JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Ste. 1800
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
CHRISTOPHER R. MORAN, *pro hac vice*
NY Bar No. 5033832, christopher.r.moran@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN **UNITED STATES' MOTION TO FREEZE THE ASSETS OF DEFENDANTS NELDON JOHNSON, RAPOWER-3, LLC, AND INTERNATIONAL AUTOMATED SYSTEMS, INC. AND APPOINT A RECEIVER** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Plaintiff, the United States, seeks an order freezing the assets of defendants Neldon Johnson, RaPower-3, LLC, ("RaPower-3"), and International Automated Systems, Inc. ("IAS")

to preserve the *status quo*, and to ensure that sufficient funds are available to satisfy any judgment the Court might enter against these Defendants with respect to our disgorgement claim.

I. Background

A. The claims and defenses in this case.

The United States seeks to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[1] As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy.[2] The technology underlying the solar energy scheme, purportedly invented by Neldon Johnson, uses "solar lenses" on "solar towers."[3] This purported technology is, however, only the starting point of Defendants' solar energy scheme.

Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC. But LTB is a company that exists only on paper; it has never done anything.[4] Nonetheless, Defendants tell customers that LTB will operate and maintain the customer's lens for them, as part of a system that will generate electricity. Defendants tell customers that LTB will sell electricity to a third-party power purchaser, and then pay customers "rental income" for use of their lenses.

---

[1] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

[2] ECF Doc. No. 2 ¶ 16.

[3] ECF Doc. No. 2 ¶ 17.

[4] LTB has never done anything; it has never had a bank account, any employees, or any revenue. Pl. Ex. 673, Deposition of LTB1, LLC, July 1, 2017, 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; 69:6-74:21, 90:19-91:8. LTB and LTB 1 are indistinguishable. LTB1 Dep. 11:9-15.

Defendants assure their customers that, by purchasing lenses, customers may claim a depreciation deduction and a solar energy tax credit. The underpinnings of Defendants' solar energy scheme are their statements assuring their customers that:

- customers who buy and then purportedly lease the lenses to LTB are in a "trade or business" and have bought the lenses for the purpose of making a profit;[5]
- by virtue of their "trade or business," customers may deduct "business" expenses, consisting mostly of depreciation[6] on the lenses, from their ordinary income like wages from their full-time jobs[7]; and
- customers may claim a solar energy tax credit to further reduce their tax liability.[8]

We allege that Defendants' statements are false or fraudulent as to material matters under the internal revenue laws.[9] Defendants knew or had reason to know that these statements were false or fraudulent when they made the statements while promoting the solar energy scheme.[10]

We also allege that, to increase the tax benefits they promote to their customers, Defendants falsely inflate the value of the lenses to more than 200 percent of the correct value.[11] When Defendants tell customers this falsely inflated purchase price, Defendants make a gross valuation overstatement.[12]

---

[5] *E.g.*, Pl. Ex. 1 at 2-3.

[6] 26 U.S.C. § 162; Pl. Ex. 25 at 1-2.

[7] 26 U.S.C. § 167; Pl. Ex. 24; Pl. Ex. 40 at 12, Lunn_F&L-00037; Pl. Ex. 214; Pl. Ex. 216; Pl. Ex. 492; Pl. Ex. 674.

[8] 26 U.S.C. § 48; Pl. Ex. 25 at 2.

[9] 26 U.S.C. § 6700(a)(2).

[10] 26 U.S.C. § 6700(a)(2).

[11] § 6700(a)(2)(B), (b)(1); *See* Pl. Ex. 520, PSK000002, demonstrating that International Automated Systems Inc. purchases each for $52.18. Defendants sell the lenses for $3,500 each.

[12] § 6700(a)(2)(B).

