Paul W. Jones (#11688)
HALE WOOD, PLLC
4766 S. Holladay Blvd.
Holladay, UT 84117
Telephone: (801) 930-5101
Facsimile: (801) 606-7714
paulwjones@halewoodlaw.com
*Attorney for Intervenors*

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**
**CENTRAL DIVISION**

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON<br><br>Defendants. | **MOTION TO INTERVENE**<br><br>Civil No: 2:15cv-00828-DN<br><br>District Judge David Nuffer |

Prospective Intervenors Preston Olsen and Elizabeth Olsen, and all other similarly situated taxpayers represented by attorney Paul Jones in the United States Tax Court[1] (collectively referred to as the "Intervenors") hereby move for leave to intervene in the above captioned action pursuant to Fed. R. Civ. P. 24 (the "Motion") in order to protect and enforce their constitutional rights, their right to fair tax collection practices under IRC[2] §6304, and certain other rights provided by Taxpayer Rights set forth in IRC §7803(a)(3) such as the right to be informed, the right to challenge the position of the Internal Revenue Service and be heard, the right to appeal a decision of the

[1] See Exhibit A which includes a list of persons in this category.
[2] IRC refers to the "Internal Revenue Code," Title 26, United States Code

Internal Revenue Service in an independent forum, and the right to a fair and just tax system. To that end, Intervenors seek to intervene for, *inter alia*, declaratory judgment and/or equitable relief against the United States to allocate payments made by the Receiver to the United States Treasury (sometimes referred to as the "Treasury") among the Intervenors' tax liabilities as deposits on their income tax accounts in order to ensure the Treasury is not unjustly enriched at the expense of Intervenors.

Intervenors' claim against the United States qualifies for intervention as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). In the alternative, Intervenors' claim qualifies for permissive intervention pursuant to Fed. R. Civ. P. 24(b)(1) because it shares common questions of law and fact with the United States claims against Defendants. More specifically, the injury incurred by the United States Treasury is the result of Intervenors' depreciation deductions and solar energy tax credits claimed on their tax returns after purchasing solar energy equipment from the Defendants. As explained by this Court's rulings, the Defendants fraudulently propagated repeatedly both the progress of their solar energy equipment and available tax benefits to Intervenors for purchasing said equipment.

Upon discovering the imminent injury to Intervenors, Intervenors' counsel and the counsel for the Internal Revenue Service held discussions relating to whether potential administrative procedures to request relief on behalf of Intervenors exist; however, neither party was able to identify a procedure available to Intervenors to seek relief because of the unique circumstances of this case (i.e. a receivership collecting funds earmarked to be applied to understated tax liabilities of a specific group of persons). See *Declaration of Paul W. Jones (7/8/2021)* ("Jones Decl.") (attached as Exhibit B). Deposits of taxes (even those that are not yet assessed) are generally described in IRC §6302 and the regulations thereunder. However, none of those authorities provide

a procedure for the Internal Revenue Service ("IRS") or the Intervenors to follow as to allocation of the funds paid to the Treasury by the Receiver. As a result, Intervenors look to this Court for relief and file this Motion to Intervene in order to protect Intervenors' rights by ordering the United States to allocate distributions from the Receiver among Intervenors' income tax accounts maintained by the IRS to apply against assessments made against them related to this case and/or their Tax Court case.

## FACTUAL BACKGROUND

The Treasury's Damages

This Court issued an opinion in *United States v. RaPower-3, LLC* on October 4, 2018, wherein it found, *inter alia*, that the Defendants in that case organized a solar energy tax scheme and—while promoting said scheme—made fraudulent statements about both the progress of the solar energy project and the allowability of a depreciation deduction and energy tax credits as the result of buying solar lenses from the Defendants. *See generally,* Dkt. No. 467. Intervenors consist of customers of the Defendants who purchased solar lenses to engage in a solar lens leasing arrangement. *Id.* Further, Intervenors not only purchased lenses from Defendants, but also relied on Defendants, and material produced by third parties hired by the Defendants, by subsequently claiming depreciation deductions and solar tax credits on their tax returns. *Id.* As explained further below, both activities are germane to Intervenors' injury.

