Jonathan O. Hafen (6096) (jhafen@parrbrown.com)
Jeffery A. Balls (12437) (jballs@parrbrown.com)
Michael S. Lehr (16496) (mlehr@parrbrown.com)
**PARR BROWN GEE & LOVELESS, P.C.**
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Telephone: (801) 532-7840

*Attorneys for Court-Appointed Receiver R. Wayne Klein*

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

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br>v.<br><br>RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; NELDON JOHNSON; and ROGER FREEBORN,<br><br>Defendants. | **RECEIVER'S RESPONSE TO OLSEN MOTION TO INTERVENE**<br><br>Civil No. 2:15-cv-00828-DN-DAO<br><br>District Judge David Nuffer<br>Magistrate Judge Daphne A. Oberg |

R. Wayne Klein, the Court-Appointed Receiver of RaPower-3, LLC ("RaPower"), International Automated Systems Inc. ("IAS"), LTB1 LLC ("LTB1"), their subsidiaries and affiliates, and the assets of Neldon Johnson and R. Gregory Shepard, (the "Receiver"), pursuant to the Court's request for supplemental briefing,[1] hereby files this response to Preston Olsen's and Elizabeth Olsen's Motion to Intervene ("Motion").[2]

[1] Docket no. 1151.
[2] Docket no. 1143.

## INTRODUCTION

Preston and Elizabeth Olsen seek to intervene in this action for "declaratory judgment and/or equitable relief against the United States to allocate payments made by the Receiver to the United States Treasury . . . among Intervenors' tax liabilities as deposits on their income tax accounts." However, what the Olsens actually seek (inappropriately) is to modify the Corrected Receivership Order ("CRO")[3] to allow them, and others like them who improperly used the solar scheme to avoid paying federal income tax, to permanently avoid paying their past due taxes by receiving the benefit of the Receiver's successful collection actions. This is inappropriate and the Court should deny the Motion. First, due to the priority and procedures set forth in the CRO, the Olsens and other Receivership Defendant customers' interests are appropriately and equitably protected and represented. Second, the Motion proceeds from a flawed understanding, and significant undervaluation, of the amount of harm to the United States Treasury due to improper depreciation deductions and tax credits by Receivership Defendants' customers. Third, the Motion is untimely due to the Olsens' failure to seek relief until three years after the amounts and distribution process were set by the Court.

## ARGUMENT

### I. Legal Standard

To intervene in an action, a movant must have Article III standing and must satisfy Rule 24 of the Federal Rules of Civil Procedure. To establish standing a movant must "demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the [challenged conduct], and that the injury will likely be redressed by a favorable decision." *Kane Cty., Utah v. United*

[3] Docket no. 491.

*States*, 928 F.3d 877, 886 (10th Cir. 2019) (citation omitted). "Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a nonparty seeking to intervene as of right must establish (1) timeliness, (2) an interest relating to the property or transaction that is the subject of the action, (3) the potential impairment of that interest, and (4) inadequate representation by existing parties." *Id*. at 889 (citation omitted).[4]

Also, relevant here is this Court's "broad powers and wide discretion to determine relief in an equity receivership" with the goal of fashioning an "equitable distribution of the [Receivership] assets." *SEC v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir.2010).

## II. The CRO Equitably Protects and Represents the Interests of Receivership Defendants' Customers.

Although the Motion repeatedly points to alleged unjust enrichment the United States will receive if the Olsens and other "intervenors" are forced to pay the proper amount of federal income tax, the only injury to the putative interveners identified in the Motion are the amounts they paid to purchase solar lenses from Receivership Defendants.[5] As set forth in the CRO, however, the Olsens and the other intervenors have an avenue to petition the Receiver—and ultimately the Court—to allow them to recover amounts associated with their involvement in the solar scheme and purchase of solar lenses. In Section Q of the CRO, the Court already determined the priority of claims to be distributed from the liquidation of the Receivership Estate. First, the United States Department of Justice was awarded its costs.[6] Second, the United

[4] The Receiver believes many of the issues raised by the Motion are directed at the United States. Indeed, the Motion itself states that the United States' interests are "directly adverse to the interests of Intervenors" without mentioning the Receiver. Motion at 12. As such, this response is directed at certain elements of Fed. R. Civ. P. 24 and equitable considerations that relate to the Receiver's duties and his obligations to the Receivership Estate.
[5] Motion at 8. Although the purpose of the Motion is to avoid paying federal income tax, the Motion stops short of calling paying the proper amount of income tax an injury.
[6] Docket no. 491 ¶ 89(a).