Defendants deny all allegations. They also claim that they relied upon advice of counsel.[13]

The United States will offer evidence showing that Defendants' statements about their solar lenses and the purported tax benefits, were false or fraudulent as to material matters and were gross valuation overstatements. To establish that Defendants knew, or had reason to know that their statements were false or fraudulent, we will offer (among other evidence) testimony and documents from attorneys and accountants who advised Defendants at various times while Defendants were promoting the scheme. We will also offer testimony from Defendants themselves, and an expert witness on solar energy technology. As the factfinder,[14] the Court will evaluate all of the relevant evidence, make credibility determinations, and apply the law to decide:

(1) what statements Defendants made or furnished while promoting the solar energy scheme, whether such statements were false or fraudulent as to material matters, and whether Defendants knew or had reason to know such statements were false or fraudulent;[15]

(2) whether Defendants made or furnished gross valuation overstatements as to a material matter;[16] and

(3) if Defendants made either or both such statements the extent of the injunctive and equitable relief that is appropriate.[17]

---

[13] ECF Doc. No. 22 & ECF Doc. No. 23, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Defenses.

[14] The Court struck Defendants' jury demand. See ECF Doc. No. 43.

[15] 26 U.S.C. § 6700 (a)(2)(A).

[16] 26 U.S.C. § 6700(a)(2)(B).

II. Argument[18]

In this case, the United States is seeking disgorgement of defendants' ill-gotten gains from their promotion of the abusive solar energy scheme.[19] The United States requests this Court, under the authority granted to it under 26 U.S.C. § 7402, freeze the assets of Defendants Neldon Johnson, RaPower-3, and IAS to preserve the *status quo*, and appoint a receiver to take custody of these defendants' assets to ensure that Defendants will have the funds to pay any disgorgement this Court may award.

A. This Court Should Freeze the Assets of Defendants Neldon Johnson, RaPower-3, and IAS.

Section § 7402(a) grants district courts the jurisdiction to issue injunctions and other orders and processes, including orders appointing receivers, as may be *necessary or appropriate* for the enforcement of the internal revenue laws.[20] The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws.[21] Courts have

(…continued)

[17] *See* 26 U.S.C. §§ 6700, 7408(b)(1) & (2).

[18] The United States requests that the Court consider this motion and the relief requested herein in conjunction with the United States' motion for partial summary judgment and memorandum in support, ECF Doc. No. 251.

[19] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

[20] (emphasis added). 26 U.S.C. § 7402(a) states: The district courts of the United States, at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

[21] *See Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957) ("It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws."); *United States v. Kaun*, 633 F. Supp. 406, 409 (E.D. Wisc. 1986) ("By its very terms, this statutory provision authorizes the federal district courts to fashion appropriate, remedial relief

(continued...)

exercised this broad authority under § 7402(a) in a variety of contexts, including the following: (1) awarding disgorgement of ill-gotten gains to the United States and against tax return preparer engaged in fraudulent return preparation; [22] (2) enjoining an individual who had filed a common-law lien against the property of an IRS employee assigned to collect his delinquent taxes, from preparing, publishing, or filing any similar document, and enjoining the county from accepting any such documents from him;[23] (3) enjoining individuals from disseminating false information regarding the taxability of wages and salaries;[24] (4) requiring an individual to withhold and pay over federal employment and unemployment taxes and to file all required federal returns;[25] (5) requiring defendants engaged in schemes that violate the internal revenue laws to notify customers of an injunction, provide a customer list, and/or post an injunction on the defendants' websites;[26] (6) permanently enjoin operators from operating any business related to tax return preparation or being involved with in any way, any work or business relating to preparation of

(…continued)

designed to ensure compliance with both the spirit and the letter of the Internal Revenue laws – all without enumerating the many, particular methods by which these laws may be violated or their intent thwarted."), *aff'd on other grounds*, 827 F.2d 1144 (7th Cir. 1987); *see also United States v. ITS Financial, LLC*, 592 Fed. Appx. 387, 397 n.6 (6th Cir. 2014).

[22] *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla., March 6, 2017).

[23] *United States v. Ekblad*, 732 F.2d 562, 563 (7th Cir. 1984).

