during discovery, and allowed Defendants to know before trial what number they would be called upon to defend. Defendants could then have retained their own expert witness. The Court would then have, as is normal in a damages dispute, only one specific number before it with competing analysis and criticism of that specific damage number to consider when making a decision. Instead, in this case we have no expert witness testimony, no analysis supporting a specific single damage number, and a wide range based on multiplication alone. Nothing like this has been encountered by the Defense attorneys in any other case involving proof of damages. This is highly irregular and extraordinarily insufficient. If the Court chooses a number from the wide range Plaintiff has proposed in their conjecture, the likelihood is that it will be thrown out on appeal because it cannot be a reasonable approximation.

An estimate of gross receipts based on a faulty calculus of lens sales that has been demonstrated on the record to be defective is an unreliable metric of reasonable approximation of any Defendants' gains. Then to couple joint and several liability on top of that defect is such an

[4] *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.")

[5] Trial Tr. at pg. 2522:20-22 (emphasis added).

error as to be extremely likely to be corrected on appeal. A stay in these circumstances is not only justified, it is likely in the long run to conserve all the parties (and the Court's) resources.

1. The Appointment of a Receiver is not Justified where there is no Demonstrated Disobedience to any Prior District Court Order.

As pointed out in Defendants' motion, there is no procedural presumption or controlling standard for appointing a receiver under Section 7402, particularly one that abandons the four-part test to merit an injunction applied generally throughout the 10th Circuit. The authority cited in *United States v. Latney's Funeral Home* seems to be a proper framework for this case for the appointment of a receiver *only after* the defendant had failed repeatedly to comply with an injunction.[6] *United States v. Bartle*,[7] also a civil contempt case, appointed a receiver *only after* the defendant had failed numerous times to comply with court orders. *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.[8]

All of them required actual disobedience to a prior order. Here the appointment is being threatened without any act of disobedience, as if the right to a receiver existed independently when requested by the Plaintiff. It is significant that the Proposed Findings admit 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.

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

3. Defendants will be Irreparably Harmed unless the Receivership Order is Stayed.

At present, Defendants are unable to conduct any of their business that is unrelated to the issues in this case because of the Order freezing assets and 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, the Stirling Engine. This in turn impairs Defendants' ability to create revenue that could be used to pay an appropriate disgorgement order that is upheld on appeal.

Before this Court made its ruling, Defendants never understood they were required to generate electricity for lens buyers to qualify for the solar energy tax credit. Defendants believed (and still believe) that it is sufficient to use solar process heat in research and development. Nothing they were told and nothing in the attorney work product they received from the lawyers advising them stated explicitly that it was required for electricity to be generated. (See PLEX 356.) It was not until cross examination that, for the first time, the attorney who prepared the contract documents for the Defendants stated explicitly that generating electricity was required to qualify:

> Q. BY MR. PAUL: If a solar lens is used in research and development, would that qualify as energy equipment?
> A. It would depend upon the nature of the use in the research and development, I believe.
> Q. And if the research and development which creates solar process heat in an energy production system, would that qualify as energy property?
> A. Consistent with my prior testimony, I do not believe so.
> Q. Are you talking generally about -- specifically about these lenses, as you understand them here, or are you --
> A. Generally.
> Q. You don't think a lens, at all --
> A. Generally, if a lens is in a research and production capacity, the mere fact that it is generating

solar process heat, I do not believe would entitle that
lens to the credit.
Q. Have you done any research on that question?
A. I have not confirmed that specifically, no. (TR. P. 709, l. 25- P. 710, l. 19.)

