ANDREA T. MARTINEZ, Acting United States Attorney (#9313)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Suite 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
Trial Attorney, 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-DAO **UNITED STATES' BRIEF IN OPPOSITION TO THE MOTION TO INTERVENE** Judge David Nuffer Magistrate Judge Daphne A. Oberg

Preston and Elizabeth Olsen seek a declaratory judgment "against the United States to allocate payments made by the Receiver to the United States Treasury . . . among the Intervenors' tax liabilities as deposits on their income tax accounts."[1] They purport to act on behalf of others allegedly "similarly situated." Their motion should be denied because they lack Article III standing to seek this relief, and they fail the standards to intervene under Rule 24.

I. Preston Olsen has known for more than ten years that he would owe the taxes that are past due and has long known about the receivership order in this case.

Preston Olsen's name is familiar in this Court. He is an attorney who "advis[ed] clients about the tax aspects of bond transactions."[2] For tax years 2010 through 2014, he "claimed substantial depreciation deductions and tax credits attributable to the [bogus solar] lenses [at issue in this case]" on his federal income tax returns.[3] He "reduced [his] taxable income to zero (or close to it) and claimed substantial refunds."[4] He "used the refunds to purchase more lenses, for which [he] claimed more deductions and credits to generate more refunds."[5] For all of the reasons stated by the Tax Court,[6] Olsen did not "genuinely expect[] to receive any future rental income" or "that the lenses would appreciate in value."[7] Olsen "purchased the lenses, *not with an actual and honest objective of making a profit, but rather to shelter his taxable wage income by*

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[1] ECF No. 1143 at 2.

[2] ECF No. 1143-4, *Olsen v. Comm'r*, Mem. Findings of Fact and Opinion ("*Olsen* Op."), 8 (Apr. 6, 2021).

[3] *Id.* at 2.

[4] *Id.* at 2.

[5] *Id.* at 2.

[6] *Id.* at 25-34.

[7] *Id.* at 32.

claiming artificial losses."[8]

The IRS disallowed the Olsens' deductions and credits "because the lenses were not used in a trade or business, held for the production of income, or placed in service during the relevant tax year."[9] The Olsens filed a petition with the United States Tax Court to challenge the notices of deficiency.[10] Approximately 200 RaPower customers *also* filed petitions to challenge their notices of deficiency that disallowed depreciation and/or energy tax credits for the same reasons.[11] Olsen's petition became the "test case" in the Tax Court and was tried in February 2020.[12] The Tax Court held that the Olsens had "no allowable deductions for depreciation during 2010-2014. . . . [and] the lenses were not energy property upon which energy tax credits could be claimed."[13] In June 2021, the Tax Court ordered that the Olsens' federal income tax deficiencies are more than $100,000 for 2010 through 2014.[14]

Olsen was deposed in *this* case in 2016 and testified at trial in 2018.[15] Olsen knew, no later than November 2019: 1) that the United States won at trial; 2) that a receivership order had been entered; 3) that the Receiver controlled all the defendants' assets; and 4) that the Receiver

[8] *Id.* at 34 (cleaned up and emphasis added).

[9] *Id.* at 18-19.

[10] *Id.* at 19.

[11] ECF No. 1143 at 5; ECF No. 1143-4, *Olsen* Op. at 1.

[12] ECF No. 1143 at 5.

[13] ECF No. 1143-4, *Olsen* Op. at 34 (cleaned up).

[14] Pl. Ex. 979, *Olsen v. Comm'r*, Order and Decision (June 10, 2021).

[15] Pl. Ex. 980, Trial Tr. 1059:20, 1067:19-22.

was marshaling and selling those assets.[16] But Olsen colluded with Glenda Johnson to violate the asset freeze and the receivership order.[17] This Court held him in civil contempt.[18]

II. The motion to intervene should be denied because the Olsens lack standing and otherwise fail the requirements for intervention under Rule 24.