[24] *United States v. May*, 555 F. Supp. 1008, 1009-11 (E.D. Mich. 1982)

[25] *United States v. Thompson*, 395 F. Supp. 2d 941, 942, 945-46 (E.D. Cal. 2005)

[26] *United States v. Jones*, 2011 WL 2680742, at *8 (D. Idaho 2011); *United States v. Kotmair*, 2006 WL 4846388 (D. Md. 2006); *United States v. Hill*, 2005 WL 3536118 (D. Ariz. 2005).

tax returns;[27] and (7) to appoint receivers to assist in collection of federal tax liabilities or otherwise ensure compliance with the internal revenue laws.[28]

The Supreme Court approved use of § 7402(a) to freeze a defendant's assets in *United States v. First National City Bank*.[29] In *First National City Bank*, the Supreme Court held that § 7402(a) authorized a district court to temporarily enjoin a bank from transferring any property or rights to property for a foreign corporation while the Government sought to foreclose a tax lien against the foreign corporation.[30] The Court held that the temporary injunction freezing assets was eminently appropriate to prevent further dissipation of assets and preserve the *status quo* pending adjudication.[31] In determining whether the injunctive relief of the asset freeze was appropriate, the Court commented that a review of the "injunction as an exercise of the equity power granted by 26 U.S.C. § 7402(a) must be in light of the public interest involved: 'Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.'"[32]

---

[27] *United States v. ITS Financial, LLC*, 592 Fed. Appx. 387 (6th Cir. 2014).

[28] *See, e.g.*, *United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014) (receiver appointed under broad authority of section 7402(a) to oversee company's finances, prevent company from pyramiding employment taxes, and ensuring that company timely filed tax returns); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005) (district court did not abuse its discretion in appointing a receiver when defendant owed more than $1 million in delinquent taxes and engaged in a series of transactions to move assets and commingle funds in an attempt to thwart the government's collection efforts); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960) ("'Though the precise limits of judicial discretion to appoint a receiver under Sections 7402(a) and 7403 of the 1954 [Internal Revenue] Code are not defined, where the record shows that a substantial tax liability probably exists, and that the Government's collection of the tax may be jeopardized if a receiver is not appointed, the appointment will be made.'") (quoting Mertens, Law of Federal Income Taxation, Vol. 9, § 49.222, 1960 Cum. Supp. p. 41).

[29] 379 U.S. 378 (1965).

[30] *Id.* at 380.

[31] *Id.* at 385.

[32] *Id.* at 383 (quoting *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).

The purpose of an asset freeze is to preserve the *status quo* and ensure that any funds that become due can be collected.[33] In cases where government agencies seek disgorgement, courts frequently order asset freezes to ensure that a future disgorgement order will not be rendered meaningless.[34] The United States seeks disgorgement orders against the Defendants and can show a substantial likelihood of success on the merits. Pursuant to general equity powers, federal courts may order relief to ensure wrongdoers do not profit from their unlawful conduct, preserve the Defendants' assets, and "assure[] that any funds that may become due can be collected."[35] If appropriate, the Court may freeze assets up to the maximum amount of disgorgement, prejudgment interest, and civil penalties that the Defendants may be ordered to pay.[36] The United States believes that an asset freeze and order appointing a receiver are necessary or appropriate to enforce the internal revenue laws in this case.

Because of the public interest in enforcing the internal revenue laws at issue in this case, to prevail in its request for an asset freeze, the United States needs to show: (1) it is likely to

---

[33] *See, e.g.*, *Smith v. SEC*, 653 F.3d 121, 127 (2d Cir. 2011); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998) (*Cavanagh II*).

[34] *See, e.g.*, *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005) ("[T]he asset freeze is justified as a means of preserving funds for the equitable remedy of disgorgement."); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105-1106 (2d Cir. 1972); *SEC v. General Refractories Co.*, 400 F. Supp. 1248, 1259 (D.D.C. 1975) (It is within the Court's authority to grant effective equitable relief by temporarily freezing specific assets in order to assure a source to satisfy that part of the final judgment which might ultimately be ordered.); *CFTC v. Muller*, 570 F.2d 1296, 1301 (5th Cir. 1978)("This temporary freeze of defendant's assets was reasonably necessary to assure the court's jurisdiction would not be defeated by the defendant's disposition of assets in the event the court should ultimately order disgorgement of the allegedly misappropriated funds."); *FTC v. Direct Marketing Concepts, Inc.*, 648 F. Supp. 2d 202, 212 (D. Mass. 2009); *FTC v. Real Wealth, Inc.*, 2011 WL 3206887, at *4 (W.D. Mo. 2011); *FDIC v. Antonio*, 843 F.2d 1311, 1313 (10th Cir. 1988) (district court had authority to freeze assets which might be needed to satisfy monetary judgments arising from the case).