The question of whether research and development that resulted in numerous solar energy related patented developments qualifies remains an open question needing clarification through an appeal. In response to the Plaintiff's proposed findings of fact the Defendants have asked the Court to explicitly rule that research and development cannot qualify for a solar energy tax credit so that this issue can be squarely addressed by the Court of Appeals. Defendants could have produced electricity at any time since 2005. (RaPower-3 Dep. 163:15-166:18.) Johnson had generated electricity using lenses on the R&D Site a hundred times or more. (Johnson Dep., vol. 1, 164:3-165:17.) Because Defendants believed R&D qualified, taking the next step and generating electricity was deferred until the manufacturing channels involving other countries were secured and manufacturing costs were determined. (TR P. 2046, l. 13-P. 2048, l. 17.) But if they knew generating electricity was mandatory, they could, and now have, begun producing electricity.

The only reason the Court has adopted the view that the Defendants' technology cannot produce electricity is due to Dr. Mancini's testimony to that effect. However, as Dr. Mancini testified, his conclusions were based on the *absence* of information, not the presence of invalidating information. (Mancini TR. P. 86, l. 25-P. 87, l. 1; P. 158, l. 2-22; P. 182, l. 25-P. 183, l. 8; P. 183, l. 14-23; P. 184, l. 13-15; P. 191, l. 21-22; P. 213, l. 1-4; P. 214, l. 7-10.) He was not employed by the Plaintiff to take any measurements or perform any calculations. (TR P. 218, l. 12-17.) Therefore, he did nothing to verify the validity of any of the technology developed by Defendants. Yet he acknowledged that broken, unmaintained and dirty lenses were able to produce 754° temperature. (TR P. 199, l. 8-10.) He nevertheless concluded that without any supporting

documentation there was no possibility for the Defendants to generate electricity. (TR P. 162, l. 21-24.)[9]

Now Defendants have engaged qualified experts whose resumes are attached[10] who have evaluated the technology, taken measurements, provided their test results to the Court, and have verified that the Defendants' lenses are now being used to produce solar process heat that is generating electricity.[11] Of course, had the Defendants been informed by their legal advisors that generating electricity was necessary, they would have produced it long before. They sincerely believed, and still believe, that research and development qualifies for solar process heat under Section 48.

4. The Stay Will Not Irreparably Harm Plaintiff or the Public.

A stay would not irreparably harm other parties, particularly if a bond is required. The Defendants have potential venture capital available to develop their patents, and may be able to post a bond which should obviate any need for a receiver to be appointed. The Court ought to establish the amount and right for Defendants to post a bond as part of any further proceedings, to allow this entire matter to be stayed pending an appeal.

Additionally, Plaintiff and the public would benefit from the ongoing and legitimate business activities that are expected to generate 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

[9] However, his testimony was very carefully worded to artfully equivocate, stating, "as it's currently represented" it will not produce electricity. Meaning that without the documentation or in the absence of any data (now provided as part of the pending motion) he did not believe it could ever produce electricity.
[10] See Exhibit 1 hereto with resumes from John Kraczek, Kem Jackson and Paul Freeman.
[11] See Defendants' Rule 59(e) and 52(b) Motion, Doc. 451.

identifying this injunction. The Court has not gone so far as to say Defendants cannot pursue legitimate business pursuits, even selling lenses. To the extent this Court is concerned about lens owners claiming tax credits, that can no longer happen due to any marketing or encouragement by any of these Defendants. Appointing a receiver will have no impact on what tax decisions are taken by lens owners. The alleged harm to the Treasury from Defendants' conduct is fixed and, if it exists, will not change. Defendants have been enjoined from any further encouragement to claim tax benefits and Defendants are complying with the Court's injunction.

Defendants' continued development of the solar lens technology will benefit the public. Progress is being made (verifiable progress confirmed by professional and qualified engineers) that will lead to affordable 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 ask that the order appointing a receive in this matter be stayed pending appellate adjudication of the issues before the 10th Circuit Court of Appeals.

Dated this 27th 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 REPLY MEMORANDUM IN SUPPORT OF RULE 62(c) MOTION [DOC. 448]** 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 Court's CM/ECF filing program

/s/ Steven R. Paul .
Attorneys for Defendants