A. The Olsens lack standing.

To establish Article III standing, a plaintiff seeking relief must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[19] "[A]n intervenor of right must [also] demonstrate Article III standing" when it seeks relief other than what the plaintiff requests.[20]

1. The Olsens have not suffered, and will not suffer, an injury in fact.

The Olsens cannot show a legally cognizable injury. Preston Olsen chose to claim false tax benefits on his income tax returns to "zero out" his income tax liability. The IRS will soon assess and collect these long overdue liabilities.[21] That is the direct consequence of Olsen's choice to "shelter his taxable wage income by claiming artificial losses."[22] It is not a legal injury.

The Olsens attempt to fabricate an "injury" by claiming that they have "a direct interest"

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[16] ECF No. 1055-2, Dep. of Preston Olsen 51:11-25, 61:1-61:12 (Sept. 4, 2020); ECF No. 888-1, Notice of Lien (Dec. 19, 2019). We presume familiarity with these key documents, including the receivership order, ECF No. 491.

[17] *E.g.*, ECF No. 1116 ¶¶ 3, 7, 23-50, 54-86, 133-34; *id.* at 55-58, 62-64.

[18] ECF No. 1088, ECF No. 1116.

[19] *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quotation omitted).

[20] *Id.* at 1651; *accord FTC v. Zurixx, LLC*, 2021 WL 3510804, at *2 (D. Utah Aug. 2021) (Oberg, M.J.).

[21] The Olsens filed a notice of appeal of the Tax Court's decision after they moved to intervene. Pl. Ex. 981. We anticipate the Tax Court's decision will be affirmed. *See also* ECF No. 1143-2, Decl. of Paul Jones, ¶ 5 ("The IRS is seeking to establish deficiencies and assessments related to the claimed depreciation deductions and solar energy credits, or has already done so in some cases . . . .").

[22] ECF No. 1143-4, *Olsen* Op. at 34.

in the amounts paid to the United States in partial satisfaction of the $14,207,517 that is second-priority for distribution under the receivership order.[23] They assert that if they pay the income taxes that they owe for 2010 through 2014, *and* the United States receives the $14 million in second priority, the United States will be "unjustly enriched."[24] These baseless assertions rest on a fundamentally flawed reading of this Court's disgorgement award and the distribution mechanism in the receivership order.

"Disgorgement is a form of restitution measured by the defendant's wrongful gain."[25] This Court concluded that "$50,025,480 in gross receipts from the solar energy scheme came from money that rightfully belonged to the U.S. Treasury,"[26] and ordered that defendants disgorge that amount.[27] The United States *illustrated* "harm [to the Treasury] due to the deductions and credits claimed on a subset of Defendants' customers' tax returns for tax years 2013-2016 [of] at least $14,207,517."[28] But this number was just a "snapshot" from four years of a decade-long abusive tax scheme.[29] The number did not include specific and direct financial harm to the Treasury from: 1) returns filed for tax years before 2013; 2) returns filed for tax years after 2016; or 3) returns that claimed the tax benefits Defendants promoted, filed by

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[23] ECF No. 1143 at 7.

[24] *Id.* at 9.

[25] *United States v. RaPower-3, LLC*, 960 F.3d 1240, 1250–51 (10th Cir. 2020) (cleaned up); *accord Liu v. SEC*, 140 S. Ct. 1936, 1943 (2020).

[26] *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115, 1130-32, 1195 (D. Utah 2018), *aff'd* 960 F.3d 1240.

[27] *E.g.*, ECF No. 444 at 17; ECF No. 491 ¶ 89(b) – (d).

[28] *RaPower-3*, 343 F. Supp. 3d at 1193 (citing Pl. Ex. 752 at 3).