[35] *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990).

[36] *Id.* at 1041-42.

succeed on the merits and (2) that the asset freeze is necessary.[37] Because, as discussed below, the United States can make this showing, the Court should freeze assets of Neldon Johnson, RaPower-3, and IAS in the amount of $47,461,050 (45,201 lenses x $1,050), a conservative estimate of the disgorgement that may be awarded by this Court.

1. The United States is Likely To Succeed on the Merits

When considering whether the United States is likely to prevail on the merits for injunctive relief under 26 U.S.C. §§ 7402 and 7408, the Court must look to the statutory criteria in § 7408, and, under § 7402, determine whether an injunction is necessary or appropriate to enforce the internal revenue laws.[38] For injunctive relief to be warranted under § 7408, the United States must prove by a preponderance of the evidence that (1) Defendants organized an entity, plan, or arrangement; (2) Defendants made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement; (3) Defendants knew or had reason to know those statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct. In the context of a motion requesting an asset freeze, the United States need only show that the probability of prevailing is better than fifty percent. [39]

---

[37] *See S.E.C. v. Unifund SAL*, 910 F.2d 1028 ,1035-36 (2d Cir. 1990) ("the standards of public interest, not the requirement of private litigation, measure the propriety and need for injunctive relief") (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944)); *see also*, *Smith v. SEC*, 653 F.3d 121, 127-28 (2d Cir. 2011); *SEC v. Cavanagh*, 155 F.3d 129, 132 (2d Cir. 1998) (*Cavanagh II*); *SEC v. Miller*, 808 F.3d 623, 635 (2d Cir. 2005); *SEC v. Margolin*, 1992 WL 279735 at *6 (S.D.N.Y. 1992).

[38] *See United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014) (citing *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000)). The first four factors come from 26 U.S.C. § 6700, conduct that is specific as enjoinable conduct under 26 U.S.C. § 7408.

[39] *See, e.g.*, *S.E.C. v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1296 (D. Utah March 28, 2017); *Unifund SAL*, 910 F.2d at 1039, 1041.

As discussed at length in the United States' motion for partial summary judgment and memorandum in support of, the United States is likely to succeed on the merits.[40] Specifically, as stated in its motion: (1) Neldon Johnson, RaPower-3, and IAS organized, promoted and sold solar lenses to customers, constituting a plan or arrangement under § 6700;[41] (2) in selling the solar lenses, Neldon Johnson, RaPower-3, and IAS made false or fraudulent statements regarding the tax benefits to be derived from purchasing solar lenses, namely depreciation and solar energy tax credits; [42] (3) Neldon Johnson, RaPower-3, and IAS knew or had reason to know the statements they made about the tax benefits were false or fraudulent;[43] and (4) the false or fraudulent statements pertained to material matters.[44]

The United States seeks limited relief in its motion for partial summary judgment, leaving for trial additional evidence that goes to the gravity of harm caused by Defendants' conduct and the scope of the injunction that we claim is appropriate. However, the United States' motion for

---

[40] ECF Doc. No. 251.

[41] *E.g.*, Pl. Ex. 2, Pl. Ex. 511; Pl. Ex. 579,Johnson Dep., vol. 1, 228:10-234:17; Pl. Ex. 682, RaPower-3 Dep., 39:9-41:2; *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000) *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n. 1 (7th Cir. 2013); *see also United States v. Stover*, 650 F.3d 1099, 1107 (8th Cir. 2011) (The organizing, promoting, or selling element of § 6700 "should be defined broadly, and is satisfied simply by selling an illegal method by which to avoid paying taxes." (quotations omitted).); *United States v. Benson*, 561 F.3d 718, 722 (7th Cir. 2009); *United States v. Alexander*, 2010 U.S. Dist. LEXIS 40108, at *13-14 (D.S.C. 2010) *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

[42] *E.g.*, Pl. Ex. 24, Pl. Ex. 32, Pl. Ex. 93, Pl. Ex. 125, Pl. Ex. 214, Pl. Ex. 294, Pl. Ex. 492, Pl. Ex. 496, Pl. Ex. 531, Pl. Ex. 532; *see United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, *9.

