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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

R. WAYNE KLEIN, as Receiver, Plaintiff, v. JUSTIN D. HEIDEMAN LLC DBA HEIDEMAN & ASSOCIATES, a Utah limited liability company, Defendant.	**RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** **(Ancillary to Case No. 2:15-cv-00828)** **(General Order 19-003)** Civil No. 2:19-cv-00854-DN Judge David Nuffer

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and DUCivR 56-1, Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of RaPower-3, LLC ("RaPower"), International Automated Systems Inc. ("IAS"), LTB1 LLC ("LTB1"),

their subsidiaries and affiliates,[1] and the assets of Neldon Johnson and R. Gregory Shepard,[2] hereby submits, through counsel, the following Motion for Partial Summary Judgment and Memorandum in Support.

[1] Collectively, unless stated otherwise, RaPower, IAS, LTB1, and all subsidiaries and affiliated entities are referred to herein as "Receivership Entities." The subsidiaries and affiliated entities are: Solco I, LLC ("Solco"); XSun Energy, LLC ("XSun"); Cobblestone Centre, LC ("Cobblestone"); LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership; Solstice Enterprises, Inc.; Black Night Enterprises, Inc.; Starlite Holdings, Inc.; Shepard Energy; and Shepard Global, Inc.

[2] Collectively, RaPower, IAS, LTB1, Shepard, and Johnson are referred to herein as "Receivership Defendants."

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INTRODUCTION AND RELIEF SOUGHT

Between 2016 and 2017, RaPower paid Defendant Justin D. Heideman LLC dba Heideman & Associates ("Heideman") as much as $130,000 to represent several RaPower solar lens purchasers (the "Oregon Lens Purchasers") in Oregon Tax Court. It is undisputed that $28,721 of that amount was for legal services for the specific benefit of only the Oregon Lens Purchasers, rather than RaPower. In this Motion, the Receiver seeks the avoidance of RaPower's transfers to Heideman in that amount pursuant to the Utah Uniform Fraudulent Transactions Act ("UFTA").

Heideman defended the Oregon Lens Purchasers—all individuals with no affiliation with RaPower other than having purchased solar lenses—against the Oregon Department of Revenue's disallowance of certain deductions and tax credits the Oregon Lens Purchasers had claimed on their state tax returns related to the solar lenses. RaPower was not party to the Oregon proceedings and Heideman does not purport to have represented RaPower in the Oregon proceedings. Rather, there is no dispute that Heideman represented the individual taxpayers in their individual capacities—while RaPower, under investigation for promoting a fraudulent tax avoidance scheme later proven in this Court, paid the legal fees.

No contract or agreement entitled the Oregon Lens Purchasers to have RaPower fund the legal defense of their claimed deductions and tax credits. In fact, quite to the contrary, all relevant agreements between lens purchasers and RaPower make clear that purchasers are *not* to rely on RaPower for tax advice and will hold RaPower harmless in

the event any tax deductions or credits are disallowed (as they were in Oregon). Nevertheless, to prolong its tax avoidance scheme, RaPower dissipated its money by paying legal fees to Heideman for the benefit of the Oregon Lens Purchasers.

Under the UFTA, a transfer may be avoided if it is made with actual or constructive intent to defraud. Actual intent in this case is conclusively established by this Court's extensive Findings of Fact and Conclusions of Law in the underlying civil enforcement case against Receivership Defendants (the "Civil Enforcement Case"), in which it found that the Receivership Defendants had, for years, built and maintained a massive fraudulent tax shelter based on the sale of solar lenses. Because RaPower's payments to Heideman were made with RaPower's actual intent to defraud creditors (in this case, such creditors being the U.S. Treasury and the very lens purchasers RaPower was ostensibly "defending" in state tax proceedings), the Receiver is entitled to partial judgment on his fraudulent transfer claims. Based on the undisputed facts, Heideman did not provide reasonably equivalent to RaPower for at least $28,721 that RaPower paid Heideman for legal services provided to effectively unrelated third parties.

In this Motion, the Receiver therefore seeks an order (1) holding that all transfers RaPower made to Heideman for Heideman's representation of the Oregon Lens Purchasers were made with actual intent to defraud under the UFTA, and (2) avoiding

RaPower's transfer of $28,721 to Heideman for legal services that did not benefit RaPower.[3]

STATEMENT OF UNDISPUTED MATERIAL FACTS

Receivership Defendants Operated a Fraudulent Tax-Avoidance Scheme

1. Receivership Defendant Neldon Johnson ("Johnson") claimed to have invented a solar energy technology in which solar lenses are arranged and placed on towers in order to concentrate heat used for power generation.[4]

2. In an attempt to generate income from the purported technology, Johnson sold the solar lenses to hundreds of investors throughout the United States via a multi-level marketing scheme through his entity RaPower.[5]

3. IAS and RaPower entered into agreements with lens purchasers to build

[3] The Receiver expressly does not waive and reserves the right to seek avoidance of the remaining amounts transferred from RaPower to Heideman in connection with Heideman's representation of the Oregon Lens Purchasers. Any purported disputes of fact pertaining to such remaining amounts do not foreclose partial summary judgment in the Receiver's favor regarding the $28,721 at issue in this Motion. Further, the Receiver reserves his right to seek avoidance of the transfers under a theory of constructive fraud or unjust enrichment.