States was awarded $14,207,517 "in full before any distributions to lower priority claims."[7] Third, and relevant here, Receivership Defendants' customers who meet certain requirements may be entitled to distributions from the Receivership Estate.[8] In order to be eligible for distributions, each third priority claimant must submit sufficient evidence to show:

1. The claimant's investment or payments to Receivership Defendants for solar lenses or other products sold by Receivership Defendants;

2. All payments received from Receivership Defendants, including commissions, rental payments, and bonuses;

3. A copy of the claimant's filed tax returns on which the customer claimed a tax deduction or tax credit related to the solar energy scheme; and

4. Evidence of the resolution of all the claimant's issues with the IRS related to the solar energy scheme. If the claimant has not yet resolved his issues with the IRS, the claimant may still submit a claim and request assistance in resolving his outstanding issues with the IRS. As part of providing assistance to the claimant, the Receiver is to forward copies of the submitted documentation to the IRS and the United States. If, as part of this process, the claimant resolves his issues with the IRS the claimant may be entitled to payment.[9]

Finally, after all eligible third priority claimants are paid, the United States is entitled to be paid the remainder of the funds in the Receivership Estate until the total payments made under every priority reaches $50,025,480.[10]

The Olsens, as customers of Receivership Defendants who purchased solar lenses,

[7] *Id*. ¶ 89(b).
[8] *Id*. ¶ 89 (c).
[9] *Id.*
[10] *Id*. ¶ 89(d).

certainly qualify as customers entitled to submit a claim to the Receiver as third priority claimants potentially entitled to funds collected from the Receivership Estate after the United States has been paid the full $14,207,517. As such, under Fed. R. Civ. P. 24(a)(2), the Olsens and other intervenors currently have the ability to protect their interests and are adequately represented in this action through the CRO.

Not only does the CRO provide a potential remedy for the only actual injury to the intervenors identified in the Motion, the priority system in the CRO represents the Court's considered determination about the order in which parties affected by the solar energy scheme are entitled to the benefit from the assets recovered by the Receiver. Importantly, the priority system makes clear that customers of Receivership Defendants cannot receive the benefit of the assets collected by the Receiver before they satisfy all outstanding tax issues with the IRS. Thus, the Court has already decided that the Olsens, who owe the IRS over $155,000 in back taxes and penalties, and others like them ***cannot receive the benefit of the Receiver's collection efforts until all of their improperly claimed deductions and credits are satisfied***. This priority system comports with equitable principles underlying the Receivership. "When a district court creates a receivership, its focus is 'to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary.'" *S.E.C. v. Vescor Cap. Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010) (emphasis added) (citation omitted). It is not equitable to allow the Olsens and others to escape their obligation to pay income tax to the IRS due to the Receiver's successful collection actions.[11]

[11] The motion incorrectly states that the Receiver has distributed $7,500,000 to the United States as a second priority claimant under the CRO; the Receiver has distributed $8,500,000 to the U.S. Treasury. This means that the United States in is still entitled to over $5.7 million before any third priority claimant is allowed to receive a distribution from the Receiver. Based on his understanding of the potential available remaining assets, the Receiver expects to distribute

In fact, not only would it be inequitable to allow customers who violated federal tax laws to receive the benefit of the Receiver's collection efforts before the satisfaction of their tax obligations, it would effectively elevate the tax violators to a privileged position over Receivership Defendants' customers who have paid their back taxes to the IRS or who purchased lenses but never claimed tax deductions. Thus, what the Olsens seek is to effectively punish those customers who timely paid their outstanding tax obligations when informed that the claimed solar energy deductions and credits were improper. It is well established that allowing individuals to elevate their positions over similar individuals in a receivership distribution process creates inequitable results. *See* *S.E.C. v. Elliott*, 953 F.2d 1560, 1569 (11th Cir. 1992) (allowing certain parties to assert equitable claims that would elevate position over similar parties creates "inequitable results, in that certain investors would recoup 100% of their investment while others would receive substantially less"). More fundamentally, the customers who have failed to pay their taxes—i.e., the Olsens and others like them—should be precluded from obtaining the benefits of the Receiver's collection efforts due to the equitable doctrine of "unclean hands" which "close[s] the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief . . . ." *Worthington v. Anderson*, 386 F.3d 1314, 1319 (10th Cir. 2004).

Not only did the Olsens fail to pay their income taxes to the United States, Preston Olsen, just a few months ago, was held in contempt by this Court for his knowing disregard of the CRO. There, the Court held that Preston Olsen colluded with Glenda Johnson "to interfere with the

significantly less than $5.7 million to the United States in the future. Due to this fact, the Receiver has not yet established a claims deadline for third priority claims. Should the Receiver file a motion seeking to establish a claims process and set a claims deadline, the Olsens and other customers of Receivership Defendants will be given notice of the deadline.

Receiver's efforts to take control over Receivership Property in violation of the CRO."[12] Ironically, that interference was with the very assets that Olsen now wants the Receiver to use for Olsen's benefit. Preston Olsen's failure to pay his taxes and his knowing violations of the CRO disqualify him from benefiting from the Receiver's collection efforts ahead of others and the Motion should be denied.

### III. $14,207,517 is Well Below the Harm Suffered Due to Improper Depreciation Deductions and Tax Credits.

Next, the Motion to Intervene is premised the incorrect assertion that the $14,207,517 to be paid to the United States represents the "amount equal to [the United States'] injuries caused by depreciation deductions and tax credits claimed by Intervenors on their tax returns."[13] In fact, this Court has made clear that the $14,207,517 is only a partial snapshot amount of the false depreciation deductions and tax credits claimed by Receivership Defendants' customers. Indeed, the $14,207,517 represents only depreciation deductions amounts from identifiable customers for tax years 2013-2016. The amount does not "include tax returns for tax years 2008 (or prior) through 2012, although [Receivership] Defendants' customers bought lenses and claimed purportedly related tax benefits during those years. This snapshot does not include tax returns for tax year 2017, although Defendants sold lenses in 2017 and it is reasonable to conclude that the people who 'bought' lenses in 2017 claimed the tax benefits Defendants' promoted for tax year 2017." *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1193 (D. Utah 2018), *aff'd*, 960 F.3d 1240 (10th Cir. 2020). Accordingly, as the Court recognized, the $14,207,517 snapshot *excludes at least six years of improper depreciation deductions and tax credits* from customers

[12] Docket no. 1116 at 62.
[13] Motion at 5.

of the solar scheme. *Id*.

Moreover, even if the Court believes that Receivership Defendants' customers who violated tax laws are entitled to receive credit for amounts paid to the United States by the Receiver, the total amount needed to satisfy all of the outstanding tax obligations of the Receivership Defendants customers is much higher than $14,207,517.

**IV. The Motion is Not Timely.**

Finally, the Olsens' Motion should be denied due to their failure to timely seek to intervene in this action. The issue that the Olsens complain about is not new. During the course of the underlying litigation, before trial and before a judgment was issued, it was foreseeable that, if the United States' allegations regarding the solar tax scheme proved true, all of the claimed depreciation deductions and tax credits of Receivership Defendants' customers would not be allowed. Further, the CRO—issued in October 2018—made clear that the United States was entitled to priority for payment of the $14,207,517 collected by the Receiver and that customers were not entitled to payment until after all of a customer's outstanding tax obligations were satisfied. The alleged double taxation issue was just as apparent in October 2018 as it is today. The only thing that has changed is that the Olsens have since lost their tax litigation in the United States Tax Court and that the Receiver's has successfully collected amounts due to the United States under the CRO. The Motion is nothing more than an attempt to now modify the CRO that has been in place for nearly three years, and upon which the Receiver and the parties have been operating.

The Olsens should not be allowed to sit back for three years awaiting the results of the Tax Court case and the Receiver's collection efforts only to now seek to benefit from amounts

allocated to United States under the CRO. *See* *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1221 (9th Cir. 1995) (affirming denial of motion to intervene as untimely due to intervenors actions laying back during the course of the litigation only to seek the advantage of other parties actions at little cost to itself). Accordingly, the Court should deny the Motion as untimely under Fed. R. Civ. P. 24.

## CONCLUSION

For the foregoing reasons, the Court should deny the Motion.

DATED this 17th day of September, 2021.

**PARR BROWN GEE & LOVELESS**

*/s/ Michael S. Lehr*
Jonathan O. Hafen
Jeffery A. Balls
Michael S. Lehr
*Attorneys for Receiver*

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that service of the above **RESPONSE TO MOTION TO INTERVENE** was electronically filed with the Clerk of the Court through the CM/ECF system on September 17, 2021 which sent notice of the electronic filing to all counsel of record.

I also certify that, on the same date, I served the same documents by first-class mail upon:

Neldon Johnson
PO Box 95332
South Jordan, UT 84095

R. Gregory Shepard
10672 Winter Haven Court
South Jordan, Utah 84095

/s/ *Michael S. Lehr*