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' SECOND MOTION TO FREEZE THE ASSETS OF DEFENDANTS NELDON JOHNSON, RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., AND R. GREGORY SHEPARD AND TO 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"), International Automated Systems, Inc. ("IAS"), and

R. Gregory Shepard 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. Procedural Background

On November 23, 2015, the United States filed its complaint against Defendants, seeking to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[1] The United States is also seeking disgorgement of Defendants' ill-gotten gains from their promotion of the abusive tax scheme.[2]

On November 17, 2017, the United States moved for an order freezing Defendants Neldon Johnson, RaPower-3, and IAS's assets and for an order appointing a receiver.[3] On March 2, 2018, the Court denied the United States' motion without prejudice.[4] The Court denied the United States' motion in part because the United States relied upon the facts set forth in its motion for partial summary judgment including the "disputed material facts as to Defendants' knowledge at the time they made certain statements."[5] Trial is now completed and on the basis of the evidence adduced at trial, the United States moves for an order freezing Defendants Neldon

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

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

[3] ECF Doc. No. 252.

[4] ECF Doc. No. 318.

[5] ECF Doc. No. 318, at 4.

Johnson, RaPower-3, IAS and R. Gregory Shepard's[6] assets and for an order appointing a receiver.

II. Statement of Facts

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower-3, LLC, International Automated Systems, Inc. and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.[7]

2. Johnson claims to have invented certain solar energy technology that involves solar thermal lenses placed in arrays on towers.[8]

3. In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on "the R&D Site" near Delta, Utah, in Millard County.[9]

4. Johnson also directed that IAS install solar lenses in those towers.[10]

5. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[11]

---

[6] The United States did not include Shepard in its original motion to freeze defendants' assets.

[7] ECF Doc. No. 22 ¶ 12; Pl. Ex. 579, Deposition Designations for Neldon Johnson, vol. 1 ("Johnson Dep., vol. 1"), 36:1-39:12, 46:3-47:3; 52:20-57:1; 74:1-14; 77:4-87:12.

[8] Johnson Dep., vol. 1, 87:16-91:1; 134:19-135:2; 139:23-144:19; Pl. Ex. 504; Pl. Ex. 509, Video 12_4_38-5_15; Pl. Ex. 509, Video 12_4_00-4-23.

[9] Pl. Ex. 581, Deposition Designations for International Automated Systems, Inc. ("IAS Dep."), 162:1-165:9; 171:10-173:20; Pl. Ex. 532 at 6; Pl. Ex. 531.

[10] IAS Dep. 62:15-64:1.

[11] Pl. Ex. 682, Deposition Designations for RaPower-3, LLC ("RaPower-3 Dep."), Dep. 36:4-39:8.

6. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[12]

7. Johnson drafted some promotional materials to describe the arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[13]

8. Johnson showed IAS salespeople these descriptive materials about the structure of the transaction, the purported technology, and the federal tax benefits that Johnson said a customer could lawfully claim when he bought a lens from IAS.[14]

9. He told IAS's initial salespeople what he understood the tax laws to mean.[15]

10. R. Gregory Shepard has been an IAS shareholder since the mid-1990s.[16] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[17]

11. Shepard's information about Johnson's purported solar energy technology came from Johnson or members of Johnson's family, and Shepard's own observations on his site visits over the years.[18]

[12] IAS Dep. 145:21-146:9; Pl. Ex. 463; RaPower-3 Dep. 140:9-143:4; Pl. Ex. 504.

[13] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[14] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[15] Johnson Dep. vol. 1, 240:18-241:10; 247:11-248:12; RaPower-3 Dep. 117:22-119:11; Pl. Ex. 473.

[16] Pl. Ex. 685, Deposition Designations for R. Gregory Shepard ("Shepard Dep."), 43:19-46:1.

[17] Shepard Dep. 70:14-71:22; Pl. Ex. 463.

[18] Johnson Dep., vol. 1, 209:11-210:3, 211:16-215:23; Shepard Dep. 36:6-40:23, 46:2-57:5, 183:14-187:13; Pl. Ex. 8A; RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

12. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[19]

13. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[20] XSun Energy,[21] and RaPower-3, LLC.[22]

14. Johnson created RaPower-3 in 2010. He is it manager and the sole decision-maker for the company.[23]

15. Once formed, RaPower-3, not IAS, sold solar lenses to individuals.[24]

16. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.[25]

17. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[26]

[19] Johnson Dep., vol. 1, 279:19-22; IAS Dep. 162:1-165:9; 194:6-20; Pl. Ex. 531.