[4] *See* Findings of Fact and Conclusions of Law, Civil Enforcement Case, Dkt. No. 467 ("FFCL"), at 2, filed Oct.4, 2018. The FFCL is attached hereto as App'x of Evid. Exhibit A. This Court may rely upon the FFCL (and other orders from the Court in the Civil Enforcement Case) as admissible evidence in this proceeding because this proceeding arose directly from the Civil Enforcement Case. *See Klein v. Shepherd*, No. 2:19-CV-00695-DN-PK, 2021 WL 1424865, at *7 (D. Utah Apr. 15, 2021). The Court may also take judicial notice of such orders under Fed. R. Evid. 201. *Id.*

[5] FFCL at 6, 8–9.

solar towers and install the purchasers' lenses at a site determined by IAS or RaPower.[6]

4. When customers purchased lenses, the purchasers also signed an Operations and Maintenance Agreement with LTB1 in which LTB1 agreed to purportedly operate and maintain the purchased lenses to produce revenue.[7]

5. Under the agreement, LTB1 was to make quarterly payments to the lens purchasers, representing a portion of the revenues earned from the lenses' operation and power generation.[8]

6. All lenses purchased and leased under this arrangement were leased to LTB1.[9]

7. Lens purchasers never received physical possession of lenses and Receivership Defendants did not track which lenses belonged to which purchaser; thus, it was not possible for a purchaser to know which specific lens he or she purchased.[10]

8. A "bonus" program paid commissions or referral fees to individuals who committed others to purchase solar lenses.[11]

9. Johnson illustrated his technology and revenue generation as follows:[12]

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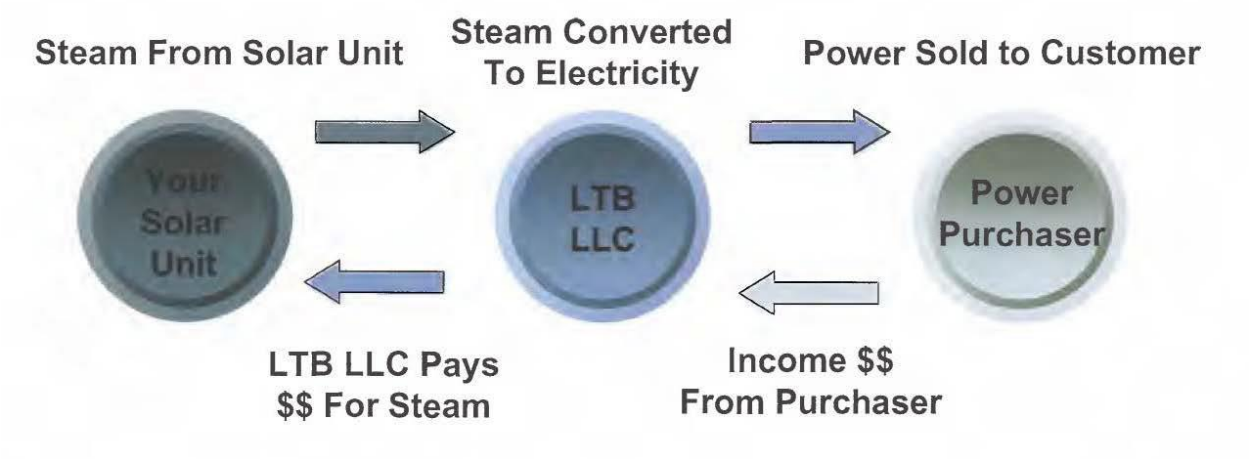
[6] *Id.* at 23–24, 26.
[7] *Id.* at 4, 27.
[8] *Id.* at 27.
[9] *Id.* at 64.
[10] *Id.*
[11] *Id.* at 6.
[12] *Id.* at 57.



10. The Receivership Entities retained possession of the lenses and controlled what would happen to them.[13]

11. Receivership Defendants emphasized to purchasers how little they would have to do to "lease out" their lenses and obtain substantial tax benefits: "[s]ince LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."[14]

12. Receivership Defendants knew that they sold solar lenses to individuals who generally worked full-time jobs and pursued careers unrelated to solar energy. Receivership Defendants knew or should have known that lens purchasers had no expertise in the solar energy industry.[15]

13. Receivership Defendants sold lenses principally by advertising substantial income and tax benefits in exchange for a relatively minimal down payment on the solar

[13] *Id.* at 64.
[14] *Id.*
[15] *Id.* at 67.

lenses.[16] RaPower's policies, procedures, and lens purchase contracts make clear that all lens purchasers would indemnify and hold RaPower harmless for any tax-related losses.[17]

The Civil Enforcement Case

14. On November 23, 2015, the United States filed a civil enforcement action against Receivership Defendants (the "Civil Enforcement Case") alleging that they were operating a fraudulent tax avoidance scheme.[18]

15. This Court found in the Civil Enforcement Case that "[f]or more than ten years, the Receivership Defendants promoted an abusive tax scheme centered on purported solar energy technology featuring 'solar lenses' to customers across the United States. But the solar lenses were only the cover story for what the Receivership Defendants were really selling: unlawful tax deductions and credits."[19]

16. Receivership Defendants told lens purchasers that they could "zero out" their federal income tax liability by buying multiple solar lenses and claiming both a

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[16] *Id.* at 38.

[17] *See* December 2019 Emails Between S. Fowlks and J. Heideman, App'x of Evid. Exhibit B; December 2019 Email from N. Peat to J. Heideman, App'x of Evid. Exhibit C; Heideman Dep., App'x of Evid. Exhibit D, at 101:25–102:17 (authenticating).

[18] *See generally United States v. RaPower-3, LLC, et al.*, Case No. 2:15-cv-00828, Compl., Nov. 23, 2015 (D. Utah); FFCL at 85 (describing legal issue as whether Receivership Defendants "ma[de] … a statement connecting the allowability of a tax benefit with participating in [a] plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter" (citing 26 U.S.C. § 6700(a)(2)(A))).

[19] *See* Memorandum Decision and Order on Receiver's Motion to Include Affiliates and Subsidiaries in Receivership, Civil Enforcement Case, Dkt. No. 636 ("Affiliates Order"), at 4, filed May 3, 2019 (quoting FFCL at 1). The Affiliates Order is attached hereto as App'x of Evid. Exhibit E.

depreciation deduction and solar energy tax credit for the purchased lenses.[20]

17. As this Court found, however, the "purported solar energy technology is not now, has never been, and never will be a commercial grade solar energy system that converts sunlight into electrical power or other useful energy" and "[t]he solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate marketable electricity."[21]

18. "Hundreds, if not thousands of customer 'lenses'" were not even removed from the shipping pallets, and thus, the purchased lenses did not satisfy the criteria for either the depreciation deduction or solar energy tax credit.[22]

19. Between 45,205 and 49,415 solar lenses were sold to purchasers.[23] Receivership Defendants' records and testimony at trial showed that their gross receipts for lens sales were at least $32,796,196 and possibly significantly more.[24]

20. Based on these findings, the Court, among other things, enjoined Receivership Defendants from promoting their abusive tax avoidance scheme, ordered them to disgorge their gross receipts, and ordered their assets into receivership.[25]

21. The Court held that the "whole purpose of . . . the Receivership Entities . . .

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[20] FFCL at 35.
[21] *Id.* at 49.
[22] *Id.* at 55–56.
[23] *Id.* at 14.
[24] *Id.* at 15.
[25] Affiliates Order at 4, (citing Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, Civil Enforcement Case, Dkt. No. 444 ("Freeze Order"), filed August 22, 2018. The Freeze Order is attached hereto as App'x of Evid. Exhibit F).

was to perpetuate a fraud to enable funding for Neldon Johnson. The same is true for other entities Johnson created, controls, and owns . . . . Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an attempt to avoid creditors."[26]

22. "Here, the whole purpose of RaPower-3 was to perpetrate a fraud to enable funding of the unsubstantiated, irrational dream of Neldon Johnson. The same is true for the other entities Johnson established and used including IAS, SOLCO I, XSun Energy, Cobblestone, and the LTB entities."[27]

23. The Court further held that Receivership Defendants "knew that their statements made to RaPower-3 customers were false or fraudulent" and that Receivership Defendants "had reason to know, and did in fact know that RaPower-3 customers were not entitled to the tax benefits they promoted based on their serial solicitations and rejections from multiple attorneys, and the misrepresentations to RaPower-3 customers regarding who they met with and the attorneys' work product."[28]

24. "Defendants have no legitimate business. Defendants' solar energy scheme is an abusive tax scheme and not a legitimate business."[29]

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[26] *Id.* (citing FFCL and Receiver's Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate, Civil Enforcement Case, Dkt. No. 581, filed Feb. 25, 2019).

[27] FFCL at 128 (footnote omitted).

[28] *Id.* at 81.

[29] Freeze Order at 18.

RaPower Transferred at Least $28,721 to Heideman for Legal Services to Third Parties

25. In 2016, RaPower hired Heideman as outside counsel to, among other matters,[30] represent RaPower "in the state of Oregon regarding administrative actions brought against [RaPower]."[31] In the Oregon proceedings, however, Heideman did not represent RaPower; Heideman represented the Oregon Lens Purchasers, who had been audited by the Oregon Tax Commission and received adverse findings related to claimed depreciation deductions and solar tax credits.[32]

26. RaPower was never a party in the Oregon tax proceedings.[33]

27. In its discovery responses, Heideman contends that it received a total of $109,632.50 from RaPower for legal services "associated with the Oregon cases."[34]

28. Based on a "line item categorization" of those funds in a spreadsheet Justin Heideman "personally prepared,"[35] Justin Heideman explained that Heideman's legal services concerning the Oregon Tax Court litigation fit into several categories, including some "for the specific purpose of benefitting the underlying [Civil Enforcement Case],"

[30] For a time, Heideman was counsel to Receivership Defendants in the Civil Enforcement Case. The Receiver is not seeking a return of monies RaPower paid to Heideman for work on the Civil Enforcement Case.

[31] RaPower Engagement Letter, App'x of Evid. Exhibit G, at 2; Heideman Dep., Ex. D at 17:12–18:23 (authenticating).

[32] *See* Heideman Dep., Ex. D at 15:16–24, 19:5–20:21.

[33] Heideman Dep., Ex. D at 66:5–15.

[34] Heideman Discovery Responses, App'x of Evid. Exhibit H, at 7–8 [hereinafter "Discovery Responses"].

[35] Heideman Dep., Ex. D at 106:9–12; Invoice Spreadsheet, App'x of Evid. Exhibit I.

"for the specific purpose of avoiding a preclusive or persuasive negative impact on the underlying [Civil Enforcement Case]," to "preserve RaPower Defendants' legal interests and positions in the [Civil Enforcement Case]," and lastly, "to address specific issues in the Oregon litigation."[36]

29. As to the final category, for services rendered "to address specific issues in the Oregon litigation," Heideman acknowledges receiving $28,721.[37] Thus, it is undisputed for purposes of this Motion that RaPower paid Heideman at least $28,721 to represent the Oregon Lens Purchasers individually in filing and pursuing appeals before the Oregon Tax Court that in no way benefited RaPower.[38]

[36] Discovery Responses at 7–8.
[37] *Id.* at 8.
[38] Heideman Dep., Ex. D at 20:9–21:8.

ARGUMENT

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[39] There is no genuine dispute of material fact as to the elements of the Receiver's causes of action for fraudulent transfer, and the Court should therefore enter summary judgment in his favor regarding RaPower's actual intent to defraud and its transfer of $28,721 to Heideman for legal services that undisputedly did not benefit RaPower.

I. THE RECEIVER IS ENTITLED TO PARTIAL JUDGMENT AS A MATTER OF LAW ON HIS FRAUDULENT TRANSFER CLAIMS.

Pursuant to the UFTA,[40] a transfer is fraudulent if the debtor made the transfer with actual intent to defraud a creditor,[41] and if the transfer was not received by the transferee in good faith and "for a reasonably equivalent value."[42] A transfer that is fraudulent under the UFTA may be avoided.[43] Here, the transfers at issue are voidable based on indisputable evidence that RaPower had actual intent to defraud creditors, and because RaPower did not receive reasonably equivalent value in exchange for certain transfers.

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[39] Fed. R. Civ. P. 56(a).
[40] The UFTA applies exclusively in this case. The UFTA was revised in May 2017 and all payments at issue in this Motion occurred before that date.
[41] *See* Utah Code Ann. § 25-6-5(1)(a) (2016).
[42] *See id.* § 25-6-9.
[43] *Id.* § 25-6-8(1)(a).

A. RaPower Made the Transfers with Actual Intent to Defraud Because it Operated as a Fraudulent Tax Avoidance Scheme.

To determine if a transfer is made with actual intent to hinder, delay, or defraud, courts look at a variety of factors, including the badges of fraud set forth in Section 25-6-2(2) of the UFTA. Courts also examine the knowledge of the transferors and the purpose of the transfer. In *In re Independent Clearing House Co.*, which dealt with an entity operating as a Ponzi scheme, this Court held that the debtor knew "from the very nature of his activities" that creditors would lose money and that the business was not legitimate.[44] Based on that knowledge, the Court held that the only inference possible was that the transfers were made with actual intent to hinder, delay, or defraud creditors. Thus, it is now the accepted rule in this Circuit that "[actual] intent to defraud is not debatable" and is therefore inferred for purposes of the UFTA where the business is operated as a Ponzi scheme.[45]

Likewise, here, the only possible inference is that RaPower made payments to Heideman related to Heideman's work on behalf of the Oregon Lens Purchasers with actual intent to hinder, delay, or defraud creditors, including the U.S. Treasury and

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[44] 77 B.R. 843, 860 (D. Utah 1987).

[45] *Id.* at 861; *see also S.E.C. v. Madison Real Estate Group, L.L.C.*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) ("Under the UFTA, a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme."); *see also Klein v. Scogin*, Case No. 2:12-cv-121-DP, 2012 WL 5503540, at *1 (D. Utah Oct. 10, 2012) ("[U]nder [the UFTA], a debtor's actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme." (quotation omitted)) (unpublished).

RaPower's customers. Each transfer made to Heideman for his representation of Oregon Lens Purchasers was to protect and shield the Oregon Lens Purchasers from adverse tax findings, and therefore to perpetuate RaPower's ability to continue selling its fraudulent and abusive tax avoidance scheme. And though the Receivership Defendants were not strictly operating as a Ponzi scheme, as in the foregoing cited cases, RaPower's scheme implicates the same policy reasons underlying the inference of actual fraudulent intent in Ponzi scheme cases. Indeed, based on those same policy considerations, courts have extended the inference of actual intent to defraud to Ponzi-*like* schemes, including abusive tax shelters.[46]

This Court found in the Civil Enforcement Case that Receivership Defendants operated a fraudulent tax avoidance scheme based on the sale of "solar lenses" that were never legitimately placed into service.[47] As part of that scheme, the Court held that Receivership Defendants "knew that their statements made to RaPower-3 customers were false or fraudulent" and that Receivership Defendants "had reason to know, and did in fact know that RaPower-3 customers were not entitled to the tax benefits they promoted based on their serial solicitations and rejections from multiple attorneys, and the misrepresentations to RaPower-3 customers regarding who they met with and the

[46] *See, e.g.*, *In re Nat'l Audit Defense Network*, 367 B.R. 207, 214–15, 222 (finding actual intent to defraud because debtor operated abusive tax scheme by selling "products they knew to be … worthless" and providing illegitimate tax avoidance advice).

[47] *See generally* FFCL.

attorneys' work product."[48] The Court further found that the "whole purpose of . . . the Receivership Entities . . . was to perpetuate a fraud to enable funding for Neldon Johnson. The same is true for other entities Johnson created, controls, and owns . . . . Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an attempt to avoid creditors."[49] The Court specifically found that RaPower's fraudulent conduct harmed creditors of the Receivership Entities, including the U.S. Treasury and customers like the Oregon Lens Purchasers.[50]

Because the only possible benefit that RaPower might have obtained from Heideman's work on behalf of the Oregon Lens Purchasers was to perpetuate RaPower's fraud, the transfers to Heideman were necessarily made with actual intent to hinder, delay, and defraud creditors. This Court has found that Receivership Defendants had knowledge that their solar lens and tax avoidance scheme did not work and would only serve to defraud customers and the U.S. Treasury; thus, Receivership Defendants knew that "their statements were false or fraudulent pertaining to a material matter, namely the tax benefits of depreciation and solar energy tax credits."[51] And because "[k]nowledge to a substantial certainty constitutes intent in the eyes of the law," a transferor's "knowledge that [creditors] will not be paid is sufficient to establish his actual intent to defraud

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[48] *See id.* at 81.
[49] Asset Freeze Order at 16.
[50] *Klein v. Shepherd*, *supra* n.4 at 17–19.
[51] *Id.*

them."[52] Thus, as this Court has already held with respect to other transferees in related RaPower fraudulent transfer cases, "'[t]he question of intent to defraud is not debatable' where the Receivership Entities were operated as a fraudulent scheme."[53]

In addition to the inference of actual intent that should be drawn based on the underlying scheme, several "badges" of fraud are present here that lead to the same result, including that the Internal Revenue Service began a criminal investigation of Receivership Defendants in June of 2012 and the Department of Justice had initiated the Civil Enforcement Action in 2015, all before the transfers to Heideman;[54] Receivership Defendants have concealed, attempted to destroy, and even falsified records;[55] and RaPower did not receive reasonably equivalent value for what it paid Heideman (*see infra*). Based on these badges of fraud, and the inference the Court should draw based on the fraudulent nature of Receivership Defendants' tax scheme, RaPower had actual intent to hinder, delay, or defraud creditors when it made payments to Heideman for its representation of the Oregon Lens Purchasers.[56]

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[52] *In re Independent Clearing House Co.*, 77 B.R. at 860 (citations omitted).

[53] *Klein v. Shepherd*, supra n.4 at 20; *Klein v. Jones*, 2021 WL 1424866, at *9 to *10 (D. Utah April 15, 2021) (quoting *In re Independent Clearing House*, 77 B.R. at 861).

[54] *See* Asset Freeze Order at 16.

[55] *See* Civil Enforcement Case, Dkt. Nos. 1007, 947; Affiliates Order at 5.

[56] *See Jones*, 2021 WL 1424866, at *9 to *10 (making same finding as to transfers to Paul Jones, who was paid commissions for lens sales).

1. Heideman Did Not Take the Transfers for Reasonably Equivalent Value.

To the extent Heideman raises the good faith and reasonably equivalent value defense, Heideman will be unable to shoulder its burden under the undisputed facts.[57] Those facts confirm that Heideman's legal services on behalf of the Oregon Lens Purchasers did not provide any Receivership Defendant with any value, let alone value reasonably equivalent to the $28,721 at issue in this Motion. "[I]n determining whether reasonably equivalent value was given, the focus is on whether the *[transferor] received* reasonably equivalent value from the transfer."[58] And "[t]he primary consideration" in that analysis "is the degree to which the transferor's net worth is preserved."[59] If the transfer serves only to "diminish" the transferor's net worth, then there is no "cognizable benefit."[60] Thus, for example, "a payment to satisfy a third party's debt does not furnish reasonably-equivalent value to the debtor" because it merely diminishes the transferor's

[57] Utah Code § 25-6-9(1) (2016). The Receiver does not dispute for purposes of this Motion that Heideman took the transfers in good faith.
[58] *Klein v. Roe*, 2021 WL 1516051, at *10 (D. Utah Apr. 16, 2021) (quoting *Miller v. Wulf*, 84 F. Supp. 3d 1266, 1276 (D. Utah 2015) (emphasis in original)).
[59] *Klein v. Cornelius*, 786 F.3d 1310, 1321 (10th Cir. 2015) (quoting *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007)).
[60] *Id.* (affirming finding on summary judgment that payment to law firm for defense of third party's criminal matter did not benefit transferor and therefore did not result in "reasonably equivalent value" to transferor); *see also Klein v. King & King & Jones*, 571 Fed. Appx. 702, 704–05 (10th Cir. 2014) (affirming summary judgment on UFTA claim against law firm on same grounds).

net worth.[61] Below, the Receiver demonstrates (a) that Heideman's services benefitted the Oregon Lens Purchasers alone; (b) that Heideman's services did not provide a reasonably equivalent indirect benefit to RaPower; and (c) Heideman's efforts to prolong and legitimize RaPower's fraud cannot be "value" as a matter of law.

a. RaPower Did Not Benefit From Heideman's Representation of Third Parties.

RaPower's payments to Heideman of $28,721 for legal services provided to the Oregon Lens Purchasers were not made in exchange for reasonably equivalent value. Though Heideman was retained by RaPower to represent RaPower in unspecified Oregon administrative proceedings, RaPower was not party to the Oregon tax proceedings.[62] As a consequence, Heideman never represented RaPower in the Oregon Tax Court and instead represented only the Oregon Lens Purchasers.[63] Thus, RaPower faced no risk of judgment in the Oregon cases, its assets were not threatened by such actions, and its net worth would only be diminished by paying Heideman for Heideman's legal representation of the lens purchasers. Indeed, in contracts with lens purchasers, RaPower expressly absolved itself of any liability related to any purported tax advice to purchasers, and required that purchasers hold RaPower harmless for any tax liability arising out of their

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[61] *See King & King & Jones*, 571 F. App'x at 704 (quoting *S.E.C. v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301–02 (5th Cir.2007)) (holding that transfers to law firm that were the "sole" benefit of a third party did not satisfy the reasonably equivalent value defense).

[62] Heideman Dep., Ex. D at 66:5–15.

[63] *See* RaPower Engagement Letter, Ex. G; Heideman Dep., Ex. D at 15:16–24, 19:5–20:21.

lens purchases.[64] As a result, there could have been no "cognizable benefit" to RaPower for the payments.

Heideman in fact concedes the $28,721 was for issues "specific" to the Oregon litigation, in which RaPower was not a party and faced no liability.[65] In its discovery responses, Heideman asserts that it received a total of $109,632.50 from RaPower for legal services "associated with the Oregon cases."[66] Based on a "line item categorization" of those services, Justin Heideman explained that the firm's legal services related to the Oregon Tax Court litigation fit into several categories, including "for the specific purpose of benefitting the underlying [Civil Enforcement Case]," "for the specific purpose of avoiding a preclusive or persuasive negative impact on the underlying [Civil Enforcement Case]," and to "preserve RaPower Defendants' legal interests and positions in the [Civil Enforcement Case]."[67] A final category is for legal services "to address specific issues in the Oregon litigation," for which RaPower paid Heideman $28,721.[68]

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[64] *See* December 2019 Emails Between S. Fowlks and J. Heideman, Ex. B; December 2019 Email from N. Peat to J. Heideman, Ex. C.