[43] *E.g.*, Pl. Ex. 40 at 8, Pl. Ex. 279, Pl. Ex. 246, Pl. Ex. 531, Pl. Ex. 532 at 6; *Stover*, 650 F.3d at 1108-09; *United Energy Corp.*, 1987 WL 4787, *9; *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985); *Campbell*, 897 F.2d at 1321-22; *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

[44] *Campbell*, 897 F.2d at 1320 (statements about material matters include those that directly address the tax benefits purportedly available to a participant in a tax scheme and those that concern factual matters that are relevant to the availability of tax benefits.).

partial summary judgment makes clear that it is likely to succeed on the merits and obtain and injunction, the full scope of which will likely be determined after the trial scheduled for April 2018. Regardless, Defendants have made it clear that they do not intend to stop promoting the solar energy scheme or selling lenses (or some variation of solar energy technology), and as such, an injunction is necessary to prevent the recurrence of Defendants' conduct.[45] Therefore, the United States is likely to succeed on the merits and an asset freeze is necessary or appropriate to enforce the internal revenue laws, specifically 26 U.S.C. §§ 7402, 7408, and 6700.

2. An Asset Freeze and the Appointment of a Receiver are Necessary or Appropriate to Enforce the Internal Revenue Laws

In determining whether an asset freeze is necessary, the Court can consider the risk of dissipation of the assets and must also weigh the possibility that the freeze itself will cause such disruption of defendants' legitimate business affairs that the assets would be destroyed.[46] Here, the United States alleges that defendants' business as they currently conduct it is solely an abusive tax scheme and therefore is not a legitimate business affair. Courts look to the conduct of defendants to determine whether there is an increased risk of dissipation including: (1) whether defendants have transferred assets to other parties, including related parties, during the course of an investigation or litigation;[47] and (2) whether a defendant has the ability to move assets outside of the jurisdiction of the United States. [48] Both factors are present in this case.

---

[45] Pl. Ex. 681, Johnson Dep., vol. 2, 220:18-224:5; Pl. Ex. 683, Howell Dep., vol. 2, 91:6-101:2; Pl. Ex. 666, Jameson Dep., 230:3-231:11; 232:14-235:19; Pl. Ex. 682, RaPower-3 Dep., 197:13-199:6; and Pl. Ex. 581, IAS Dep., 239:13-246:22.

[46] *SEC v. Prater*, 289 F. Supp. 2d 39, 54 (D. Conn. 2003) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972)).

[47] *SEC v. Wyly*, 73 F. Supp. 3d 315, 322 (S.D.N.Y. 2014); *see also*, *SEC v. Aragon Capital Advisors, LLC*, 2011 WL 3278642, at *10 (S.D.N.Y. 2011) (transfers to third parties "provide even greater support for an asset freeze");

(continued...)

First, defendants throughout the course of this litigation have been transferring money amongst themselves and have been making payments to and for the benefit of Neldon Johnson and his family members.[49] Defendants' bank records show that they have continued to transfer and spend money during the course of this litigation and it is likely that without an asset freeze, these defendants will continue to dissipate their assets rendering a possible disgorgement order meaningless.

Second, Neldon Johnson has shown not only his ability to move assets outside of the United States, but has been engaging in this practice since 2013, at which time Neldon Johnson was well aware of the IRS investigation into his conduct relating to the solar energy scheme.[50] Specifically, Neldon Johnson has set up two companies in the country of Nevis and has begun transferring assets, including some of the patents relating to the technology purportedly invented

(…continued)

Monteleone v. Leverage Group, 2008 WL 4541124, at *7 (E.D.N.Y. 2008) (finding evidence of dissipation in transfers to related entity); *Red Head, Inc. v. Fresno Rock Taco, LLC*, 2009 WL 37829, at *5 (N.D. Cal. 2009) (loans to affiliated entities may be evidence of "secreting or dissipating assets").