[20] Johnson Dep., vol. 1, 82:8-83:6; LTB1 Dep. 78:22-79:5; 79:12-80:9; IAS Dep. 38:10-40:6, 45:4-17.

[21] *See generally* Pl. Ex. 355; IAS Dep. 47:2-19; Johnson Dep., vol. 1 79:8-81:7.

[22] RaPower-3 Dep. 32:16-33:14, 44:4-14, 45:9-10.

[23] RaPower-3 Dep. 32:16-33:14.

[24] RaPower-3 Dep. 32:16-33:14; IAS Dep. 23:22-25:22; Pl. Ex. 462; Pl. Exs. 8A, 25, 91-95, 119, 121, 174, 181, 346, 462, 464, 473, 511, 512, 531-533, 555, 587, 613-615, 637-639, 760, 762; Rowbotham Testimony, Trial Tr. 910:24-927:7; Williams Testimony, Trial Tr. 982:3-983:23; 985:4-990:12; 991:6-994:15; Olsen Testimony, Trial Tr. 1060:11-25; 1070:11-1074:7; 1078:20-1081:23; Jameson Testimony, Trial Tr. 1221:15-22; 1224:13-1225:25; 1226:6-1228:10; 1237:8-16.

[25] RaPower-3 Dep. 32:16-33:14; 36:4-39:8.

[26] Pl. Ex. 8A at 9; Pl. Ex. 749.

18. Johnson directed RaPower-3 to create a site online (https://rapower3.net) where a customer can access and sign a contract to buy lenses and sign other transaction documents that Johnson provides (described below).[27]

19. Among other things, Shepard created the website www.rapower3.com[28] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[29]

20. Shepard gets paid for his work with RaPower-3 through his company, Shepard Global.[30]

21. On the RaPower-3 website, Shepard describes the solar energy technology (including the solar lenses) and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the website with the transaction documents.[31] Shepard also uses the IAUS and RaPower-3 Forum and emails to communicate with RaPower-3 members and prospective members.[32]

22. Shepard also organizes groups of people to visit the R&D Site, the site where component parts of the purported solar technology system are manufactured (the "Manufacturing

[27] RaPower-3 Dep. 39:9-41:2; Pl. Ex. 511; Pl. Ex. 673, Deposition Designations for LTB1, LLC ("LTB1 Dep."), 39:6-25; Pl. Ex. 61.

[28] Shepard Dep. 25:22-26:8; Pl. Ex. 459; Pl. Exs. 1, 5, 19, 20-21, 24-25, 34, 352, 419, 674, 676, 678-80, 714-724, 796.

[29] Shepard Dep. 286:5-24.

[30] Jameson Testimony, Trial Tr. 1294:15-1301:3; M. Shepard Testimony, Trial Tr. 1412:18-1415:16.

[31] Pl. Ex. 688, Deposition Designations of Roger Freeborn ("Freeborn Dep."), 23:2-24:14; Pl. Ex. 490; Pl. Ex 689, Deposition Designations for Peter Gregg ("Gregg Dep."), 56:20-57:13.

[32] Shepard Dep. 286:5-289:13; Pl. Ex. 481.

Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[33]

23. Shepard directs customers to use tax return preparers who are part of the solar energy scheme, like John Howell in Wichita Falls, Texas; Kenneth Alexander in Florida; and Richard Jameson in St. George, Utah.[34]

24. From 2009 through 2016, RaPower-3 had received at least $25,874,066 from its role in the solar energy scheme.[35]

25. From 2008 through 2016, IAS has received at least $5,438,089 from its role in the solar energy scheme.[36]

26. From 2011 through 2016, XSun Energy has received at least $1,126,888 from its role in the solar energy scheme.[37]

27. From 2010 through 2016, SOLCO I has received at least $3,434,992 from its role in the solar energy scheme.[38]

28. From 2005 through February 28, 2018, all lens-selling entities have received at least $32,796,196.

---

[33] *E.g.*, Pl. Exs. 21, 419 at 1; Johnson Dep., vol. 1, 87:23-89:10; Pl. Ex. 509, Video 12_4_00-4_23.

[34] Pl. Exs. 242-245; Pl. Ex. 597; Gregg Dep. 121:14-25; Pl. Ex. 606; Pl. Ex. 334.

[35] Pl. Ex. 735; Reinken Testimony, Trial Tr. 863:18-866:18; 866:19-868:24; *see also*, Pl. Exs. 742B, 749.