[65] Discovery Responses, Ex. H at 6.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 7–8; *see also* Invoice Spreadsheet, Ex. I (highlighting in blue Heideman's services "to address specific issues in the Oregon litigation"). Justin Heideman confirmed in his deposition that he "personally prepared" the categorized document. Heideman Dep., Ex. D at 106:9–12. Though the Receiver does not contest Heideman's categories for purposes of this Motion, the Receiver will demonstrate at trial that *none* of these other categories of legal services provided value RaPower, let alone reasonably equivalent value. Rather, *all* of RaPower's payments to Heideman at issue in this case were for

Thus, Heideman admits such legal services in the amount of $28,721 benefitted the Oregon Lens Purchasers and *only* the Oregon Lens Purchasers. A review of those services confirms that they pertain exclusively to the Oregon Tax Court and provided no benefit to RaPower. For example, Heideman includes in this category "[d]raft[ing] discovery responses for Orth and Kevin [Oregon Lens Purchasers]";[69] "prepar[ing] Oregon discovery";[70] drafting the Oregon "Complaint and Authorization";[71]and "review[ing] Orth and Gregg trial transcripts."[72] Heideman cannot meet its burden of demonstrating "reasonably equivalent value" for such services under Utah Code § 25-6-9(1).

Both this Court and the Tenth Circuit have consistently ruled that legal services performed for a third party's benefit do not provide a transferor with reasonably equivalent value as a matter of law. In *Klein v. King & King & Jones*, the Tenth Circuit affirmed this Court's holding that a Georgia law firm's legal services on behalf of a third party, for which the receivership defendant paid, did not provide the receivership defendant with reasonably equivalent value.[73] Similarly, in *Klein v. Cornelius*, the Tenth

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Heideman's representation of the Oregon Lens Purchasers in the Oregon Tax Court and did not provide benefit to RaPower, who was not party to those proceedings.

[69] Invoice Spreadsheet, Ex. I at 6.

[70] *Id.* at 7.

[71] *Id.* at 11.

[72] *Id.* at 20.

[73] 571 F. App'x at 704–05 ("Because the record fails to show that the legal services KKJ *provided* benefitted anyone but Mr. Baca, the district court further concluded that the 'reasonably equivalent value' requirement was not met. We agree.").

Circuit affirmed summary judgment in the Receiver's favor, holding that a law firm's legal services on behalf of a friend of the Ponzi scheme's founder only "served to diminish [the receivership entity's] net worth, which was already negative."[74] Under this controlling law, and the undisputed facts in this case, the result here should be the same. Heideman represented the Oregon Lens Purchasers in Oregon Tax Court, and that representation was funded by RaPower. RaPower was not party to those proceedings and obtained no benefit from Heideman's legal services; accordingly, Heideman cannot demonstrate that RaPower received "reasonably equivalent value" as a matter of law.

b. RaPower Did Not Receive Indirect Benefits for Heideman's Services.

To the extent Heideman argues its services for the $28,721 somehow indirectly benefited the Receivership Defendants, that argument also fails under the undisputed facts. For the above reasons, the Receiver has met his burden of demonstrating that Heideman received the funds from RaPower for Heideman's representation of the lens purchasers—not RaPower.[75] The burden is on Heideman to "identify and to quantify the benefit which replaced [RaPower's] transfer of assets."[76] And importantly, as the plain

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[74] *Cornelius*, 786 F.3d at 1321 ("[Receivership entity] existed for the purpose of generating profits for its investors, and defending Andres's friend in a criminal matter had nothing to do with that purpose.").

[75] Heideman Dep., Ex. D at 60:23–61:4 ("The payment was issued and arranged by RaPower because they were the entity that hired us.").

[76] *In re Burbank Generators*, 48 B.R. 204, 207 (C.D. Cal. 1985) (avoiding payment of legal fees under Bankruptcy Code paid for benefit of debtor's employee).

language of the statute demands, such benefit must be "reasonably equivalent" to the amount transferred, even where the benefit is "indirect."[77]

Heideman's concession that the $28,721 was for services "to address specific issues in the Oregon litigation" is dispositive on this point. Indeed, Heideman has already "identif[ied] and quantif[ied] the benefit which replaced [RaPower's] transfer of assets,"[78] and concluded that the $28,721 at issue in this Motion was received for issues "specific" to the Oregon litigation. In other words, unlike the other categories in which Heideman contends some benefit redounded to RaPower for its payments, Heideman admits the $28,721 provided benefit *only* to the Oregon Lens Purchasers.

Moreover, here, as in *Burbank Generators*, where the court rejected a "tenuous" theory that legal representation of the debtor's employee may have preserved the debtor's stock,[79] any connections between the Receivership Defendants and the Oregon Lens Purchasers are too "tenuous and distant" for Heideman's legal services to have conferred any benefit on the Receivership Defendants.[80] RaPower had no contractual or other legal obligation to defend customers in Oregon Tax Court, and in fact the opposite is true,

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[77] *See id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*

given the indemnity and hold-harmless provisions in RaPower's policies and procedures related to any tax-related losses.[81]

Further, the legal outcome of the claims against the lens purchasers would have no preclusive (or other) effect on any action in which the Receivership Defendants were involved, other than to perpetuate the fraud for which Receivership Defendants were later found liable. The Oregon Tax Court proceedings concerned the propriety of deductions and credits of the Oregon Lens Purchasers' state tax returns, under Oregon law.[82] Even if federal law can be said to have been at issue in the Oregon Tax Court given Oregon's adoption of federal tax law, which it cannot, the issues in each proceeding were fundamentally different. Indeed, in a separate *federal* tax proceeding against other RaPower lens purchasers, the United States Tax Court expressly acknowledged that the propriety of lens purchasers' deductions and credits is a wholly separate issue from RaPower's liability in the Civil Enforcement Case.[83] In addition to the two proceedings deciding fundamentally different issues, Heideman concedes that the Oregon Tax Court

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[81] *See* December 2019 Emails Between S. Fowlks and J. Heideman, Ex. B; December 2019 Email from N. Peat to J. Heideman, Ex. C; Heideman Dep., Ex. D at 101:25–102:17.

[82] Heideman Dep., Ex. D at 41:8–42:7 (conceding that while Oregon "adopted federal [tax] law," proceedings concerned Oregon deductions).

[83] *See Olsen v. CIR*, T.C. Memo. 2021-41, Docket Nos. 26469-14, 21247-16, at 22 n.4 (2021), attached hereto as App'x of Evid. Exhibit J ("[The Commissioner of Internal Revenue] does not contend that [the lens purchasers] are allowed no deductions or credits because of any abusive behavior. [The Commissioner's] position at trial and on brief is that [the lens purchasers] are allowed no deductions or credits because their lenses were not used in a trade or business, held for the production of income, or placed in service.").

cannot bind the IRS,[84] and that the Oregon Lens Purchasers—not RaPower, who was "never" a party in the Oregon proceedings—were Heideman's clients in the Oregon Tax Court.[85]

In contrast, in the Civil Enforcement Case between the United States and Receivership Defendants—that did *not* involve lens purchasers—the United States claimed (and proved) that Receivership Defendants made fraudulent misrepresentations in the course of providing tax avoidance advice under federal law.[86] Neither the issues, parties, nor burdens of proof are sufficiently similar (let alone "identical," as required) in the respective proceedings such that the Oregon Tax Court findings would have any beneficial impact on Receivership Defendants or their net worth.

c. Prolonging RaPower's Fraud Is Not "Value."

In addition to the foregoing reasons why RaPower did not receive reasonably equivalent value for its payments to Heideman, as this Court has repeatedly held, monies received for merely "prolonging the fraud" of a fraudulent enterprise cannot be found to be in exchange for reasonably equivalent value.[87] Indeed, this Court made specific

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[84] Heideman Dep., Ex. D at 41:8–42:7.

[85] *Id.* at 44:12–24, 66:5–10.

[86] *See* FFCL at 85 (describing legal issue as whether Receivership Defendants "ma[de] … a statement connecting the allowability of a tax benefit with participating in [a] plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter" (citing 26 U.S.C. § 6700(a)(2)(A))).

[87] *See Wing v. Holder*, 2010 WL 5021087, at *2 (D. Utah Dec. 3, 2010) ("It takes cheek to contend that in exchange for the payments he received the [fraudulent] scheme benefited from his efforts to extend the fraud by securing new investments."); *Jones*,

findings that RaPower's payment for legal representation of lens purchasers, like those in Oregon, supported its conclusion of law that "[Receivership] Defendants organized, or assisted in organizing, the solar energy scheme," which was an essential element of the United States' claim.[88] Thus, any assertion by Heideman that its services to Oregon Lens Purchasers somehow insulated or benefitted Receivership Defendants' business model is merely an admission that Heideman was paid to effect the very fraud for which Receivership Defendants were found liable by this Court. As a result, Heideman cannot show as a matter of law that its representation of the Oregon Lens Purchasers constituted reasonably equivalent value for the transfers.

CONCLUSION

For the foregoing reasons, the Receiver requests that partial summary judgment be entered (1) finding that RaPower made the transfers at issue to Heideman with actual intent to defraud, and (2) avoiding RaPower's fraudulent transfers to Heideman in the amount of $28,721 for services that have been conceded as "specific" to Heideman's representation of the Oregon Lens Purchasers.

2021 WL 1424866, at *11 ("Commission payments paid to parties that promote a fraudulent scheme constitute fraudulent transfers and the recipients of the commission payments do not give reasonably equivalent value.").

[88] *See* FFCL at 86 (finding in support of this element of a Section 6700 claim that "[Neldon] Johnson is paying for customers' representation in Tax Court").

DATED this 27th day of September, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** to be served on the below parties via the method indicated on September 27, 2021.

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