[29] *Id.* at 1169-70, 1193.

customers the IRS had not yet identified.[30]

The Olsens' own tax liabilities show the gap between the snapshot of the harm to the government and the Treasury's *actual* losses. Their 2010, 2011, and 2012 liabilities were not included in the $14 million snapshot. They also understated their *2009* federal income tax liability by more than $30,000, thanks to the false deductions and credits they claimed from participating in the scheme.[31] But their 2009 underpayment was not part of the $14 million snapshot, and the IRS will not be able to recover it from the Olsens because the deficiency determination related to 2009 was made too late.[32] Olsen also "bought" lenses in 2015 and claimed false tax benefits on his 2015 tax return.[33] But the Olsens' liability for tax year 2015 was not before the Tax Court. And if the IRS did not examine that return and/or the statute of limitations for assessment has passed (on that year or any subsequent year that the Olsens – or any other customer – claimed false deductions and credits from the solar energy scheme on their income tax return), the IRS will never be able to collect those underpaid tax liabilities.[34]

Therefore, as this Court has already found, the Treasury's direct financial harm is far greater than the $14 million to be paid at second priority – it is more than $50 million.[35] IRS assessment and collection from individuals like Preston Olsen will help close the gap between

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[30] *Id.* at 1135 (the scheme started as early as 2005), 1193; *see also* Pl. Ex. 674, "Tax Time Success Stories."

[31] *Olsen*, 121 T.C.M. (CCH) 1282, at 9, 15.

[32] *See* Pl. Ex. 982, *Olsen v. Comm'r*, Petition for Redetermination of Deficiency ¶ 8(a)-(d) *and* Pl. Ex. 983, *Olsen v. Comm'r*, Answer ¶ 8(a)-(d).

[33] Pl. Ex. 984, excerpt of Dep. of Preston Olsen 157:8-158:4 (Aug. 10, 2016).

[34] *See* 26 U.S.C. § 6501(a).

[35] *E.g.*, ECF No. 491 ¶ 89(b) – (d).

those two numbers. The receivership order already (rightly) allocates second-priority distribution to the countless dollars uncollected and uncollectable in this matter. The Olsens cannot meet their burden of showing that they have some interest (direct or otherwise) in this amount, or that the United States will be "unjustly enriched" if the IRS collects their long overdue income taxes from them. To even begin to support such an argument, they would have to show that the Receiver, the IRS, or some combination of both, had collected or would collect the $50 million this Court ordered disgorged. The Olsens have not made that showing.

2. The Olsens' purported "injury" is not redressable in this Court.

Even if the Olsens could show a legally cognizable harm (which they cannot), such purported harm is not redressable in this Court. The Olsens seek a declaratory judgment "against the United States [requiring it] to allocate payments made by the Receiver to the United States Treasury . . . among the Intervenors' tax liabilities as deposits on their income tax accounts."[36] But this relief is proscribed by the Declaratory Judgment Act.[37]

The Declaratory Judgment Act empowers a federal court to enter a declaratory judgment

[36] ECF No. 1143 at 2.

[37] 28 U.S.C. § 2201. Granting the requested relief would also violate the Anti-Injunction Act, 26 U.S.C. § 7421, particularly to the extent the Olsens seek other "equitable relief" not specified in their opening brief. *See Hicks v. I.R.S.*, 1999 WL 501007, at *2 (W.D. Va. June 2, 1999) (court lacked subject matter jurisdiction for claim seeking injunctive relief to set off tax year 1981 overpayment against tax year 1983 liability); *Long v. Sec. of Treasury*, 1992 WL 442694, at *2 (E.D.N.Y. Nov. 10, 1992) (noting that if the Anti-Injunction Act would bar a request to enjoin a tax offset). The Anti-Injunction Act strips federal district courts of subject matter jurisdiction over suits brought "for the purpose of restraining the assessment or collection of any tax," with only limited exceptions not applicable here. *See* § 7421(a); *Bob Jones Univ. v. Simon*, 416 U.S. 725, 731 n.6, 736-39, 749 (1974). The "reach of these two statutes is coextensive." *Wyoming Trucking Ass'n, Inc. v. Bentsen*, 82 F.3d 930, 933 (10th Cir. 1996). The Olsens' opening brief did not address these statutes or how this Court has subject matter jurisdiction to order their requested relief. If they raise new arguments in a reply brief the United States may request a sur-reply.