[36] Pl. Ex. 738; Pl. Ex. 852, at 59; Buck Testimony, Trial Tr. 257:7-258:20; 271:9-272:12; 293:1-294:11; 312:5-15; Pl. Ex.. 371; Pl. Ex. 507, at 20, 35; Johnson Testimony, Trial Tr. 1812:4-12.

[37] Pl. Ex 741; Johnson Dep., vol. 1, 79:8-81:7; 82:8-10; IAS Dep. 47:2-19; Pl. Exs. 208, 355, 356, 510, 743, at 11.

[38] Pl. Ex. 739; Reinken Testimony, Trial Tr. 863:18-866:18; 870:3-871:7; Johnson Dep., vol. 1, 82:8-85:2; IAS Dep. 38:10-40:6; 45:4-21; LTB1 Dep. 78:22-79:5; 79:12-80:9;81:12-21; Pl. Exs. 38, 325, 495, 545. Reinken Testimony, Trial Tr. 863:18-866:18; 871:10-872:14.

29. From 2008 through 2016, Shepard received $702,001 from his role in the solar energy scheme.[39]

30. While selling the solar lenses, Defendants told customers they could buy "lenses" and claim tax benefits.[40]

31. While they sold solar lenses, and organized efforts to sell solar lenses, Defendants told their customers that, if they bought a solar lens and signed the transaction documents Defendants provide, their customers were in the "trade or business" of "leasing" solar lenses.[41]

32. According to Defendants, because their customers are in the trade or business of leasing solar lenses, their customers are allowed to claim on their federal income tax returns a business tax deduction for depreciation on the solar lenses and a solar energy tax credit.[42]

---

[39] Pl. Exs. 411, 445; G. Shepard Testimony, Trial Tr. 1596:5-1598:21; Jameson Testimony, Trial Tr. 1296:19-1301:3.

[40] Oveson Testimony, Trial Tr. 377:21-378:3; Rowbotham Testimony, Trial Tr. 928:14-929:10; 957:17-19; Williams Testimony; Trial Tr. 1022:4-14; 1099:16-1102:15; Olsen Testimony, Trial Tr. 1089:21-1090:15; RaPower-3 Dep., 155:4-166:18; Shepard Dep. 250:13-251:13; Aulds Dep. 42:11-44:22; 54:15-55:14; 57:17-60:15; Freeborn Dep. 71:2-20; Gregg Dep. 127:19-128:8; 136:4-6, 10-14; 137:3-12; 147:5-148:10; 149:1-7; Lunn Dep. 164:12-171:1; Pl. Exs. 1, 30, 32, 43, 49, 93, 125, 214, 294, 348, 492, 496, 499, 501, 532.

[41] *E.g.,* Pl. Ex. 32. Occasionally, Shepard has claimed that customers have been "in the solar energy business." Shepard Dep. 243:11-244:3; Pl. Ex. 43 at 1 ("AM I REALLY IN THE SOLAR ENERGY BUSINESS? Yes."). But in recent years, Shepard has made it clear that "We should not consider ourselves in an 'energy' business. We are buying lenses and leasing them – THAT is our business – LEASING – NOT producing energy …" Pl. Ex. 32.

[42] Pl. Ex. 1 at 2-3 ("Tax Question" Nos. 45). A collection of Johnson's statements: IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 531 at 3; *see also* Pl. Ex. 532 at 7-10. A collection of Shepard's statements: Pl. Ex. 93 (as a result of purchasing a lens, "the investor gets his $9,000 back in the form of a Tax Credit, plus the depreciation which adds extensive value over a six year period plus the income from power produced by the Solar Pod."); Shepard Dep. 148:21-149:25; *e.g.,* Pl. Ex. 125 (letter from Shepard telling a customer that he is "qualif[ied] … for the Internal Revenue Service solar energy tax credit" because RaPower-3 "put [their lenses] into service").

33. Defendants told customers that IAS, RaPower-3, or LTB "placed in service" or "put into service" their solar lenses in the year that the customers purchase the lenses.[43]

34. Starting in 2010, RaPower-3 sold lenses for a price of $3,500 per lens.[44] Johnson determined the price that RaPower-3 would charge for the lenses.