As part of its case, the United States calculated the amount of injury incurred that was caused by the Defendants' conduct. This Court determined that the harm caused to the Treasury was the result of "Defendants' customers [Intervenors] follow[ing] the solar energy scheme and claim[ing] depreciation deductions and solar energy credits on their tax returns." *Id.* at ¶ 420. The reasonable approximation of this harm to the Treasury was found to be $14,207,517. Dkt. No. 491

¶ 89(b). In order to understand the harm to the Intervenors, it must be emphasized that this amount was calculated based on Intervenors' tax returns, and does not represent any other damages or a penalty to be paid to the United States as a result of these proceedings (i.e. disgorgement or some other equitable remedy). In fact, during the trial, the United States clarified that the Treasury's injury stems exclusively from inaccurate tax returns and is not reflective of a disgorgement resulting from the Defendants' actions. Counsel for the United States and the Court had the following exchange:

> MS. HEALY-GALLAGHER: There are tax returns. That, Your Honor, is more to reflect to the harm to the Treasury which goes to our injunction factors, so that Your Honor has a visible picture of what's happened here.
>
> THE COURT: So you don't claim that's a measure of disgorgement because disgorgement reflects what the defendants were doing, not what the injury is to the Treasury.
>
> MS. HEALY-GALLAGHER: Right. There needs – to be an injury, there needs to be an injured party. There needs to be unjust enrichment at the expense of a party. But that's not the measure of disgorgement.

Exhibit C, Trial Transcript, pg. 891 lns. 14 – 20.

Therefore, the Treasury's injury of $14,207,517 relates solely to tax returns wherein Intervenors claimed depreciation deductions and tax credits, as was fraudulently purported by the Defendants. See also PLEX00752.0003.

The Receivership

In order to protect its interests, the United States also sought injunctive relief in the form of an asset freeze and appointment of a receiver. *See generally*, Dkts. # 490, and 491. Pursuant to 26 U.S.C. § 7402, this Court—in response to said injunctive relief request—determined a receiver was necessary or appropriate to effect the asset freeze. Dkt. No. 444. On November 11, 2018, this Court issued its Corrected Receivership Order ("CRO") wherein a Receiver Estate was created.

Dkt. No. 491. As part of that order, the Court instructed the Receiver, among other things, to "distribute proceeds from the liquidation of the receivership estate" . . . "[t]o the United States, in the amount of $14,207,517." Dkt. No. 491 ¶ 89(b). Therefore, upon collecting sufficient receipts the Receiver has been instructed to pay to the Treasury the amount equal to its injuries caused by depreciation deductions and tax credits claimed by Intervenors on their tax returns.

Intervenors' Tax Court Decision

While this case was being litigated, the Internal Revenue Service (the "IRS") selected the Intervenors' tax returns for examination. After its review, the IRS disallowed depreciation deductions and energy tax credits claimed on Intervenors' tax returns. Intervenors petitioned the United States Tax Court to appeal the IRS' determination. Given the number of taxpayers, the parties agreed to first try a test case, wherein the Tax Court considered the facts relating to Preston Olsen and Elizabeth Olsen and any decision rendered would aid to resolve approximately 200 cases of taxpayers similar to the Olsen's. See *Olsen v. Commissioner,* T.C. Memo. 2021-41, 1 (attached as Exhibit D). On April 6, 2021, the Tax Court upheld the IRS' disallowance of depreciation deductions and energy tax credits—the very injury identified in *United States v. RaPower-3, LLC. See Id.* As a result, the holding of the Tax Court will inform the resolution of the approximately 200 taxpayers—i.e. Intervenors—who will be liable to the Treasury for tax deficiencies. As explained in further detail below, as the result of this holding, the Treasury now stands to receive not only the full amount of its calculated injuries from the Receiver, but now also, additional amounts from Intervenors, which is effectively equivalent to double taxation.

Receivership Distribution to Treasury

Pursuant to the CRO, the Receiver distributed $7,500,000.00 to the United States to count towards the amount awarded by this Court. Dkt. No. 1121, pg. 12. Again, this amount is aimed to

restore the Treasury's injury incurred from inaccurate depreciation deductions and tax credits claimed on Intervenors' tax returns. For the reasons set forth herein, Paul W. Jones on behalf of the Preston Olsen and Elizabeth Olsen—and those taxpayers similarly situated—respectfully request leave to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2) or alternatively, by permission pursuant to Fed. R. Civ. P. 24(b)(1) to obtain an order that would require the United States to apply these funds to taxpayer accounts.

## LEGAL STANDARD

Fed. R. Civ. P. 24(a) provides that upon a "timely motion, the court *must* permit anyone to intervene who: . . . (2) claims an interest relating to the property or a transaction that is subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a) (emphasis added). Therefore, a movant is entitled to intervene as a matter of right when the movant demonstrates the "(1) the application is timely, (2) the applicant claims an interest relating to the property or transaction which is the subject of the action, (3) the applicant's interest may be impaired or impeded, and (4) the applicant's interest is not adequately represented by existing parties." *Elliot Indus. V. BP Am. Prod. Co.,* 407 F.3d 1091, 1103 (10th Cir. 2005) (citing *Coalition of Ariz./N.M. Counties for stable Econ. Growth v. Dep't of Interior,* 100 F.3d 837, 840 (10th Cir. 1996)). While the movant bears the burden of establishing the aforementioned elements, "[t]he Tenth Circuit generally follows a liberal view in allowing intervention under Rule 24(a)." *Id.* (citing *Nat'l Farm Lines v. Interstate Commerce,* 564 F.2d 381, 384 (10th Cir. 1977)).

Even if the Court is not persuaded that the Olsen's, and similarly situated taxpayers, are entitled to intervene as a matter of right, the Fed. R. Civ. P. also permits a movant to intervene

when she "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising this discretion, 'the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."' *Union Pac. R.R. Co. v. Utah State Tax Comm'n,* 2020 U.S. Dist. LEXIS 172914, *11, 2020 WL 5634142 (quoting Fed. R. Civ. P. 24(b)(3)).

## ARGUMENT

Intervenors satisfy both the criteria to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), and those for permissive intervention under Rule 24(b)(1)(B). Under either provision, the Court should acknowledge the interests of the Intervenors as taxpayers impacted by this case with a direct interest in the property that was transferred to the Treasury. The Court should grant the Motion and allow Intervenors to seek an order allocating the distribution to the United States among the Intervenors' income tax accounts as deposits to redress the imminent harm.

### I. Intervenors Have Standing to Intervene in This Action.

As a threshold matter, Intervenors have standing to intervene in this action under Article III of the United States Constitution. As this Court has noted, an intervenor as of right must demonstrate Article III standing when they seek particular relief. *See Fed. Trade Comm'n v. Nudge LLC,* No. 2:19-cv-00867-DBB-DAO, 2020 WL 6881846, at *3 (D. Utah Nov. 23, 2020) (Oberg, J.) (quoting *Town of Chester v. Laroe Estates, Inc.,* 137 S. Ct. 1645, 1651 (2017); *Safe Sts. Alliance v. Hickenlooper,* 859 F.3d 865, 912 (10th Cir. 2017)). Further, "Article III standing requires a litigant to show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent, no conjectural or hypothetical; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury can likely be redressed by a favorable decision." *Id.* (quoting *Kane Cnty. V. United States,* 928 F.3d 877, 888 (10th Cir. 2019)).

The Intervenors have Article III standing. As set forth, Intervenors have suffered an injury in fact that is concrete and particularized, and actual and imminent. First, Defendants, who were promoters of the solar energy scheme, made fraudulent statements relating to the solar energy project and availability of legitimate tax benefits to Intervenors. See Dkt. No. 467. Intervenors, relying on said statements, purchased solar lenses, which are now held by the Receiver, and further claimed depreciation deductions and solar energy credits, which have now been disallowed. *Id*. As mentioned above, the claimed tax benefits are the exclusive cause of the Treasury's injury. Next, pursuant to the CRO, the Receiver is to restore the Treasury in the full amount of its harm by distributing $14,207,517 from the Receiver—$7,500,000.00 of which has already been distributed. Dkt. No. 1121, pg. 12. Notwithstanding the Receiver being ordered to distribute to the Treasury an amount equal to its damages, Intervenors, pursuant to the Tax Court Order, are also already liable (or soon will be) to the Treasury for the same damages incurred through the disallowance of tax benefits.

Based on the foregoing, Intervenors will suffer injuries from two sources. First, Intervenors purchased solar lenses from the Defendants, which are currently held by the Receiver and will be used to distribute to the Treasury to restore damages incurred from disallowed depreciation deductions and tax credits. Further, Intervenors will also incur injury in the amount they are ordered to pay the Treasury, pursuant to the Tax Court Order, since the Receiver has already been ordered to pay over an amount equal to the Treasury' damages. Any subsequent payments will result in the United States receiving the equivalent of double taxation. As currently ordered, Intervenors' stand to be the injured party. The United States, during trial, argued that "[t]here needs . . . to be an injury, there needs to be an injured party. There needs to be unjust enrichment at the expense of a party." See Ex. C, Trial Transcript, pg. 891 ln. 14 – 20. Unless this Court grants

intervention, to allow Intervenors to obtain an order allocate the amount distributed from the Receiver among Intervenors tax liabilities, the United States will be unjustly enriched "at the expense of" the Intervenors. Intervenors' injury can be redressed by a favorable decision to apply the amount distributed from the Receiver among Intervenors' various tax liabilities.