[48] *See, e.g., SEC v. Gonzalez de Castilla*, 145 F. Supp. 2d 402, 420 (S.D.N.Y. 2001), *modified in part sub nom. SEC v. Duclaud Gonzalez de Castilla*, 170 F. Supp. 2d 427 (S.D.N.Y. 2001) (imposing asset freeze in part because defendants resided outside the United States and had "off-shore bank accounts and therefore the capacity to transfer the funds beyond the jurisdiction of this Court"); *SEC v. Dubovoy*, 2015 WL 6122261, at *3, 9 (D.N.J. 2015) (considering whether defendants will transfer assets "beyond the jurisdiction of the United States" and expressing "serious concern" that individual who "control[led] the foreign entities" lived "abroad").

[49] Pl. Ex. 684, true and correct copies of bank statements of defendants Neldon Johnson, RaPower-3 and IAS showing some of the activity and transfers that have occurred during the pendency of this litigation; *see also,* Pl. Ex. 646, Pl. Ex. 647, Pl. Ex. 648, Pl. Ex. 649, Pl. Ex. 650; Johnson Dep., vol. 2, 202:17-220:16.

[50] RaPower-3 Dep., vol. 197:13-199:6.

by Neldon Johnson, that used to be held by the NP Johnson Family Limited Partnership, a domestic entity, to these Nevis entities. [51]

Defendants have reaped substantial financial gains from the promotion of their solar energy scheme. Defendants sell the lenses for $3,500, but tell customers that they need only pay a down payment of $1,050.[52] Defendant's customers are supposed to pay that $1,050 as follows: $105 per lens in the year of purchase and $945 more in the *next* year because they pay with their "tax refunds/savings" generated from their participation in the scheme. [53] According to Defendants' own records (which are likely incomplete), Defendants have sold *at least* 45,201 lenses. [54] As such, the United States requests that the Court order defendants' assets frozen in an amount not less than $47,461,050 (45,201 lenses x $1,050, the full amount of the downpayment), as a conservative estimate of the disgorgement that may be awarded by this Court.

B. A Receiver is Necessary or Appropriate to Effect the Asset Freeze.

The Court's authority to appoint a receiver is twofold. First, this Court has explicit statutory authority to appoint a receiver pursuant to 26 U.S.C. § 7402(a) as may be necessary or

---

[51] Johnson Dep., vol. 2, 37:22 – 38:5; Neldon Johnson assigned the rights to six patents to Black Night Enterprises, Inc., #6 Solomon's Arcade, Main Street, Charleston, Saint Kitts and Nevis (see USPTO Patent Assignment Search, search by assignee name: "Black Night"). The assignments were executed between April 2013 and June 2015 and recorded on June 16, 2015. See USPTO assignment search for Neldon Johnson, https://assignment.uspto.gov/patent/index.html#/patent/search/result?id=neldon%20johnson&type=patAssignorName.

[52] Pl. Ex. 677, a true and correct copy of a printout from a prior version of www.rapower3.com, at Bates numbered page US001678.

[53] *Id.*

[54] *See* ECF Doc. No. 246 and ECF Doc. No. 247. As pointed out at the hearing on October 23, 2017, the document produced by Defendants does not appear to include all lenses sold. However, for purposes of this motion, the number of lenses Defendants admit were sold serves as a reasonable approximation for amount of disgorgement that may be awarded and thus the appropriate amount of the asset freeze.

appropriate for the enforcement of the internal revenue laws.[55] Second, the appointment of a receiver is authorized by the inherent equitable power of a federal court.[56] The appointment of a receiver is an especially appropriate remedy in cases involving fraud and the possible dissipation of assets since the primary consideration in determining whether to appoint a receiver is the necessity to protect, conserve and administer property pending final disposition of a suit.[57]

Defendants Neldon Johnson, RaPower-3, and IAS have accumulated significant assets from the perpetuation of their solar energy scheme. But they have refused to respond to discovery regarding their assets and resisted discovery on many other matters that they simply do not want to disclose,[58] including the location of assets. Because of defendants' resistance, the appointment of a receiver is necessary or appropriate to enforce the internal revenue laws. Courts, including those entering relief under § 7402, frequently use their broad powers to prevent wrongdoers from enjoying the fruits of their misconduct.[59] Based on defendants' conduct

---

[55] 26 U.S.C. § 7402(a); *see also*, *United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

[56] *See SEC v. Vescor Capital Corp.*, 599 F3d. 1189, 1193-94 (10th Cir. 2010) (the district court has broad powers and wide discretion to determine relief and supervise receiverships); *United States v. Bartle*, 159 F. App'x 723, 725 (7th Cir. 2005); *Consolidated Rail Corp. v. Fore River Railway Co.*, 861 F.2d 322, 326-27 (1st Cir. 1988) (court may exercise discretion to appoint receiver upon considering fraudulent conduct, relative risks of harm, inadequacy of legal remedies, chance of success on merits, likelihood of irreparable injury, etc.); *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994) (federal court has inherent power to appoint receiver to manager defendant's assets pending litigation); *National Partnership Investment Corp., v. National Housing Development Corp.*, 153 F.3d 1289, 1291 (11th Cir. 1998) (appointment of receiver in equity is an ancillary remedy); *see also* Fed. R. Civ. P. 66.

[57] *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994).

[58] *E.g.*, ECF Doc. No. 53, ECF Doc. No. 55, ECF Doc. No. 56, ECF Doc. No. 57, ECF Doc. No. 58, ECF Doc. No. 59, ECF Doc. No. 138, ECF Doc. No. 140, ECF Doc. No. 143, ECF Doc. No. 160, ECF Doc. No. 161, ECF Doc. No. 203, ECF Doc. No. 206, ECF Doc. No. 209, ECF Doc. No. 210, ECF Doc. No. 212, ECF Doc. No. 213, ECF Doc. No. 218, ECF Doc. No. 219.

[59] *See United States v. Stinson*, 239 F. Supp. 3d, 1326 ; *Manor Nursing Centers*, 458 F.2d at 1104 ("The effective enforcement of the federal securities law requires that the SEC be able to make violations unprofitable. The

(continued...)

throughout this litigation, a receiver is necessary to determine: (1) the amount of the ill-gotten gains, or unjust enrichment, defendants have reaped from their solar energy scheme; (2) the disposition of the ill-gotten gains they received from the sale of their solar lenses; and (3) the extent of the assets to be frozen while this case is pending.[60] The United States requests that the receiver be appointed within 30 days, with the powers and authority of a receiver in equity and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and this Court. Specifically, the United States requests that this Court grant the powers and authorities as enumerated in its proposed order attached to this motion.

III. Conclusion

For the foregoing reasons, this Court should freeze the assets of defendants Neldon Johnson, RaPower-3 and IAS and appoint a receiver to protect, conserve and administer the property of these defendants pending final disposition of this suit because both are necessary or appropriate to enforce the internal revenue laws under 26 U.S.C. § 7402(a). The asset freeze and receiver are necessary to preserve the *status quo* and ensure that any future disgorgement order will not be rendered meaningless.

//

//

(…continued)

deterrent effect of a Commission enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.").

[60] The United States is aware of certain corporate entities owned and controlled by Neldon Johnson, bank accounts of Neldon Johnson, RaPower-3, and IAS, and stock and patents owned by Neldon Johnson and would seek that the Court freeze those assets immediately while reserving the ability to freeze any additional assets the receiver may locate.

Dated: November 17, 2017

Respectfully submitted,

/s/ Erin R. Hines
ERIN R. HINES
FL Bar No. 44175
Email: erin.r.hines@usdoj.gov
Telephone: (202) 514-6619
ERIN HEALY GALLAGHER
DC Bar No. 985760
Email: erin.healygallagher@usdoj.gov
Telephone: (202) 353-2452
CHRISTOPHER R. MORAN
New York Bar No. 5033832
Email: christopher.r.moran@usdoj.gov
Telephone: (202) 307-0834
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
FAX: (202) 514-6770
ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin R. Hines
ERIN R. HINES
Trial Attorney