35. Customers started purchasing lenses via the internet at rapower.net. On that site, a potential customer enters the number of lenses he wishes to purchase, and the website "figures" the amount the customer owes and the amount of the customer's down payment.[45]

36. The site also provides all transaction documents for customers to sign electronically: an Equipment Purchase Agreement, an Operations & Maintenance Agreement ("O&M"), and, at times in the past, a bonus contract.[46]

37. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[47]

---

[43] Pl. Ex. 1 at 3 ("Tax Question" No. 7); Pl. Exs. 44, 57, 104-105, 123-125, 176, 185, 313, 588; *see also,* Pl. Ex. 472.

[44] Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition Designations for Robert Aulds ("Aulds Dep.") 141:3-13; 146:17-147:5.

[45] Aulds Dep. 141:3-13.

[46] RaPower-3 Dep. 39:18-41:2; Aulds Dep. 141:3-13.

[47] RaPower-3 Dep. 39:9-41:2; *e.g.,* Pl. Exs. 119, 181, 511; Aulds Dep. 141:3-13; 146:17-147:5; Gregg Dep. 55:19-56:13; Howell Dep. 39:17-40:4; 95:3-5; 134:14-135:22; Zeleznik Dep. 67:3-12; Pl. Ex. 693, Deposition Designations for Frank Lunn, IV ("Lunn Dep.") 114:11-115:4.

38. Over the years, Defendants told customers about Johnson's purported solar energy technology and the progress being made by Defendants.[48] Defendants emphasized progress being made despite their knowledge that the system was not up and running.[49]

39. From the start, Defendants have told their customers that they can "zero out" their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and solar energy tax credit for the lenses.[50]

40. Defendants knew that when they made statements to customers and prospective customers about the tax benefits and their purported solar lens leasing "trade or business," that the only way a customer has ever "made money" from buying a lens is from the tax benefits; no customer has earned money from rental income or income from a bonus contract.[51]

---

[48] *E.g.,* Pl. Ex. 185 at 1; Johnson Dep., vol. 1, 173:11-177:16; Pl. Exs. 16 & 17. Johnson gave these white papers to Shepard. Johnson Dep., vol. 1, 185:15-23; Shepard Dep. 126:9-128:5. Shepard made them available to the public on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Exs. 441, 491; RaPower-3 Dep. 140:4-143:17; Pl. Ex. 504; Shepard Dep. 199:10-204:14; Pl. Ex. 471; Shepard Dep. 250:13-252:21; Pl. Ex. 72; Pl. Ex. 109 at 1-3; *see also* Freeborn Dep. 95:3-98:1; Pl. Ex. 425 at 1. Johnson dep., vol. 1, 211:16-215:23; Shepard Dep. 36:6-40:23, 183:14-187:13; Pl. Ex. 8A; Pl. Ex. 676; Gregg Dep. 57:18-59:12; Pl. Exs. 298-299; Pl. Ex. 26; 93; 216, 246, 270, 329, 348.

[49] J. Anderson Testimony, Trial Tr. 617:25-618:9; Pl. Ex. 602; Ruling on Plaintiff's Motions in Limine, Trial Tr. 2107:2-9; Pl. Exs. 6; 292; 411, at 10-11; 412, at 9; 413, at 6; 414, at 10; 415, at 7; 416, at 7; 509, Video 12_4_38-5_15; 509, Video 18_4_09-4_25; 526; 901; Johnson Testimony, Trial Tr. 1990:13-16; Shepard Dep. 204:15-207:8.

[50] Johnson Dep., vol. 1, 247:11-248:12; Pl. Ex. 490 at 9-10; IAS Dep. 162:1-165:9; Pl. Ex. 531. According to Shepard, "the greater one's tax liability, the greater will be the depreciation benefit." Pl. Ex. 24 at 1; *see also*, Pl. Ex. 20 at 2; Lunn Dep. 188:18-189:20; Pl. Ex. 24, 43, 48, 70, 71, 85, 88, 109, 133, 142, 158, 181, 207, 214, 220, 325, 438, 474, 490, 496, 497, 501, 532, 597, 674, 718, 721, 722, 777.

[51] Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commission on solar lens sales is also "functional." Freeborn Dep. 82:16-85:17; Pl. Ex. 246. But the multi-level marketing component of RaPower-3 is not connected to lens ownership. RaPower-3 Dep. 33:8-34:9. A distributor need not buy a lens in order to sell lenses for RaPower-3. *Id*; Johnson Testimony, Trial Tr. 2242:8-2251:18.

41. LTB has never done anything; it has never had a bank account, any employees, or any revenue.[52]

42. Defendants told customers to expect income from the "lease" of their lenses, but Defendants know that no customer has been paid for the use of his or her lenses.[53]

43. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[54]

44. Based on the advice and information provided by attorneys or accountants they spoke with about the solar energy scheme, Defendants knew or had reason to know that the purported tax benefits were not permissible under the Internal Revenue Code.[55]

45. Defendants also knew or had reason to know that the purported tax benefits from their solar energy scheme were not permissible under the Internal Revenue Code because others also disagreed with their assertions about tax benefits available from the solar lenses, including: customers' or prospective customers' tax preparers/CPAs, the Internal Revenue Service, the

[52] LTB Dep. 10:10-11:1; 14:7-16:7; 18:2-9; 42:10-43:5; 69:6-74:21; 90:19-91:8; Pl. Ex. 464; Johnson Testimony, Trial Tr. 2246:7-2247:19

[53] Shepard Dep. 34:18-35:24; 67:1-12; 76:23-82:18; 93:17-94:13; Pl. Ex. 279 at 1; Pl. Ex. 602 at 1-2; Pl. Ex. 465; Johnson Dep., vol. 1. 230:4-11; Pl. Exs. 10, 19, 48, 49, 61, 70A, 142, 151, 159, 217, 246, 283, 341, 465, 724, 796; Rowbotham Testimony, Trial Tr. 933:19-935:15; Williams Testimony, Trial Tr. 1000:9-1001:7; Olsen Testimony, Trial Tr. 1074:8-1078:16; 1086:12-1087:6; Jameson Testimony, Trial Tr. 1238:3-24; 1241:6-11; 1241:17-1245:1; 1280:21-1282:20; 1310:18-1312:9; M. Shepard Testimony, Trial Tr. 1406:12-1407:2; 1574:21-1575:14; G. Shepard Testimony, Trial Tr. 1734:9-1738:23.

[54] *E.g.*, Pl. Ex. 683, Deposition Designations of John Howell ("Howell Dep."), 211:11-213:14 (aware of 150 cases in Tax Court); Shepard Dep. 250:17-251:3.

[55] Pl. Exs. 23, 73, 135, 141, 185, 231, 370, 373, 374, 449, at 2; 450, at 4; 452, at 2; 477, 480, 547, 570, 574, 582; Freeborn Dep. 95:3-13; Dr. Mancini Testimony, Trial Tr. 75:4-15; 85:24-86:12; 90:5-94:7; 96:17-20; 105:9-107:6; Shepard Testimony, Trial Tr. 1692:25-1693:5; 1723:15-22; 1728:4-1729:25; 1730:18-1731:3; Buck Testimony, Trial Tr. 267:24-269:22; 270:3-271:4; Oveson Testimony, 331:11-23; 334:18-336:3; 341:20-342:25; 343:1-2, 6-8; 343:21-344:10; 344:21-346:19; 347:18-348:13; 352:24-355:21; 356:7-357:14; 358:13-361:2; Shepard Dep. 266:2-267:1; J. Anderson Testimony; Trial Tr. 613:12-618:9; 620:1-621:24; 622:19-623:20; 630:20-632:10; 632:17-633:1.

Oregon Department of Revenue, the Oregon Tax Court Magistrate Division, and the Department of Justice.[56]

46. When a customer notifies Shepard that they are under audit, Shepard typically directs the customer to Enrolled Agents John Howell or Richard Jameson to represent the customer before the IRS.[57] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[58]

47. Shepard has also advocated for customers under audit before the IRS.[59] He has given customers arguments to make before the IRS and documents to submit while under audit.[60]

48. Johnson is paying the attorneys' fees for all customers whose tax benefits have been disallowed on appeal by the IRS and who have filed petitions in Tax Court.[61]

---

[56] *Id.*; *see also*, ECF Doc. No. 2; *Peter C. Gregg v. Department of Revenue*, 2014 WL 5112762 (Or. Tax. Magistrate Div. 2014); *Kevin M. Gregg v. Department of Revenue*, 2017 WL 5900999 (Or. Tax Magistrate Div. 2017); *Matthew D. Orth v. Department of Revenue*, 2017 WL 5904611 (Or. Tax Magistrate Div. 2017).

[57] Gregg Dep. 151:7-25; Pl. Exs. 333-34; Howell Dep. 183:11-184:8; 211:11-212:10; Pl. Ex 348.

[58] *See, e.g.,* Howell Dep. 221:16-223:18; Pl. Exs. 605, 608, 637.

[59] Pl. Ex. 10.

[60] Pl. Ex. 49; Pl. Ex. 697, Deposition Designations for Brian Zeleznik ("Zeleznik Dep."), 184:18-185:17; 211;4-214:4 and *compare, e.g.,* Pl. Ex. 81 (document written by Brian Zeleznik to the IRS in response to his audit) *with* Pl. Ex. 89 (email from Shepard to Zeleznik with a sample document to use with the IRS); *see also*, Pl. Ex. 163 at 1-2; Pl. Ex. 231; Pl. Ex. 340 (*id.* at 2 ("You can hand write notes or even copy the above [arguments] down by hand and read it word for word [to an auditor]. Just don't give [an auditor] this email.")).

[61] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23; Zeleznik Dep. 142:7-143:1; Jameson Testimony, Trial Tr. 1249:14-1250:1.

49. Defendants have caused serious harm to the United States Treasury as a result of their solar energy scheme.[62] Defendants' customers claimed at least $14 million of improper tax refunds as a result of Defendants' scheme for tax years 2013 through 2016.[63]

50. To date, Johnson, Shepard, IAS and RaPower-3 continue to organize sales of solar lenses, and participate (directly and indirectly) in the sale of solar lenses.[64]

51. They are not deterred from promoting the scheme, not by the IRS' disallowance of their audited customers' depreciation deductions and solar energy tax credits or by the complaint filed in this case.[65]

III. Argument

The United States seeks two types of relief in this motion: an asset freeze and an order appointing a receiver to take control of Defendants IAS and RaPower-3's assets and business operations. Under 26 U.S.C. § 7402, this Court has the authority to grant the relief requested.[66] Section 7402(a) encompasses a broad range of powers necessary to compel compliance with the

---

[62] Pl. Ex. 750; Howell Dep. 186:3-190:23; 193:22-194:10; 194:19-200:20; Zeleznik Dep. 152:10-15, 152:22-159:5; Gregg Dep. 102:7-103:25; 104:24-105:4; 105:15-106:2; 112:7-124:9; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14; Olsen Testimony, Trial Tr. 1136:14-1137:18; 1139:8-1145:12; Williams Testimony, Trial Tr. 1022:18-1028:14; Jameson Testimony, Trial Tr. 1282:21-1289:11; 1289:15-1293:18; 1304:4-1306:8; 1307:2-1308:17.

[63] Pl. Ex. 750; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14.

[64] Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Exs. 424, 426, 539, 679, 731-33.

[65] Shepard Dep., 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25; Jameson Testimony, Trial Tr. 1229:11-14; M. Shepard Testimony, Trial Tr. 1526:19-21

[66] Under 26 U.S.C. § 7402(a), the district courts "shall have jurisdiction to make and issue in civil actions, writs and orders of injunction, [ ] 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."

tax laws.[67] Courts have exercised this broad authority under § 7402(a) in a variety of contexts, including ordering disgorgement of ill-gotten gains against a tax return preparer engaged in fraudulent return preparation,[68] appointing receivers to assist in collection of federal tax liabilities or otherwise ensure compliance with the internal revenue laws,[69] and freezing a defendant's assets.[70] The statute alone provides this Court with sufficient authority to issue an injunctive order freezing Defendants' assets and appointing a receiver without examining the preliminary injunction factors.[71] However, even considering those factors, the United States is entitled to the relief requested.

---

[67] *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 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).

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

[69] *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).

[70] *United States v. First National City Bank*, 379 U.S. 378 (1965).

[71] *See, e.g., S.E.C. v. Torr*, 87 F.2d 446, 450 (2d Cir. 1937) ("As the issuance of an injunction in cases of this nature has statutory sanction, it is of no moment that the plaintiff has failed to show threatened irreparable injury or the like, for it would be enough if the statutory conditions for injunctive relief were made to appear.") (citation omitted); *see also*, *United States v. Colo. Mufflers Unlimited, Inc.*, 2007 WL 987459, at *4 (D. Colo. 2007) (suggesting that when there is statutory authority to issue injunctions, as in § 7402, the proponent of the injunction need only meet the criteria contained in the statute.). In similar contexts, the SEC in bringing injunction actions under its statutory authority need only show a likelihood of prevailing on the merits and a reasonable likelihood that the wrong will be

In the Tenth Circuit, a party seeking a preliminary injunction must show 1) that there exists a substantial likelihood that the movant will prevail on the merits; 2) that the movant will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and 4) that the injunction would not be adverse to the public interest.[72] If the Court finds that the United States must also meet the burden for a preliminary injunction in spite of the explicit authority for the requested relief under 26 U.S.C. § 7402(a), then the United States, as the moving party, bears the burden of showing it is entitled to the requested relief.[73]

A. The United States has succeeded on the merits.

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. Alternatively, for injunctive relief to be warranted under § 7402, the United States must prove that an injunction is necessary ***or*** appropriate to enforce the internal revenue laws.[74] As the Court has found, the

---

repeated. *S.E.C. v. Traffic Monsoon,* 245 F.Supp.3d 1275, 1296-97 (D.Utah 2017) (citing *S.E.C. v. Unifund SAL,* 910 F.2d 1028, 1031, 1039 (2d Cir. 1990)).

[72] *In re Qwest Communications Intern., Inc. Securities Litigation*, 243 F.Supp.2d 1179, 1185 (D. Colo. 2003) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)); *see also*, Fed. R. Civ. P. 65.

[73] *Lundegrin*, 619 F.2d at 63.

[74] 26 U.S.C. § 7402(a) (emphasis added).

United States has proven that it is entitled to an injunction under 26 U.S.C. §§ 7402 and/or 7408. The evidence adduced at trial shows that Defendants organized the solar energy scheme, [75] that Defendants made false or fraudulent statements about the tax benefits to be obtained from purchasing a solar lens,[76] that Defendants knew or had reason to know that their statements were false or fraudulent pertaining to a material matter,[77] namely the tax benefits of depreciation and solar energy tax credits. Further, Defendants have testified that they have no intention of ceasing their activity related to and sales of solar lenses. An injunction is necessary to prevent recurrence of Defendants' conduct.

Disgorgement is also necessary or appropriate to enforce the internal revenue laws. Defendants profited from their scheme in the millions of dollars through money from the United States Treasury that was funneled through their customers. Defendants should not be permitted to retain their ill-gotten gains. The United States has shown that a reasonable approximation of

---

[75] *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).

[76] *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.

[77] *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 1320-22 (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.); *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

their proceeds is at least $32,796,196. This Court has found that an injunction will issue and that disgorgement will be ordered. Thus, the United States has already succeeded on the merits.

B. The United States will suffer irreparable injury if an order granting the asset freeze and appointing a receiver is not issued.

The United States Treasury has already been greatly harmed by Defendants' scheme. Defendants continue to sell lenses to this day, and Defendants' customers continue to claim the tax benefits related to those lenses. If the injunctive relief requested is not granted, Defendants will have full unfettered access to the funds illicitly obtained to the detriment of the United States.[78] Defendants' entire scheme was geared to "zero-out" a customer's tax liability. Defendants requested customers make a down payment for their solar lenses of $1,050 per lens. The customers paid this with a $105 "upfront fee" and were asked to pay the remaining amount *after* they received their tax refunds.[79] Defendants funded their entire scheme through funds that were "redirected" or diverted from the United States Treasury to their pockets though the money first went through the hands of their customers. The United States will not be able to recover all of the improper refunds paid to Defendants' customers. Defendants have been dissipating assets since they learned of the criminal investigation by the Internal Revenue Service no later than

[78] *See Stinson*, 239 F. Supp. 3d. at 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 deterrent effect of a Commission enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.").

[79] Pl. Ex. 511; Shepard Dep. 150:17-153:21, 154:9-156:17; Pl. Exs. 119, 147, 265, 267.

June of 2012[80] and throughout the course of this litigation.[81] Defendants have moved assets into foreign jurisdictions[82] and both Johnson[83] and Shepard[84] have taken steps to frustrate the collection of a potential disgorgement award. Without ordering the relief requested, Defendants will continue in their attempt to frustrate the collection of any disgorgement this Court may award and thus irreparably injure the United States.

C. The balance of harm to the United States in not issuing the injunctive relief outweighs the harm to be caused to Defendants by issuing the requested relief.

---

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

[81] 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.

[82] 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.

[83] For example, Neldon Johnson has transferred patents to Nevis and has ownership interests in multiple foreign entities, *supra*. Further, Neldon Johnson testified that if a "government agency caus[ed] problems," then certain assets would revert back to the foreign company. Trial Tr. 2175:4-16. Johnson has structured his affairs in a convoluted manner and in such a way as to obstruct the United States' discovery of ownership interests and assets. *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. Permitting Defendants more time to engage in their solar energy scheme and moving assets while the case has been submitted and decision and judgment is forthcoming will only cause further injury to the United States.

[84] In March 2017, during this litigation, R. Gregory Shepard transferred his property right in his personal residence to a trust in the name of his wifePl. Ex. 914, 915, 916 (attached); *see also*, U.C.A. § 78B-5-503(7); U.C.A. § 78B-5-512. Pl. Ex. 914, 915, and 916 are certified copies of documents filed with the Salt Lake County Recorder and are self-authenticating. Fed. R. Evid. 902(4).

In evaluating this factor, courts look to whether the freeze itself will cause such disruption of defendants' *legitimate* business affairs that the assets would be destroyed.[85] Here, Defendants have no legitimate business. Defendants' solar energy scheme is an abusive tax scheme and not a legitimate business. Defendants do not operate the solar energy scheme – or any of the entities involved in the solar energy scheme – in a businesslike manner. Defendants do not have any revenue or income aside from the sale of solar lenses. There is no harm to Defendants in prohibiting them from using ill-gotten gains to fund their technology tinkering and their personal expenses, including offshore arrangements that will be difficult to collect against. The United States however, and the taxpaying public, will continue to be harmed by the probable dissipation of Defendants' assets. The United States has a compelling interest in enforcing the tax laws and ensuring that persons promoting abusive tax schemes do not profit from their unlawful behavior.[86] As such, the balance of harms weighs in favor of the United States and for relief to be granted.[87]

D. A preliminary injunction will benefit, not disserve, the public interest.

By issuing the preliminary injunctive relief requested by the United States, this Court would serve the public interest in enforcing the tax laws and encouraging compliance with the

---

[85] *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)) (emphasis added).

[86] *See Bull v. United States*, 295 U.S. 247, 259 (1935) (Taxes are the life-blood of government and their prompt and certain availability an imperious need.).

[87] *See United States v. Buddhu*, 2009 WL 1346607, at *5 (D. Conn. 2009) ("While the [defendants] will be denied the right to earn a livelihood preparing income tax returns, the harm to them is substantially outweighed by the harm to which their clients are subjected by having fraudulent tax returns prepared in their names.")

internal revenue laws.[88] Defendants' activities do a disservice to the taxpaying public, undermining confidence in the fair administration of the internal revenue laws, and have cost the United States' Treasury over $14 million. Defendants should not be permitted to profit from their illicit activities. By issuing the preliminary injunctive relief requested, the public interest is served in preserving Defendants assets so that they can be used to satisfy any disgorgement award this Court may order or otherwise compensate those harmed by their abusive tax scheme.[89]

E. 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 appropriate for the enforcement of the internal revenue laws.[90] Second, the appointment of a receiver is authorized by the inherent equitable power of a federal court.[91] The appointment of a

---

[88] *United States v. Anderson*, 2010 WL 1988100, at *3 (D.S.C. 2010); *accord HedgeLender*, 2011 WL 2686279, at *10 (E.D. Va. 2011) (Promoting an abusive tax shelter that caused millions of lost tax revenue "is a significant harm to society because it promotes noncompliance with federal tax laws and is a great cost to the public."); As the Senate Report regarding the enactment of § 6700 observed, "[t]he widespread marketing and use of tax shelters undermines public confidence in the fairness of the tax system and in the effectiveness of existing enforcement provisions." S. Rep. No. 97- 494, Vol I at 266.

[89] When the public interest is 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." *United States v. First National City Bank*, 379 U.S. 378, 383 (1965) (quoting *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).

[90] 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).

[91] *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

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.[92] Given Defendants' reluctance to cooperate in discovery regarding assets and ownership structure[93], a receiver is necessary to enforce the internal revenue laws and determine and corral the assets Defendants have, regardless of their location. This is appropriate to ensure that any disgorgement that may awarded will not be rendered meaningless.

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 receiver control over and the power to investigate all assets and business operations of RaPower-3 and IAS and report to the Court his or her findings. If this Court issues injunctive relief, the United States will seek to have the Court grant the receiver the power to liquidate the businesses, sell assets, and otherwise dispose of property for the purpose of paying the disgorgement award and/or Defendants' other creditors in liquidation of the businesses.

IV. Conclusion

For the foregoing reasons, this Court should issue an order freezing Defendants assets in the amount of $32,796,196 (the amount of disgorgement established by the United States) and

---

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.

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

[93] ECF Doc. No. 218.

appointing 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.

Dated: June 22, 2018

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 June 22, 2018, 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