"[i]n a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*."[38] This tax exception to the Declaratory Judgment Act "prohibits a court from declaring the rights of litigating parties with respect to federal taxes."[39] The exception "is to prevent the disruption which would occur to the federal revenue gathering processes if these processes were subject to judicial interference prior to the actual determination, assessment and collection of tax liabilities."[40]

The Olsens ask this Court to engage in the very disruption the Declaratory Judgment Act is designed to prevent: to declare that money collected by the Receiver should be applied to their personal income tax liabilities. Courts routinely reject requests for similar relief because it is prohibited by the Declaratory Judgment Act.[41] The receivership order expressly provides, through the potential third-priority claims process for customers, for the orderly assessment and collection of taxes through the IRS.[42] If it appears that the Receiver will collect more than $14 million, and *after* the assessment and collection process is complete for a customer, that customer may apply for payment from the receivership.[43] Among other things, a customer would

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[38] 28 U.S.C. § 2201 (emphasis added). The statute contains exceptions to this bar that are not applicable here.

[39] *Wyoming Trucking Ass'n*, 82 F.3d at 932–33.

[40] *Dietrich v. Alexander*, 427 F. Supp. 135, 137–38 (E.D. Pa. 1977) (quotation omitted).

[41] *E.g.*, *Schon v. United States*, 759 F.2d 614, 617–18 (7th Cir. 1985) (the Declaratory Judgment Act precluded subject matter jurisdiction when plaintiffs "attempt[ed] . . . to reduce their personal liability for trust fund taxes by having a federal court rule that the [IRS] should have applied [a $52,383.00 payment] to the trust fund taxes" the plaintiffs owed); *Latch v. United States*, 842 F.2d 1031, 1033 (9th Cir. 1988) ("The district court clearly lacked jurisdiction over the Latches' claim for a tax abatement, which involved the same relief that would be conferred by an injunction or a declaratory judgment. There is also no statute that gives federal district courts jurisdiction over suits for tax accounting." (citation omitted)); *DeJulis v. Alexander*, 393 F. Supp. 823, 825 (D. Wyo. 1975).

[42] ECF No. 491 ¶ 89(c).

[43] ECF No. 491 ¶ 89(c).

have to show that he has fully paid or otherwise satisfied his federal tax obligations from his participation in the scheme.[44] This is the Olsens' avenue for the redress they seek.

B. The Olsens fail the standards to intervene under Fed. R. Civ. P. 24.

Even if they could show that they have standing (which they cannot), the Olsens would otherwise fail the tests for intervention as of right or permissive intervention under Fed. R. Civ. P. 24. To intervene as of right, a proposed intervenor must show: 1) an interest relating to the property or transaction at issue; 2) that disposing of the property or transaction "may as a practical matter impair or impede the movant's ability to protect its interest"; and 3) that the existing parties to the case do not adequately represent that interest.[45] A court may, in its discretion, allow permissive intervention when a proposed intervenor shows that he "has a claim or defense that shares with the main action a common question of law or fact."[46] For the same reasons the Olsens lack standing, they fail to demonstrate an interest relating to the amounts the Receiver has collected to date, much less that any such interest will be impaired if they are not allowed to intervene. Similarly, they do not have a cognizable claim remediable here that would allow for permissive intervention.

Assuming, however, that the Olsens *did* have a legally protectable interest in the second-priority funds, their motion should still be denied because it is untimely.[47] Whether a motion is

[44] ECF No. 491 ¶ 89(c).

[45] Fed. R. Civ. P. 24(a)(2); *Kane County v. United States*, 928 F.3d 877, 889 (10th Cir. 2019).

[46] Fed. R. Civ. P. 24(b)(2).