## II. Fed. R. Civ. P. 24(a)(2) Grants Intervenors the Right to Intervene in this Action.

As noted above, there are four elements prerequisite to intervention as of right under Fed. R. Civ. P. 24(a)(2): timeliness, protectable interest, practical impairment, and inadequate representation. As explained in more detail below, Intervenors satisfy each of these elements.

### A. Intervenors' Motion is Timely

The courts have stated that "[t]he timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances." *Elliott Indus.*, 407 F.3d at 1103 (quoting *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)). "'The analysis is contextual; absolute measures of timeliness should be ignored.'" *Utah Ass'n of Ctys.*, 255 F.3d at 1250 (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)) (additional citation omitted). "'The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained.'" *Id.* (quoting *Sierra Club*, 18 F.3d at 1205) (secondary quotation and additional citation omitted).

Upon discovering the injury, Intervenors acted expeditiously. While this Court issued its decision in 2018, Intervenors were appealing the IRS' examination results through the proper venues available to them. It was not until the Tax Court's Order, on April 6, 2021, that the

Intervenors' injury became concrete and imminent. *Olsen v. Commissioner,* T.C. Memo. 2021-41. Subsequent to this order, Intervenors' counsel researched administrative venues before the IRS to remedy the taxpayers' injury of effectively paying double tax to the United States Treasury. See Ex. B, Jones Decl. After independent research and discussions with IRS counsel, both parties agreed that there was no administrative procedure for Intervenors to seek relief from their injury. *Id.* As a result, Intervenors have filed this motion.

Further, no party will be prejudiced by Intervenors' participation in this case. The "prejudice prong of the timeliness inquiry 'measures prejudice cause by the intervenors' delay—not by the intervention itself.'" *Utah Ass'n of Ctys.,* 255 F.3d at 1251 (quoting *Ruiz v. Estelle,* 161 F.3d 814, 828 (5th Cir. 1998)). The Treasury's injury relates solely to depreciation deductions and energy tax credits and is independent of the disgorgement. See Ex. C, Trial Transcript, pg. 891 ln. 14 – 20. Further, there is no "prejudice" to any of the parties in the colloquial version of the term because the Treasury will still receive the amount equal to its calculated damages. Intervenors' Motion ensures that the parties do not receive more than awarded by this court. In its Motion, Intervenors merely request that the amount distributed from the Receiver to the Treasury be allocated among the various Intervenors in the amount equal to their tax liabilities. If the Court grants this Motion and orders to allocate the Receiver's distribution among Intervenors' tax liabilities, then no party in this matter would receive less than awarded, and equally as important, no party will be unjustly enriched at the expense of the other.

B. **Intervenors Have a Protectable Interest and Would Suffer Practical Impairment of that Interest**.

A proposed intervenor has a protectable interest sufficient for intervention if "'[the] interest in the proceedings [is] direct, substantial, and legally protectable.'" *Coal. of Ariz./New Mexico Ctys. for Stable Econ. Growth v. DOI*, 100 F.3d 837, 840 (10th Cir. 1996) (quoting *Vermejo Park*

*Corp. v. Kaiser Coal Corp.*, 998 F.2d 783, 791 (10th Cir. 1993)) (secondary quotation omitted). "'Whether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact specific determination,' and 'the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Coal. of Ariz./New Mexico Ctys. for Stable Econ. Growth v. DOI*, 100 F.3d 837, 841 (10th Cir. 1996) (quoting *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) and *Nuesse v. Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694, 700 (1967), respectively) (additional citations omitted).

The question of whether proposed intervenors have a protectable interest is intertwined with the third element of the mandatory intervention analysis: whether the proposed intervenors would suffer a practical impairment of their interests. "'[T]he question of impairment is not separate from the question of existence of an interest.'" *Utah Ass'n of Ctys.*, 255 F.3d at 1253 (quoting *Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)). "'To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Id.* (quoting *Grutter v. Bollinger*, 188 F.3d 394, 399 (6th Cir. 1999)) (secondary quotation omitted). "Moreover, 'the Rule refers to impairment as a practical matter. Thus, the court is not limited to consequences of a strictly legal nature.'" *Id.* (quoting *Natural Res. Def. Council*, 578 F.2d at 1345) (secondary quotation omitted).

In this case, Intervenors have a protectable interest that would be impaired if they are not permitted to intervene. As mentioned above, the Receiver is to make distributions to the Treasury equal to the damages it incurred from depreciation deductions and energy tax credits. Notwithstanding this distribution, Intervenors are also required to pay the Treasury for the same

depreciation deductions and energy tax credits identified and used to calculate the Treasury's damages. As a result, the Treasury is being unjustly enriched at the expense of the Intervenors. Intervenors are being deprived of their rights and will suffer injury in the event they are required to pay the Treasury, despite the Treasury already being made whole. Accordingly, Intervenors satisfy the second and third elements for intervention as of right; constitutional interest and practical impairment.

C. **Intervenors Interests are not Adequately Represented by the Parties**.

Finally, Intervenors are entitled to intervene in this action as a matter of right because their interests are not adequately represented by the parties of this case. '"Although an applicant for intervention as of right bears the burden of showing inadequate representation, that burden is the minimal one of showing that representation may be inadequate.'" *Utah Ass'n of Ctys.*, 255 F.3d 1246, 1254 (10th Cir. 2001) (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)) (secondary quotation omitted). Here, neither the Defendants nor the United States adequately represents Intervenors' interests.

First, the United States clearly has not, nor will it, represent Intervenors' interests as it is directly adverse to the interests of Intervenors. As detailed above, the United States is actively working against Intervenors in Tax Court and is currently permitted to receive—effectively—double taxation from Intervenors, unless this Court allows intervention. Therefore, Intervenors are tasked to present the Court with that evidence for themselves. Put differently, the United States will not present evidence to the Court to redress Intervenors' harm.

Next, the Defendants do not represent Intervenors' interests either. While Intervenors may have followed the outcome of this case in hopes of validating the solar energy business they had invested into, it was the Defendants, after all, who repeatedly made fraudulent representations to

Intervenors about their solar energy equipment and available depreciation deductions and energy tax credits. Further, despite damages being awarded in an amount equal to depreciation deductions and tax credits claimed on Intervenors' tax returns, Intervenors' individual liabilities has not been represented or addressed by either party. Therefore, since neither the United States nor the defendants represent Intervenors' interest, Intervenors must be afforded the opportunity to present their case to the Court for themselves.

As illustrated above, all elements of intervention as a matter of right are satisfied. Accordingly, the Court should grant the Motion and allow Intervenors to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(2).

## III. **Alternatively, the Court Should Permit Intervenors to Intervene Pursuant to Fed. R. Civ. P. 24(b)**.

In the event that the Court does not grant Intervenors' Motion pursuant to Federal Rule of Civil Procedure 24(a)(2), it should nevertheless permit Intervenors to intervene pursuant to Rule 24(b). In the case of permissive intervention, a movant need only demonstrate timeliness and that they have claims or defenses that share a common question of law or fact with the main action. *See, e.g., Union Pac. R.R. Co.*, 2020 U.S. Dist. LEXIS 172914, *11, 2020 WL 5634142; Fed. R. Civ. P. 24(b)(3)). Here, Intervenors' Motion is timely for the reasons discussed in Argument Section I.A, above. Further, Intervenors' claim against the United State plainly shares common questions of fact with the United States' claims against the Defendants; namely, Intervenors' claim of depreciation deductions and tax credits resulted in damages incurred by the Treasury. Since the affirmation of the IRS' examination by the Tax Court, Intervenors are ordered to pay tax deficiencies despite the CRO demanding that these damages be paid in full by the Receiver. Therefore, Intervenors' claims are based on the reality that the Treasury will be unjustly enriched at the expense of Intervenors. These rights are based on Constitutional principles.

As such, in the event Intervenors did not qualify for intervention as of right under Fed. R. Civ. P. 24(a)(2), which Intervenors still claim they do, this Court should permit Intervenors to intervene pursuant to Rule 24(b).

## CONCLUSION

For the reasons recited in the foregoing Motion, Intervenors respectfully requests that this Court grant their Motion and allow them to seek an order that the distributions from the Receiver to the Treasury are to be allocated to Intervenors' income tax accounts at IRS as deposits to apply against assessments made against them related to this case and/or their Tax Court case.

Dated this 5th day of August, 2021

HALE & WOOD, PLLC

/s/ Paul W. Jones
Paul W. Jones
*Attorney for Intervenors*

**CERTIFICATE OF SERVICE**

I hereby certify that the above **MOTION TO INTERVENE** was filed with the Court on this 5th day of August, 2021 and served via ECF on all parties who have requested notice in this case. Copies were also sent by mail to:

Neldon Johnson
Post Office Box 95332
South Jordan, UT 84095

R. Gregory Shepard
858 Clover Meadow Drive
Murray, UT 84123

/s/ Paul W. Jones