Paul W. Jones (#11688)
HALE WOOD, PLLC
4766 S. Holladay Blvd.
Holladay, UT 84117
Telephone: (801) 930-5101
Facsimile: (801) 606-7714
paulwjones@halewoodlaw.com
Attorney for Intervenors

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, and NELDON JOHNSON Defendants.	**REPLY TO RESPONSES TO INTERVENORS MOTION TO INTERVENE** Civil No: 2:15cv-00828-DN District Judge David Nuffer

Prospective Intervenors Preston Olsen and Elizabeth Olsen, and all other similarly situated taxpayers represented by attorney Paul Jones in the United States Tax Court[1] (collectively referred to as the "Intervenors") pursuant to DUCivR 7-1 hereby files this reply to the opposition filed by the United States (Dkt. No. 1152 and response filed by the Receiver (Dkt. No. 1153) (the "Oppositions").

Introduction

Prior to Intervenors addressing the substance of the Oppositions, the Intervenors note that the Oppositions filed by both the United States and the Receiver make many improper ad

[1] See Exhibit A of Dkt No. 1143.

hominem attacks against Intervenor Preston Olsen that have no relationship to the elements of the issue this Court has been asked to decide—can the Intervenors intervene in this action to seek an order from this Court that the distributions from the Receiver to the Treasury are to be allocated to Intervenors' income tax accounts at IRS as deposits to apply against assessments made against them related to this case and/or their Tax Court case. The Intervenors are a large group of similarly situated persons. As such, it is improper of both the Receiver and the United States to attempt to prejudice this Court by focusing solely on taxpayer Preston Olsen. This Reply will address the issues raised by the United States and the Receiver that are relevant to the elements at issue and will disregard the many improper ad hominem attacks against Intervenor Preston Olsen. Intervenors, respectfully request, the Court do the same.

Turning to the substance of the Oppositions, they raise no issues that would cause this Court to deny Intervenors' motion. This reply will confirm that the Motion is timely, the Intervenors will be injured if this Motion is not granted, the injury is redressable by this Court, and the Intervenors meet the requirements of Fed. R. Civ. P. 24. Notably, neither the United States nor the Receiver identified an alternative forum or venue where the Intervenors could be heard to address the application of the funds that have been paid over to the Treasury in this case. Neither Opposition presents any valid reason why the Motion to Intervene should be denied. Indeed, the Tenth Circuit "has historically taken a 'liberal' approach to intervention and thus favors the granting of motions to intervene."[2] Likewise, this Court should grant the Motion to Intervene.

[2] *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017).

Reply Argument

I. The Motion to Intervene Is Timely.

Both the United States and the Receiver assert that the Intervenors' motion is untimely. The motion is very clearly timely. "The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances."[3] This analysis is contextual, and "absolute measures of timeliness should be ignored."[4] Although the proceedings in this case are public and both the United States and the Receiver seek to identify Preston Olsen's specific knowledge of these proceedings, it is undisputed that the test case that determined the Olsens' tax deficiencies was not ruled upon until April 6, 2021 and the decision was not entered by the Tax Court until June 10, 2021.[5] The very specific context and circumstances of Intervenors asserted injury is effectively paying double tax to the United States Treasury if application of funds paid to the Treasury is not ordered.[6] However, Intervenors would not be injured in this way if they prevailed in the Olsen's "test case" heard in the Tax Court. Indeed, had Intervenors brought this motion prior to the decision in the Olsens' test case it could have then been argued that such a motion would be premature because the Tax Court had not yet determined whether a deficiency existed or not (meaning they would not suffer any injury because they would not owe any tax). As such, there has been no delay in seeking this Motion, because it was only sought once it became clear an injury exists.

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[3] *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)
[4] *Id.* (quoting *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)).
[5] See Docket Nos. 26469-14, 21247-16 of the United States Tax Court (*Olsen v. CIR*)
[6] See Motion to Intervene (Dkt. No. 1143) at pgs. 8-9

Next, we turn to whether the parties are prejudiced by the timing of the motion. The Receiver does not identify any prejudice that he would suffer if the Motion to Intervene were to be granted. The United States does not identify any valid ways by which it is prejudiced. In fact, the United States does not present any argument about how the timing of the motion creates *any* prejudice. Instead, the prejudice that United States asserts is that the motion has the potential to "interfere" the receivership order, which is a concern that it would have regardless of the time of the motion's filing. Essentially the argument is that the Intervenors will "jump" from second priority to third priority. This is a wholly invalid concern because the Intervenors are not asking to receive the funds turned over to the United States. Instead, they are seeking to ensure that the funds turned over are actually applied to the injury that United States represented to this Court to have incurred, and to the injury that this Court found to exist—namely that "Defendants' customers [(Intervenors)] followed the solar energy scheme and claimed depreciation deductions and solar energy credits on their tax returns." Dkt. No. 467 at ¶ 420. See also Exhibit C of Dkt. No. 1143.

In other words, the United States is not going to receive a penny less that it would otherwise receive in the second priority class from the Receiver. The Motion is not seeking to have the funds turned over to the Intervenors. Instead, it merely asks that the funds be applied to the Intervenors' tax accounts as the CRO appears to contemplate anyway. Obviously, those funds remain with and are retained by the United States AND those funds still address the injury that they are intended to address. Denying this motion allows the United States to unjustly double its recovery by (i) receiving second class priority funds to redress its injury from the Receiver and (ii) receive the same recovery directly from the Intervenors through payment of the tax liability

collection made directly against them. Thus, the United States is not prejudiced by the timing of this motion. But it will receive an unjust enrichment if this motion is denied.

II. The Intervenors Have Suffered An Injury.

The United States and, in part, the Receiver argue that Intervenors have not suffered an "actual injury". The argument made by the United States as to this point can be summarized as follows. There are taxpayers, including (possibly) some of the Intervenors, that purchased lenses from the Defendants, took tax benefits upon their tax returns and were either not audited or did not have a deficiency asserted against them because of the statute of limitations. For the purposes of this Motion only, the Intervenors will presume that this circumstance exists. The Intervenors do not know (and cannot know) the extent or amount of this "gap"[7] that we'll presume exists. However, this argument fails to address the fact that Intervenors are still injured. Intervenors will explain why this is indisputably true.

In this case the United States had to show that they were injured to obtain an injunction and equitable remedy of disgorgement.[8] As discussed in Intervenors' Motion, the United States articulated that its total injury from depreciation deductions and tax credits that as was fraudulently purported by the Defendants was $14,207,517. This amount was accepted by this Court as all such damages, albeit an approximation.[9] The CRO[10] makes this clear because once this amount is satisfied it is the customers of the Defendants that receive the next dollars that the Receiver distributes (should the Receiver collect that much money). Thus, when the United

[7] The United States uses this word to describe an amorphous and apparently unknowable amount between the $14,207,517 second priority amount identified the CRO and United States Treasury's actual losses (which apparently cannot be known).
[8] See e.g., Dkt. 467 at ¶¶420-427
[9] Dkt. No. 467 at 422
[10] Dkt. No. 491

States receives any portion of the $14,207,517 distributed by the Receiver it is specifically and directly receiving payment for deficiencies of tax of the customers of Defendants—the Intervenors. Thus, the Intervenors are harmed if their tax accounts do not get any credit or application for such payments. This is a direct injury because the Intervenors receive the detriment from whomever does receive the benefit of the amounts paid toward this $14,207,517 distribution class in the CRO.

The U.S. Supreme Court recently held in *Liu v. SEC*, 140 S. Ct. 1936 (2020) that a disgorgement "remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains." This strongly suggests that the United States cannot just keep the proceeds of the $14,207,517 as some undefined windfall that amorphously compensates the United States for unassessed tax liabilities.

The Intervenors injury is particularized. Taxpayers in the "gap" identified by United States that have not been assessed any tax by the United States (or that weren't ever audited), in a literal sense, do not owe the United States any money related to the conduct of the Defendants in this case. An assessment of tax is a recording of the amount a taxpayer owes the government, serving as the official record of the liability.[11] See also *Hibbs v. Winn*, 542 U.S. 88 (2004) (noting that "'assessment' serves as the trigger for levy and collection efforts"). 26 U.S.C. §6501(a) also provides that the government cannot begin any court proceeding for the collection of the tax after the three-year assessment period, if a timely assessment was not made. Thus, the "gap" that the United States identifies are not liabilities that are owed to the United States. However, now that the U.S. Tax Court has ruled in the Olsens' "test case," a tax liability is now assessable and owed by the Olsens. The Tax Court's ruling is also indicative that the remaining Intervenors

[11] 26 U.S.C. §6203; Treas. Reg. §301.6203-1; *Liang v. United States*, 423 U.S. 161 (1976)

deficiencies will become assessable and owing. Thus, unlike the unidentified "gap" persons the United States refers to—persons that will not be assessed a tax even though they claimed tax benefits—the Intervenors are actually injured because they are essentially being double taxed.

Intervenors paid funds to the Defendants, the Receiver recovered those funds from Defendants in this case, and the Receiver gave those funds to the United States *specifically* to make the United States whole for Intervenors' tax liabilities, yet the Intervenors are not receiving any credit for those payments against said tax liabilities. That is an injury. The persons in the "gap" that are not assessed tax (and will not be assessed tax) have no injury because they are not subject to this potential double tax/double recovery scenario. These "gap" persons are not the Intervenors. The Intervenors have or will have tax liabilities and are not getting any credit for the amounts paid to the United States, even though the payment is ostensibly intended to apply toward those tax liabilities.

We lastly note on this point that the Receiver does not make a direct argument that the Intervenors are not injured. Instead, the Receiver merely states that if there is enough money (i.e., an amount above the $14,207,517), then Intervenors will receive money that they could apply toward their tax liabilities. This argument ignores the very purposes for which the United States is receiving the up to $14,207,517 amount, which is to address the harm caused to the Treasury from "Defendants' customers [(Intervenors)] follow[ing] the solar energy scheme and claim[ing] depreciation deductions and solar energy credits on their tax returns." Dkt. No. at ¶420.

It is clear the Intervenors have suffered an actual injury.

III. The Injury Intervenors Have Suffered Is Redressable in This Court.

Next the United States argues that the injury suffered by the Intervenors is not redressable in this Court. Specifically, the United States argues that the tax exception to the Declaratory Judgment Act, 28 USC § 2201 precludes this Court from hearing Intervenors as to the relief they will request if this motion is granted. The Intervenors agree that under the Declaratory Judgment Act, actions that seek "to restrain the assessment or collection of taxes" are exempt from the jurisdiction of the district courts to render declaratory judgments. However, this Motion is not such a case. Thus, the United States' argument is invalid.

In *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278 (D.C. Cir. 1974), rev'd on other grounds, 426 U.S. 26 (1976), the court held that a party whose tax liability was not directly in dispute could maintain a declaratory judgment action where there was no adequate remedy at law and where a judgment would not have the effect of restraining assessment or collection of taxes. This is precisely the case as to the issue that Intervenors are asking this Court to hear.

Likewise, in *Sorenson v. Secretary of the Treasury*, 752 F.2d 1433 (9th Cir. 1985), aff'd, 475 U.S. 851 (1986) the taxpayers sought a declaratory judgment that earned income credits are not subject to retention by the IRS for past-due child support under the tax-intercept law enacted in 1981. The *Sorenson* court ruled that tax exception to the Declaratory Judgment Act was deemed inapplicable on the ground that the case did not involve any question as to the taxpayers' tax liabilities. Similarly, the Intervenors here are not asking the Court to make any decisions or

rulings that will alter their tax liabilities in any way.[12] The central issue of the Motion is focused on the application of tax payments made upon tax liabilities that are already determined.

This Court has previously followed both the Federal Circuit and the Ninth Circuit in declining to apply the tax exception to the Declaratory Judgment Act where the "plaintiff is not attempting to restrain the assessment or collection of taxes."[13] *Caine v. United States*, 92-2 USTC Para. 50,556 (D. Utah 1992).[14] In *Caine* the plaintiff sought a declaratory judgment that the IRS has no interest in the Property to establish title to real property in Mr. Caine. This Court ruled Mr. Caine's case was "not a case 'with respect to Federal taxes' because plaintiff is not attempting to restrain the assessment or collection of taxes."

Likewise, the Intervenors here are not seeking any relief that would restrain the assessment or collection of taxes. Indeed, each of them has a separate case in the Tax Court that is addressing those specific issues. Thus, the United States' argument that the tax exception to the Declaratory Judgment Act is a bar to Intervenor's issue being heard by this Court is unavailing. The Receiver does not make this argument.

IV. The Standards of Fed. R. Civ. P. 24 Are Met

The last argument made by the United States is that the Intervenors do not meet the standards of Fed. R. Civ. P. 24. This argument is also unavailing. The United States specifically argues that (i) Intervenors do not have an interest in the second-priority funds and (ii) the Motion is untimely. The issue of timeliness was addressed above. As such, Intervenors will not re-address

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[12] See also, *Oatman v. Department of Treasury*, 34 F.3d 787 (9th Cir. 1994) (taxpayers allowed to maintain a class action for a declaratory judgment to invalidate the IRS policy of refusing to allow a refund of a taxpayer's community property share of an overpayment which was withheld to satisfy the spouse's obligation for child support and related injunctive relief.)

[13] Citing to *Sorenson v. Secretary of the Treasury*, 752 F.2d 1433 (9th Cir. 1985); *Church of Scientology v. Egger*, 539 F.Supp. 491 (D.D.C. 1982).

[14] Case No. 2:91-cv-00286-DS, Memorandum Decision dated September 4, 1992

this issue here. Intervenors will address the issue of whether the Intervenors have a protectable interest in the second-priority funds—they do.

"[T]he question of impairment is not separate from the question of existence of an interest."[15] The burden is minimal to show that impairment of a legal interest is possible if intervention is denied.[16] Tellingly, the United States does not ever explain why it is that it believes the Intervenors do NOT have an protectable interest in the second priority funds paid over to the United States. The sole argument made is that Intervenors "fail[ed] to demonstrate an interest relating to the amounts the Receiver has collected to date…"[17] This is obviously not accurate. Section II B of the Intervenors' Motion discusses the law and the property interest that Intervenors seek to protect. Regardless, and for clarity, Intervenors note here that there is a very straight line to the property interest that Intervenors seek to protect. The CRO directs the Receiver to make distributions to the United States in an amount equal to the harm/injury it incurred from depreciation deductions and energy tax credits from Defendants' customers. Dkt. No. 467 at ¶ 420. Intervenors are a group of Defendants' customers that will double pay for these amounts if this Court does not allow them to intervene. At a minimum, Intervenors should be allowed know how much of the funds collected will apply to their tax accounts. 26 U.S.C. §6314(a) requires the Secretary of the Treasury to "give receipts for all sums collected by him" that are taxes. At this time, it is unknown how the application of the funds is being made (or whether the funds are, in fact, being applied to the purpose for which this Court ordered). Presumably, the United States knows how it intends to account for these receipts and where they

[15] *Nat. Res. Def. Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978).
[16] *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001)
[17] United States Opposition at 9.

will be applied to.[18] Intervenors have a protectable interest in these matters and, therefore, have a right to intervene.

CONCLUSION

The Oppositions do not raise any valid reasons for the Intervenors' motion to be denied. Thus, for the reasons recited in the Motion and this reply, Intervenors respectfully requests that this Court grant their Motion and allow them to seek an order that the distributions from the Receiver to the Treasury are to be allocated to Intervenors' income tax accounts at IRS as deposits to apply against assessments made (or that will be made) against them related to this case and/or their Tax Court case.

Dated this 11th day of October, 2021

HALE & WOOD, PLLC

/s/ Paul W. Jones
Paul W. Jones
Attorney for Intervenors

[18] See Art. I, § 9, cl. 7, of the U.S. Constitution ("…a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.")

CERTIFICATE OF SERVICE

I hereby certify that the above **REPLY TO RESPONSES TO INTERVENORS MOTION TO INTERVENE** was filed with the Court on this 11th day of October, 2021 and served via ECF on all parties who have requested notice in this case. Copies were also sent by mail to:

Neldon Johnson
Post Office Box 95332
South Jordan, UT 84095

R. Gregory Shepard
858 Clover Meadow Drive
Murray, UT 84123

/s/ Paul W. Jones