[47] Fed. R. Civ. P. 24 (a) & (b) (any motion to intervene must be "timely"); *see Zurixx*, 2021 WL 3510804, at *4 (when proposed intervenors *had* an interest in the case, the court concluded that a motion filed eighteen months after

timely is committed to the "exercise of the sound discretion of the trial court."[48] It depends on all the facts and circumstances including 1) the length of time since the movant knew or reasonably should have known about his interest in the case; 2) prejudice to the existing parties caused by the movant's delay; 3) prejudice to the movant if the motion is denied; and 4) the existence of any unusual circumstances.[49]

Preston Olsen knew, or reasonably should have known, about the interest he now claims when he knew about the receivership order itself: no later than November 2019. The order clearly identifies the priority for distribution, the payees, and the amounts. The second priority (properly) does not require the United States to allocate payments from the receivership to any particular taxpayer's account. If the Olsens objected to that, they should have filed a motion to intervene nearly two years ago. The Tax Court's decision in April 2021 did not create any right that they now claim. It just reduced to writing what Olsen already knew: that since 2009 he had "shelter[ed] his taxable wage income by claiming artificial losses"[50] through the solar energy scheme. He knew that he would be required to pay his actual income tax liabilities.

The primary concern in the timeliness analysis is to prevent prejudice to the existing parties.[51] This is particularly true when, as here, the proposed intervention would interfere with a receivership order that has long been in effect and when the Receiver and the parties to the case

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a receiver suspended an entity's operation was a delay that "weigh[ed] against intervention" and denied their motion).

[48] *Lumbermens Mut. Cas. Co. v. Rhodes*, 403 F.2d 2, 5 (10th Cir. 1968)

[49] *Kane County*, 928 F.3d at 890-91; *Stallworth v. Monsanto Co*., 558 F.2d 257, 264-66 (5th Cir. 1977);

[50] ECF No. 1143-4, *Olsen* Op. at 34.

[51] *Utah Ass'n of Counties. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001).

have been operating under its settled terms.[52] The Olsens claim that there would be no prejudice to the United States if they are allowed to intervene "because the Treasury will still receive the amount equal to its calculated damages."[53] But, as stated above, it would violate the Declaratory Judgment Act (and cause the significant prejudice to the United States that the statute is designed to prevent) to allow the Olsens to jump from third priority to second and require some kind of "accounting" for second-priority funds. This is especially true when the IRS has already devoted significant resources to determine income tax deficiencies for the Olsens and hundreds of other solar energy scheme customers and litigate the deficiencies in Tax Court. Granting the Olsens' request would also undo this Court's carefully designed (and three-year-old) distribution plan that allows the IRS to assess and collect from individual customers before permitting qualifying customers (not just the Olsens or the others on the list of proposed intervenors) potential recourse through the receivership.

III. Conclusion

For all of the foregoing reasons, this Court should deny the Olsens' untimely motion to intervene.

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[52] *See Chase Manhattan Bank v. Corporacion Hotelera de P.R.*, 516 F.2d 1047, 1050 (1st Cir. 1975) (affirming order denying motion to intervene when it was "in effect a request that the court unscramble the distribution it ordered and reopen proceedings two-and-a-half months after the execution of its judgment"); *Zurixx*, 2021 WL 3510804, at *4–6; *see generally SEC v. Wolfson*, 296 F. App'x 637, 638-40 (10th Cir. Oct. 8, 2008) *aff'g* 2008 WL 893002 (D. Utah).

[53] ECF No. 1143 at 10.

Dated: September 17, 2021

Respectfully submitted,

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER
DC Bar No. 985760
Email: erin.healygallagher@usdoj.gov
Telephone: (202) 353-2452
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
FAX: (202) 514-6770
ATTORNEY FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2021, the foregoing UNITED STATES' BRIEF IN OPPOSITION TO THE MOTION TO INTERVENE was 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.

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

Neldon Johnson
P.O. Box 95332
South Jordan, UT 84095

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

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney