CASE NOS. 18-4150 and 18-4119

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' OPENING BRIEF

Respectfully submitted,

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

CORPORATE DISCLOSURE STATEMENT

RaPower-3, LLC is a Utah limited liability company. Its members consist of Randale P. Johnson, a Utah resident, LaGrand T. Johnson, a Utah resident, and Neldon P. Johnson, a Utah resident.

LTB1, LLC is a Utah limited liability company. It has never established members of the entity.

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Attorney for Appellants

Dated: January 20, 2019

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None.

STATEMENT OF JURISDICTION

The United States District Court for the District of Utah, Central Division, had jurisdiction under 28 U.S.C. §1340, 1345 and 26 U.S.C. §7402. Findings of Fact and Conclusions of Law were entered on 10/4/18 (ECF 467), Judgment entered on 10/4/18 (ECF 468), and an Amended and Restated Judgment was entered on 11/13/18 (ECF 507). The Notice of Appeal was timely filed under Rule 4(a)(1)(B)(i), F.R.A.P. on 10/10/18. You have jurisdiction under 28 U.S.C. §1291 and 26 U.S.C. §7402.

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THE SOLAR ENERGY SYSTEM WAS A TAX SCHEME WHEN ALL OF THE ELEMENTS OF 26 U.S.C.A §§46 AND 48 HAVE BEEN FULLY MET .

II. DISGORGEMENT AWARD WAS IN ERROR.

III. PLAINTIFF VIOLATED THE DISCOVERY DISCLOSURE RULES.

IV. DEFENDANTS WERE DENIED THEIR RIGHT TO A JURY.

V. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A PERMANENT INJUNCTION WAS REQUIRED BECAUSE THE SYSTEM DID NOT AND WOULD NEVER WORK.

STATEMENT OF THE CASE

The IRS claimed sales of patented solar lenses that took 11 years and $35 million to develop were marketed as a tax scheme. Defendants relied on advice from lawyers and accountants to follow the law. Defendants prepared no tax returns and advised purchasers to get tax advice.

During discovery the IRS disclosed nothing about disgorgement damages and used no expert witnesses to prove damages. Defendants' objection was overruled.

The IRS claimed $5 to $37 million disgorgement. The court awarded over $50 million while denying the right to a jury.

Defendants ask the decision against them be reversed.

STATEMENT OF THE FACTS

Facts Related to Whether Defendants Complied:

Knew or Should Have Known; Lens existed.

Defendants sold patented lenses and continually advised purchasers consult with tax professionals about any tax benefits. (See: PLEX 5, p. 2; PLEX 14, p. 2; PLEX 20, p. 3; PLEX 27, pp. 1-3; PLEX 94, p. 5; PLEX 95, p. 5; PLEX 119, pp. 1-2; PLEX 174, pp. 1-2; PLEX 511, p. 1-2; PLEX 531, pp. 3-6; PLEX 533, pp. 5-6; PLEX 620, p. 6, among others). All lenses were sold from inventory. (DEX 1522; DEX 1500).

26 U.S.C. §48; Qualified Energy Property uses "solar process heat" without defining it. Government expert Dr. Thomas Mancini testified "solar process heat is basically a way of taking thermal energy that you collect and applying it to some other application, other than generating power, using the heat." (TR.105). He added, "I suppose if you were doing research and development and as part of the process where heating water for a site that could be considered process heat." (TR.200). He witnessed lenses concentrating solar energy to generate over 750°. (TR.199).

Witnesses of concentrated solar heat include Mancini (TR.104:25-105:3; 198:21-199:11), Lynette Williams (TR.1009:10-20), Preston Olsen (TR.1161:16 – 1162:13), Richard Jameson (TR.1234:11-20), Matt Shepard (TR.1545:20-25), and Greg Shepard (TR.1666:7-1667:5; 1750:13-1752:1). The court acknowledged "the

record is pretty clear that there has been some experimental generation of process heat." (TR.2195:12-14). Uncontested evidence proves the lenses qualify as energy property.

Advice of Counsel

Defendants trusted and shared information from two law firms with lens purchasers. (TR.1101:2-22; 1252:21-1253:7; 1643:25-1644:9; 1997:20-1998:19; 2166:1-14; 2214:24-2215:19).

Placed in Service

Witnesses testified equipment is "placed in service" when it is "on site and it works and that someone can use it. " (TR.345). CPA Oveson testified "the equipment had to be produced, had to be delivered in some way to the customer and it had to have the ability to function as it was supposed to function. " *Id*. Placed in service was the biggest question his firm faced in providing an opinion, but added, "If it was determined that it was placed in service that they qualified we felt for the credit and [depreciation]." *Id*. at 346. His firm never finished researching "placed in service". (TR.348, 351, 356-357).

CPA Richard Jameson testified the IRC has three relevant comments: "[C]omment number one is the asset is available and ready for use and in case there is a down time or a broken one that's considered placed in service." (TR.1315). He added, "the third one states that if the asset is being used in the research and

development or some other aspect of the business, like say advertising or something that, but the main thing is research and development to further produce or advance the technology." *Id*.

RaPower lenses were "placed in service." IRS witness Cody Buck admitted he did not know the IRS definition for "placed in service" and never researched it. He did not know how courts interpreted it. (TR.306-307).

Attorney Jessica Anderson explained the IRS definition of "placed in service" only required the equipment be available for use. (TR.657).

Attorney Birrell testified equipment qualified as "placed in service" if used in research and development or marketing. (TR.702).

System works

Johnny Kraczek, MET, a 30 year Senior Engineer and Technologist with extensive experience in mechanical manufacturing, automation, process and renewable energy engineering projects, and Jeffrey Jorgensen, EE PE, a senior electrical engineer and a licensed professional engineer with over 40 years of experience in power generation and industrial electrical systems, conducted a study at Defendants' site to determine whether the Fresnel lens system can be used to generate enough solar process heat to generate electricity using a Sterling Engine system. The study used lenses on existing towers. The "Colorado" Sterling engine was tower-mounted and connected to a controller, the output load wired to an Onics

35 Ohm, 6 kW resistor as the load for the test. On September 5, 2018, from 1:58pm-4:13pm, Kraczek and Jorgensen measured a steady production of electricity using the lenses.[1]

Facts Related to Expert Witness Failures:

During discovery Plaintiff failed to disclose any damage computation, failed to identify its theory of damages, and failed to supplement its initial disclosures as required by Fed. R. Civ. P. 26. Plaintiff refused to produce any witness to explain their case, and obtained a protective order to prevent depositions of their damage witnesses. Plaintiff claimed attorney work-product or attorney-client privilege protected them from discovery.[2] When Defendants tried to depose an IRS witness, Plaintiff objected it was an undue burden and involved protected materials. (ECF 177). Defendants had no intention of invading attorney-client or attorney work product, but wanted to know Plaintiff's proof. (ECF 180). The court granted a Protective Order, ruling: "Upon consideration of the United States' motion for protective order prohibiting Defendants from deposing the United States' trial counsel and related submissions, IT IS HEREBY ORDERED THAT the motion is GRANTED. Defendants shall not depose any representative of the United States Department of Justice, Tax Division." (ECF 196). Just prior to trial, Plaintiff

[1] See Appendix Exhibit 70.
[2] ECF 319, p. 7.

disclosed damage witnesses from the United States DOJ, Tax Division. Defendants filed a Motion in Limine to prevent United States DOJ, Tax Division employees from testifying because DOJ concealed them during discovery. (ECF 319). Defendants asked to exclude three surprise witnesses including DOJ, Tax Division employees Perez (ECF 364), Reinken (ECF 365), and new expert witness Roulhac (ECF 362).

The DOJ/IRS argued and the court decided Rule 26 does not require disclosure of disgorgement damages. This was an error. The plain language of Rule 26 says otherwise.

In Initial Disclosures, DOJ/IRS explained damages tersely:

> . . . disgorgement of the proceeds that all defendants received for the gross receipts (the amount of which is to be determined by the Court) that they received from any source as a result of their conduct in furtherance of the abusive solar energy scheme described in the complaint, together with prejudgment interest thereon. The amount to be disgorged will be based on income information available to the IRS, income information in the possession of all defendants, and the financial records and accounts of all defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme described in the complaint.

Government expert Mancini had no understanding of tax issues. (TR.171). He performed no tests. (TR.173). He did not understand RaPower-3 components. (*Id*.) His work on solar energy failed to produce economically viable solar power. (TR.178). He did not use common measuring equipment for accuracy. (TR.180).

He used guesses, but his "estimates" have never been peer reviewed, lack a known error rate, have no known standards, have no method to replicate his results, and he took no actual measurements on which to base his opinions. (TR.180-183). He testified only 0.04% of total US energy comes from solar, and all solar projects require natural gas to preheat or supplement when dark. (TR.185-186). All solar energy requires tax support, and solar electrical generation cannot compete economically with coal. (TR.188). A motion to strike Mancini's incompetent testimony was denied without explanation. (TR.207-208, 210).

Facts Related to Damages Issue:

In June 2017, Plaintiff quashed Defendants' deposition of the US Department of Justice, Tax Division.[3] After the order "Defendants shall not depose any representative of the United States Department of Justice, Tax Division" (ECF 196) Defendants understood no lawyer, paralegal or employee could testify.

Over Defendants' objections, DOJ employees testified. DOJ paralegal Reinken testified she reviewed bank statements, but ignored all other bank records, including checks and deposit slips.[4] Reinken made no effort to determine which receipts were related to lens sales even though that information was available to her. She made no effort to avoid double counting.[5]

[3] ECF 170.
[4] TR.878:15-880:1
[5] TR.880:2-884:16.

DOJ paralegal Perez testified about "harm to the Treasury." But Perez could not provide a definition for any term used in her exhibit summarizing tax records. Over objections,[6] she made no effort to connect the information in the tax returns to any other documentary evidence, including RaPower-3 sales.[7]

Surprise expert witness Roulhoc could not explain and did not understand the numbers in his spreadsheet. He did not compare the spreadsheet numbers to any bank records (TR.800: 17-24), nor verify any of the numbers represented actual receipts (TR.806:15-17; 812:24-813:1), nor verify any quantity of lenses were sold (TR.813:2-4), nor verify there were any actual lens purchases. (TR.806:18-20). He could not verify any number proved payment for a lens. (TR.811:10-12; 22-24; 813:5-7). He could not explain terms in the database. (TR.822:6-8).

Defendants asked that Perez be barred for untimely disclosure under Rule 37. Perez testified as a summary witness relating 1,643 tax returns "demonstrating total depreciation and solar tax credits that the Defendants' customers claimed" as summarized in PLEX 752 and is the basis for the "harm to Treasury" theory. The court permitted Perez to testify, allowing a two-hour deposition. One business day before trial, Perez' limited deposition disclosed no specifics.

[6] TR.840:16-841:14.
[7] TR.842:17-847:15.

During 12 days of trial, Plaintiff claimed disgorgement was: $17 million,[8] $17 to $50 million,[9] $5 million to $51,885,000,[10] $25 million,[11] $25,874,065,[12] $32 million,[13] and $175 million[14] among other amounts, before eventually settling on $32,796,196.[15]

Defendants showed $43,156,400.88 in business expenses for solar and lens research and development, sales and business costs. All money from lens sales passed through RaPower-3. RaPower-3 purchased materials to build the solar systems and pay sales commissions. All funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS,[16] identified in PLEX 735, 737, and 738 came from RaPower-3.

Facts Related to Jury Issue:

On 1/25/16, Defendants timely demanded a jury.[17] The Court later struck the jury, but permitted reinstatement "if penalties become a part of this case."[18] On

[8] TR.887.
[9] TR.895.
[10] TR.2317.
[11] TR.2441.
[12] TR.2441.
[13] TR.2447.
[14] TR.2514.
[15] ECF 412, p. 98.
[16] IAS sold lenses in 2009, but transferred those sales to RaPower in 2010 and thereafter all sales were by RaPower alone. (TR.2441:23-2442:6).
[17] ECF 24.
[18] ECF 43 at 3.

2/9/18, Plaintiff served its pretrial disclosures, which did not contain any calculation of damages or disgorgement. The same day Defendants moved to reinstate the jury based on *Kokesh v. SEC*[19] because the disgorgement was punitive rather than remedial, entitling them to a jury. [20] On 2/28/18, Plaintiff provided its first summary of damages in PLEX 752. On 3/3/18, the court denied jury reinstatement as untimely and held *Kokesh* did not apply.[21] The court held disgorgement was only remedial.[22] The court later ordered disgorgement exceeding any requested amount, was not supported by the evidence, nor a reasonable approximation of gross receipts.[23] The judgment did not return parties to the status quo and is non-remedial.

SUMMARY OF THE ARGUMENTS

Appellants did not promote a tax scheme. Their system works and qualifies for tax credit and depreciation as solar energy equipment. The trial court ignored years of research and development, millions of dollars of investment, and patented advancements.

Plaintiff failed to present a reasonable approximation of damages. The trial court ignored evidence of Defendants' revenues and imposed an unsupported penalty over $50 million dollars.

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[19] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)
[20] ECF 289.
[21] ECF 322.
[22] *Id*. at 4.
[23] ECF 467 at 144.

The trial court improperly admitted surprise evidence improperly withheld from discovery.

Defendants asked for and were entitled to a jury. The trial court improperly denied this.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THE SOLAR ENERGY SYSTEM WAS A TAX SCHEME WHEN ALL OF THE ELEMENTS OF 26 U.S.C.A §§ 46 AND 48 HAVE BEEN FULLY MET.

A. There Is No Solar Energy Scheme.

Energy tax credits promoted by Defendants are available to qualifying taxpayers. RaPower lenses meet the requirements of the IRC. The District Court's interpretation of the tax code is reviewed *de novo*. *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1284 (11th Cir. 2015); *see also Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994).

An energy tax credit under 26 U.S.C. §§46 or 48 is available to qualifying taxpayers. Once qualified under §48, 26 U.S.C. §36 allows depreciation. There was no evidence Defendants misrepresented application or interpretation of those provisions. There is no "scheme" when buyers are told of potential tax benefits of solar energy development while recommending purchasers get advice from tax professionals. (See Defendants' Statement of Facts ("SOF"), p. 1-2). Nor can buyers rely on Defendants when told to get their own tax advice.

Defendants did not organize or assist in organizing an illegal tax scheme. Defendants sold solar lenses, not a tax avoidance program. The IRS is stopping a legitimate business under the false claim it is a tax avoidance scheme.

Under the IRC a court "may enjoin [a] person from engaging in . . . activity subject to penalty under this title." I.R.C. §7408(b). "Such activity includes the promotion of abusive tax shelters under I.R.C. § 6700." *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at *6 (D. Utah Mar. 9, 2012). "The government must prove five elements to obtain an injunction under these statutes: (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the 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." *Id*.

Here, an injunction was wrongly granted under §7408 for alleged 26 U.S.C. §6700. Defendants did not know or have reason to know anything was false or fraudulent about potential tax benefits for customers. The IRS claimed false or fraudulent statements were telling customers they were in a trade or business; could deduct expenses against active income; and, were "at risk" for the full purchase price

of each lens.[24] Defendants advised customers to get their own tax advice about all these.

The lenses purchased by taxpayers exist. (DEX 1522). DEX 1500 is a video of the solar fields. There is a warehouse full of lenses in addition to those installed on towers. (TR.1082 (Preston Olsen); TR.1321 (R. Jameson); TR.1549 (M. Shepard)). All the RaPower-3 lenses sold to customers exist.

Relying on legal counsel's advice, Defendants represented the lenses were "placed in service" when bought. Numerous copies of the "placed in service" letters are exhibits (PLEX 103-105, 313, 321-322, 327, 466, 534). Defendants had no reason to know their statements were false.

Because the representations the lenses (1) existed and (2) were placed in service at the time of sale were true, there was no false or fraudulent statement or tax scheme.

The lenses qualified under §48. But even if they did not, there is no basis to find Defendants knew or should have known they solar lenses did not qualify. Solar energy property is defined as "any equipment which uses solar or wind energy to generate electricity, to heat or cool or provide hot water for use in a structure, or **to provide solar process heat.**" 26 U.S.C. §48(A)(i) (Emphasis added.) Government

[24] ECF 467 at 87-119, 123.

expert Mancini admitted research and development qualified. (TR.200). Numerous tax preparers independently agreed.

The court wrongly concluded it was "false or fraudulent statement" for Defendants to tell customers they were involved in a "trade or business." That statement cannot make a tax scheme for at least three reasons. First, this is a true statement of the law. Second, it was supported by advice from counsel. Third, each taxpayer's circumstances uniquely determine whether they qualify—and all purchasers are told to consult with their own tax preparer about their circumstances.

The question of whether a person qualifies for the energy tax credit of §48 and whether the person is in a trade or business is circular and dependent on the same facts. 26 U.S.C. §48(C) requires energy property be depreciable.

Lawyers Anderson (PLEX 23A and 570) and Birrell (PLEX 362) explained the solar energy tax credit is for the person "doing business" who can depreciate the asset. Defendants did not misrepresent the tax provisions nor did they deceive purchasers when advising that, upon buying a lens, the purchaser was involved in a trade or business. Defendants believe this in good faith.

IRS stumbled over whether all purchasers of lenses were involved in a trade or business. This was explained in detail by Ms. Anderson on the third day of trial. Anderson scrutinized the question of "material participation" (TR.578), one of the main requirements for depreciation. (TR.591-595). She concluded "material

participation is based on the facts applicable to the individual taxpayer." (TR.595). That is what Defendants told purchasers, in addition to getting advice of their own tax advisor to confirm they qualified. (TR.660; PLEX 570). The Anderson letter given purchasers states it was provided to help them "understand the possible tax saving benefits of purchasing energy equipment through RaPower-3 . . . so that you can consult with your own tax professional about the potential tax advantages." (TR.669-670; PLEX 23A).

The Birrell memorandum included the Circular 230 disclaimer that advice given was not intended to avoid paying federal tax penalties that may be imposed on a taxpayer and each taxpayer should consult their own tax advisor. (TR.701; PLEX 362, p. 16).

The RaPower3.com website warned each taxpayer should obtain his own advice on tax matters. (TR.1465, PLEX 832A[25]).

Defendants routinely instructed, advised, recommended, advocated, and promoted the potential tax benefits of buying RaPower lenses and leasing the lens for use in research, testing, demonstrations and development. There is no evidence Defendants knew their statements were false or fraudulent. What they said was true.

[25] "It is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer."

They acted in good faith. Being mistaken is not bad faith or knowing and intending to violate the law. The tax benefits of §48 are available to qualified purchasers.

B. Plaintiff Makes No Distinction Between False and Fraudulent Statements.

The IRS claims Defendants made statements about tax benefits "which Defendants knew or had reason to know were false or fraudulent." The IRS never made a distinction between "false" and "fraudulent" statements. Defendants' statements cannot be "fraudulent" because there was no proof of intent to cause reliance or anyone relying. Purchasers confirmed solar lenses were bought for reasons other than the tax benefits. At the start of trial, Defendants asked to clarify whether the Court required proof of fraud, or only false statements. The court took the question under advisement, but never returned to the issue until the conclusion of the case. The words "false or fraudulent" in the IRC has recognized meaning and require proof Defendants acted intentionally and knowingly.

Plaintiff asserted "A statement about a material matter is false in the tax law context if 'untrue and known to be untrue when made.'"[26] There was no proof Defendants said anything knowing it was untrue.

Also, "A statement about a material matter can also be false because of what a plan promoter fails to say."[27] This case is not about Defendants failing to say

[26] ECF 467, p. 97.
[27] *Id*.

something. They produced full citations of the tax law on their website (PLEX 903) and encouraged customers to seek professional advice. (TR.1465, PLEX 832A, fn. 24). No defendant claimed to be a tax professional. They cannot be held to that standard. There was nothing they knew and left undisclosed. §6700(a)(2)(A) requires the United States prove scienter for false or fraudulent statements. *United States v. Campbell,* 704 F. Supp. 715, 726 (N.D. Tex. 1988). There is no evidence for that. There is a difference between a mistake and knowing something is fraudulent.

C. Application to Research and Development.

There is undisputed proof customer lenses were used in research and development, including framing support design and testing, alignment and positioning mechanism development, heat collector development, heat exchanger development, and testing with the Johnson Turbine. Under 26 U.S.C. §48 solar process heat used in research and development qualifies for tax credit.

Richter v. Commissioner, T.C. Memo. 2002-90, (04/05/2002) states: "The energy property must be depreciable, which requires that the property be used in a trade or business or held for the production of income. Secs. 48(a)(3)(A)(i)."

Private Letter Rulings acknowledge that "research and development" can be a trade or business[28], acknowledge a corporate taxpayer that is "engaged in the

[28] PLR 9413035 and 9507004.

business of research and development"[29], and discuss a corporation that "is principally engaged in the business of research and development of products in the music industry"[30].

FSA 200145011 acknowledges "research and development" can be a trade or business and cites to *Snow v. Commissioner*, 416 U.S. 500 (1974); the taxpayer need not currently be engaged in selling or producing a product to qualify for a §174 deduction (the research and development credit). *Green v. Commissioner*, 83 T.C. 667 (1984), held that while the probability of a firm's going into business will satisfy §174, the mere possibility of doing so will not. The tax court required actual sales to qualify:

> The Supreme Court reversed and stated that the meaning of the phrase "in connection with a trade or business" used in §174 should not be limited by other restrictive definitions of "trade or business" which had been suggested for other sections of the Code. The Court specifically disclaimed the restrictive test of a trade or business advanced by Justice Frankfurter in *Deputy v. du Pont*, supra, as inappropriate to the purpose of §174. 416 U.S. at 502-503. §174 is intended to encourage research and experimentation by "small or pioneering business enterprises," as well as by established, ongoing businesses. A trade or business test under §174 which depended upon the existence of production or sales of the invention "would defeat the congressional purpose somewhat to equalize the tax benefits of the ongoing companies and those that are upcoming and about to reach the market." 416 U.S. at 504. Therefore, the Court held that the partnership was entitled to a deduction under §174 even though it had not yet had any sales.

[29] PLR 8421031.
[30] PLR 8403028.

The court required Defendants' product be completely beyond research and development before qualifying. That is wrong.

D. Legislative History Supports a Liberal Interpretation of Placed in Service.

In *Sealy Power v. Comm'r*, 46 F.3d 382 (5th Cir. 1995), the 5th Circuit considered "placed in service" by examining the legislative history of the investment credit. It dismissed the Tax Court's interpretation as too stringent in requiring a "regular achievement of anticipated production levels" when Congress created the credit.[31] "Congress enacted the investment tax credit to stimulate the economy by encouraging investment in machinery, equipment, and certain other property."[32] It continued:

> Courts have often recognized the notion that the "investment tax credit should be construed liberally in light of its purposes." The Tax Court's reading of "specifically assigned function" as achieving ideal or near ideal production levels, however, demands a hindsight approach to the success of a taxpayer's investment expenditures which undermines the very focus of the credits' incentive, the initial investment decision. … In defining "placed in service," Treasury Regulation 1.46-3(d)(1)(ii) neither states nor implies that the property must produce an anticipated or projected amount before it may be considered ready and available for a specifically assigned function. Neither do the examples in Treasury Regulation §1.46--3(d)(2)(ii) and (iii) -- illustrating when

[31] *Id*. at 393 ("These regulations do not require that property entitled to depreciation and credits must first meet expected output goals before it may be deemed to have been placed in service; to the contrary, these regulations reveal that defectively or disappointingly performing property may still be considered to have been placed in service.")

[32] *Id*. (citing S. Rep. No. 529, 95th Cong., 2d Sess. 1, 6-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7942, 7945-49.)

> property acquired for use in a trade or business or for the production of income is placed in service -- support the Tax Court's unduly strict construction of the statute.[33]

The *Sealy* court examined a Regulation example[34] of property placed in service justifying a less stringent approach. The example explained operational farm equipment is considered in state of readiness and availability the year it was acquired even if not used that year.[35] Equipment also qualified if acquired for a "specifically assigned function which is operational but is undergoing testing to eliminate any defects."[36] "This example acknowledges defective performance -- presumably performance below that which was anticipated or projected -- does not bar 'placed in service' designation."[37]

E. The Finding of Gross Overvaluation was in Error.

Development of RaPower solar lenses took more than 11 years. (TR.1830-1886). Mr. Johnson testified during those years he alone invested $14,000,000 (TR.1866), and performed mathematic equations analyzing suitable type of plastic,

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[33] *Sealy*, 46 F.3d at 393-94.

[34] *Id*. at 394 citing Treasury Regulation §1.46-3(d)(ii)(2)(ii) ("In the in case of property acquired by a taxpayer for use in his trade or business (or in the production of income), the following are examples are cases where property shall be considered in a condition or state of readiness and availability for a specifically assigned function: Operational farm equipment is acquired during the taxable year and it is not practicable to use such equipment for its specifically assigned function in the taxpayer's business of farming until the following year.")

[35] *Id*.

[36] *Id*. (citing Treasury Regulation §1.46-3(d)(ii)(2)(iii).)

[37] *Id*.

heat co-efficient of the plastic in relation to cooling temperature, factors for deformation at cooling, how to avoid the "stickiness" of the plastic separating from the mold, determining angles for every position of the lens, and then for every position on the roller die, the rate of cooling of each location of the roller, exact angles for the lenses, and temperatures that needed to be maintained to cool effectively. (TR.1842:13–1843:7).

Johnson evaluated multiple plastics, examining useful life, effects from sunlight exposure, and degradation over time. (TR.1850:13-18). There was extensive testing and evaluation of manufacturing heat transfer of metals reacting with the plastics, temperatures needing to be maintained across the entire form to prevent plastics from pulling away on the lens roller die, and suitable fluid used for cooling. (TR.1851).

The roller die was developed in Canada, Tennessee, California, and Utah and required an aerospace facility for testing the mold (TR.1861); required a machinist in California to make the mold (*Id*.). It took 8-9 months to complete the first suitable mold. (*Id*.). Design took approximately 3 years for the first mold in Canada, at a cost of $3,000,000. Afterward, the Canadians told Johnson they couldn't make it work. (TR.1864).

Several patents were awarded: Patent 8900500 "facet deformation minimizing Fresnel lens die roller and manufacturing method." Patent 7789650 "Fresnel lens

angular segment manufacturing apparatus and method." Patent 7789651; Patent 7789652 "roller extruder for manufacturing Fresnel lens angular segments from raw plastic." Patent 20080150189 "Fresnel lens angular segment manufacturing apparatus and method." Patent 20080150175 "Fresnel lens angular segment manufacturing apparatus and method." Patent 2008050179; Patent 20120177768 "facet deformation minimizing Fresnel lens die roller and manufacturing method."

Plaintiff presented no proof on gross overvaluation. The only mention was in closing argument (TR.2332:13): "They grossly overvalued the lenses to pump up the dollar amounts that customers could claim for these unlawful benefits." (TR.2399:20). Counsel asserted the "correct valuation" of any lens was $26-$35. (*Id*.) There was no testimony of "correct valuation." Plaintiff failed to designate anyone to provide any value for the lenses. Plaintiff ignored research, development and testing costs. IRS admitted "Generally a correct valuation is a price that is agreed to by a willing buyer and a willing seller." (TR.2432:23). But contradicted that, viewing sales as a tax scheme. Because of the lack of evidence, the finding of a gross overvaluation should be reversed. The IRS did not meet its burden; offering only conclusion, inuendo and argument.

II. DISGORGEMENT AWARD WAS IN ERROR.

The court erroneously ordered Defendants to disgorge an excessive amount. "We review the district court's findings on damages for clear error. *See Easley v.*

Cromartie, 532 U.S. 234, 242 (2001); *Furr v. AT & T Techs., Inc.*, 824 F.2d 1537, 1547 (10th Cir.1987). To reverse under this standard requires that, based on the entire evidence, we have a "definite and firm conviction that a mistake has been committed." *Easley*, 532 U.S. at 242. We review the district court's legal conclusions *de novo*. *Dang v. UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999).

A. Plaintiff Was Required and Did Not Provide a Reasonable Approximation of the Disgorgement Penalty.

The law is ″a claimant bears the burden of showing the disgorgement amount is a reasonable approximation of [defendants′] unjust enrichment.″ (ECF 359). Disgorgement is to prevent unjust enrichment.[38] IRS has the burden to show the disgorgement amount. To do so they must prove a reasonable approximation of ill-gotten gains.[39] Only after a reasonable approximation is proven does the burden shift to the defendant to show it is not a reasonable approximation.[40]

Plaintiff did not meet its burden. In discovery Plaintiff failed to disclose any amount for their damage claim. At trial Plaintiff presented a vast range of $5,000,000-$51,885,000 as the possible floor and ceiling of damage. A $46,000,000.00 range is not reasonable.[41]

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[38] *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014).
[39] *See S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[40] *S.E.C. v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012).
[41] See *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951).

During trial, Plaintiff claimed disgorgement was: $17 million,[42] between $17 million and $50 million,[43] $5 million to $51,885,000,[44] $25 million,[45] $25,874,065,[46] $32 million,[47] and $175 million,[48] among other amounts. A motion[49] stated disgorgement should be $47,461,050. (*Id*. at pg. 9.[50]) At trial Plaintiff settled on $32,796,196.[51] Plaintiff also said the best evidence of actual payments received comes from isolating the word "full" in PLEX 749 to isolate collections.[52] Doing so results in $17,911,507.[53] The court ignored this and entered judgment for $50,025,480.00, which was clearly incorrect.

B. Gross Revenues as Measurement.

In SEC disgorgement cases, courts have ordered disgorgement from defendants where all of the defendant's conduct was fraudulent or the defendant's illegitimate activity is indistinguishable from his legitimate activity.[54] Plaintiff still

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[42] TR.887.
[43] TR.895.
[44] TR.2317.
[45] TR.2441.
[46] TR.2441.
[47] TR.2447.
[48] TR.2514.
[49] ECF 252.
[50] This Court should note, this filing was well after the close of both fact and expert discovery and was based upon an inaccurate extrapolation of alleged lens sales. See additional argument below.
[51] ECF 412 pg. 98.
[52] TR.886:24-888:8.
[53] TR.820:19-822:3.
[54] *S.E.C. v. Lauer*, 478 F. App'x at 557; *S.E.C. v. Calvo*, 378 F.3d at 1217.

bears the burden of showing a reasonable approximation. This generally involves reviewing banking records and tax returns showing gross revenues, or fees earned in preparing fraudulent tax returns on a taxpayer's behalf.[55] In the absence of a reasonable approximation, courts deny disgorgement.

In *United States v. Stinson*,[56] involving disgorging fees earned from preparing fraudulent tax returns, the government's proposed disgorgement was not a reasonable approximation. The government failed to carry its burden because it failed to show some fees were distinct from others and double-counting damages is prohibited.

In *United States v. Mesadieu*,[57] a proposed disgorgement was not a reasonable approximation. Like this case, the government relied on a random sampling of returns. The government used ***expert testimony*** to estimate the number of non-compliant returns from a random sampling.[58] The court found the government had access to all returns (just like in this case), and it was not inordinate or impractical to review each return for proof of fees improperly earned.[59] In that case, expert

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[55] *United States v. Barwick*, No. 6:17-cv-35-Orl-18TBS, 2018 U.S. Dist. LEXIS 32289, at *3 (M.D. Fla. Jan. 25, 2018) (testimony regarding review of tax returns which included an inflated EITC amount, non-existent business, and fabricated unreimbursed business expenses and fees earned by defendants in preparing these returns)

[56] 239 F.Supp.3d 1299, 1329 (M.D. Fla. 2017).

[57] 180 F.Supp.3d 1113, 1118 (M.D. Fla. 2016).

[58] *Id*.

[59] *Id*. at 1122.

opinion did not justify a speculative award. In this case, Plaintiff failed to review any tax returns, made calculations without evaluating the actual tax treatment of RaPower-3 lenses, and presented no expert witness on damages.

C. Net Revenues as Measurement for Disgorgement.

The power to order disgorgement is limited. It extends only to the amount the defendant profited from wrongdoing.[60] Any additional sum is an impermissible penalty.[61] Funds returned to customers or investors is a proper deduction to measure net-revenue subject to disgorgement.[62]

Generally, a defendant is not allowed to deduct business expenses from the disgorgement amount if the business was created and run to "defraud investors."[63] But it is proper to deduct business expenses if the business was not created to defraud investors.[64] Plaintiff did not show Defendants intentionally defrauded investors. At

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[60] *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).
[61] *Id.*
[62] *SEC v. United Am. Ventures, LLC*, No. 10-CV-568 JCH/LFG, 2012 U.S. Dist. LEXIS 51978, at *17 (D.N.M. Mar. 2, 2012)(deducting from disgorgement award the amount repaid to investors as "interest payments"; see also *S.E.C. v. Haligiannis*. 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) ("[D]istributions must be subtracted because they did not unjustly enrich defendant.").
[63] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006).
[64] *Id.* ("Neither the deterrent purpose of disgorgement nor the goal of depriving a wrongdoer of unjust enrichment would be served were we to allow these defendants — who defrauded investors ... to 'escape disgorgement by asserting that expenses **associated with this fraud** were legitimate.'") (emphasis added).

every level, Defendants encouraged its customers to seek their own tax advice. (See SOF, p. 1).

Defendants showed business expenses that should reduce any judgment. Expenses for 2011 were $159,975. (PLEX 542). Expenses in 2012 were $228,410.70. (PLEX 543). PLEX 520 shows Plaskolite purchases of $1,145,930.18. Research and development expenses for 2008 are $760,798 and for 2009 $704,889. (PLEX 371). The cumulative net loss in the 10K of IAS for 2009 is $35,334,617. (*Id*.) The IAS 2016 10K shows a cumulative net loss of $40,156,398. (PLEX 507). A total of $43,156,400.88 in business expenses related to solar research and development of lenses, and to lens sales and business. All of these are legitimate business expenses and should have been deducted from disgorgement.

D. Injury to Treasury is an Illegitimate Measurement of 7402(a) Disgorgement.

The court found Defendants damaged the Treasury in the speculative amount of at least $14,207,517. This figure is allegedly calculated by adding all deductions of any kind used by purchasers, who, with the help of their own tax advisors, claimed depreciation and/or a solar tax credit. The calculation is not based on actual amounts deducted, but an assumed average tax rate. There was no evaluation on an individual basis. This was wrong. Had the IRS reviewed actual returns, that number could have been determined. The government failed to distinguish deductions based upon some other investment or equipment. IRS did not separate energy tax credits

claimed by taxpayers for home-rooftop solar panels, home insulation, water heaters, or other qualifying purchases in their tax returns. There is no reduction for the recovery the IRS will make in the individual audits, refilings, and penalties from Defendants' purchasers.

E. Income of Individual Defendants is Basis for Disgorgement.

Disgorgement is the amount an individual profited from wrongdoing. There must be a "relationship between the amount of disgorgement and the amount of ill-gotten gain."[65] The income of individual defendants is germane to a disgorgement amount only to the extent the government can show it is income *solely from the illicit or fraudulent activities* and not a compounding calculation of amounts already included in the disgorgement calculation for the entities.[66]

All amounts claimed against individual Defendants are entirely derived from and included in the RaPower-3 total and constitutes an improper double recovery. All money from lens sales passed through RaPower-3. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS,[67] identified in PLEX 735-738 came directly from RaPower-3. To include those both to individual Defendants and as income to RaPower-3 results in prohibited double counting and

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[65] *C.F.T.C. v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999).
[66] See *Mesadieu*, 180 F.Supp. at 1122 (refusing to award disgorgement when government failed to distinguish legitimate gains from illegitimate gains).
[67] IAS sold lenses in 2009, but in 2010 those sales were transferred to RaPower and thereafter all sales were conducted by RaPower alone. (TR.2441:23-2442:6).

double recovery.[68] RaPower is the only party whose gross revenues should be counted.[69] RaPower's costs of business should reduce claims against them.

F. The Government's Methodology for Proving Disgorgement is Inherently Unreliable.

Testimony from two DOJ paralegals introduced summaries of voluminous evidence.[70] Perez prepared PLEX 752, which purports to summarize the contents of "at least 1,643 tax returns that Defendants' customers filed with the IRS."[71] She testified "the total depreciation and solar tax credits that the Defendants' customers claimed, applied the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government)" and the tax credits taken as a reduction to the taxpayers' liability.[72] Determining and applying an "average tax rate" by definition requires expert opinion, involving selecting and applying a hypothetical "average" not a summary. She was not qualified as an expert witness, designated as an expert, and no attempt was made to meet the Scheduling Order deadline to disclose expert witnesses. She was an ambush witness, unqualified to offer damage testimony.

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[68] The government has also failed to reduce for other income sources for these parties. The extent of that error is impossible to determine without seeing the government's source documents and how they were selectively used to reach their calculated results, a document which the court ruled defendants could not see in ECF 376.

[69] Further, RaPower did not collect on all sales. What was "booked" and "collected" are very different. Collections were much lower.

[70] ECF 329.

[71] *Id*. at fn. 14.

[72] *Id*.

As set out in ***Facts Related to Expert Witness Failures***, and ***Facts Related to Damages Issue***, supra, the IRS blocked all discovery to obtain information about disgorgement. Because it could not be discovered, Defendants concluded no lawyer, paralegal or employee of DOJ would be allowed to testify. Defendants were surprised and unprepared at trial when ambushed by DOJ witnesses and exhibits and had no opportunity to obtain experts for the defense. Defendants were cheated out of having their own expert dissect the summaries to challenge accuracy and to address and counter the clearly erroneous assumptions, calculations and analysis done by Plaintiff's DOJ employees. Hiding until the eve of trial, long after expert witness discovery had already concluded, was unfair abuse.

G. $50,025,480.00 is Not a Reasonable Approximation of Neldon Johnson's Gains.

Finding of Fact 76 states that the "total sales price of orders placed with defendants by customers was $50,025,480.00 to $50,097,672.15." This was from a column in PLEX 749, prepared by Roulhoc and never offered as a damage calculation. It is an Excel spreadsheet created from a database maintained by Defendants to attempt to internally track lens sales, payments, and other information. Its raw data included "test" transactions and posted "sales" that did not result in any revenue for Defendants. Roulhoc could not explain and did not understand the numbers on this spreadsheet. He did not compare the spreadsheet numbers to any

bank records. (TR.800:17-24). He did not verify any of the numbers represented actual receipts (TR.806:15-17; 812:24-813:1), any quantity of sales (TR.813:2-4), there were any actual lens purchases (TR.806:18-20), nor verify any number represented an actual payment for a lens purchase. (TR.811:10-12; 22-24; 813:5-7). He could not explain how terms were used in the database. (TR.822:6-8). He ignored all of the comments in the document about whether actual payments were received. (TR.805-807:5). Roulhoc's testimony only shows the information in PLEX 749 came from defendant's raw database. There was no attempt to interpret PLEX 749 by any witness. Plaintiff could have deposed or called Glenda Johnson, who entered the raw data, to explain it but instead chose to use unexplained raw data and present speculation through a witness who did not know if it included actual revenue, actual lens purchases, what quantity of lenses were reliably counted, or what any comment in the database meant.

The court relied upon PLEX 749 to enter judgment against Johnson in the inflated amount of $50,025,480. This apparently came from summing a column in PLEX 749 purporting to be lens sales then multiplied by a hypothetical cost of those lenses – despite clear evidence this amount was never received by RaPower and certainly not by Johnson. This number far exceeds PLEX 749 totals for amounts identified as received. It exceeds all deposits in company and personal bank accounts. It is punitive.

Plaintiff acknowledged in open court PLEX 749 does not support $50,025,480 as either gross receipts or the increase in net assets.[73] The court acknowledged "[t]here was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought." (ECF 467, p. 126). Despite this, the court entered a finding "Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480." (See ECF 467, ¶86). Earlier, Plaintiff identified that number as the "total sale price of orders." (*Id.*, ¶76). Orders are not payments. In fact, Plaintiff's counsel admitted the amount of gross receipts for payments made identified in PLEX 749 was $17,911,507.[74] Plaintiff admitted "there is evidence that not everybody paid for every single lens in the amount of $1,050."[75] The amount awarded is more than triple the amount shown as paid in the very same exhibit. The Plaintiff has the burden to prove a reasonable approximation and has repeatedly admitted on the record their guesstimates are neither accurate nor reasonable. Plaintiff argued that because most of the lens purchasers did not pay the full contract amount this was indicia of the false tax scheme.[76] The amount of disgorgement was grossly overstated.

[73] ECF 412, p. 98; Transcript at 2447:15-2448:2.
[74] TR.821:7-822:2; 887:11-8.
[75] TR.892:16-17.
[76] TR.2422:20-25.

Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities,"[77] its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts,[78] $5,438,089 in IAS accounts,[79] and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196.[80] (See ECF 467, pp. 81-85). These may have been double or triple counted. Plaintiff's witness was not a CPA (TR.877:8-9) or a lawyer. (TR.877:10-11). She used a term "gross receipts" but included in that category anything and everything on bank statements, without tying any deposit to lens sales. (TR.877:16-878:22). She did not use any available information on checks or deposit slips to isolate lens sales. (TR.879:1-14). Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits about RaPower and other Defendants may have been labeled "gross receipts" but none of the exhibits make any attempt to limit to lens sales. (PLEX. 735-TR.881:11-16; PLEX 737-TR.881:25-882:6; PLEX 738-TR882:8-14; PLEX 739-TR.882:21-883:1; PLEX 740-TR.883:2-7.) She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no attempt to exclude deposits from the purchase of IAS stock, despite the Plaintiff

[77] ECF 467, 80.
[78] ECF 467, 81.
[79] ECF 467, 82.
[80] ECF 467, 85.

clearly knowing the stock purchases happened. (TR.1812:4-12).[81] These numbers are inherently unreliable. The court relied on unreliable numbers. (ECF 467 86). Plaintiff is not entitled to one penny more than the actual gross receipts or increase in net assets. (ECF 359). Plaintiff did not prove a reasonable approximation.

The court found, "It is reasonable, based on the facts of this case and Defendants' extensive promotion of the solar energy scheme, to conclude that customers have used their 'purchases' of all, or nearly all, of those lenses to claim a depreciation deduction and a solar energy credit. Because of the manner in which Defendants promoted the scheme, the Court concludes that $50,025,480 in gross receipts from the solar energy scheme came from money that rightfully belonged to the U.S. Treasury. Defendants – who are the ones in possession of the best evidence of a reasonable approximation of their gross receipts – failed to rebut the United States evidence of this reasonable approximation, and introduced no credible evidence of their own on the point." (ECF 467, pp. 126-127). The court bases this on three factors: that some of RaPower's customers claimed a depreciation deduction and a solar energy credit, that because of its promotional activity $50,025,480 of money that rightfully belonged to the U.S. Treasury was received by

[81] The court told Plaintiff this was impermissible double counting, but made no effort in its findings to correct it. (TR.2443:2-2444:24).

Defendants, and Defendants failed to present credible evidence to rebut the point. These conclusions are unsupportable.

There was no evidence Defendants actually received $50,025,480. Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities,"[82] its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts,[83] $5,438,089 in IAS accounts,[84] and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196.[85] Much of this was double-, perhaps triple-counted. This evidence directly contradicts the court's conclusion.

Plaintiff proposed the harm to the Treasury was the speculative amount of $14,207,517. (PLEX 752). This figure was allegedly calculated by adding all of the deductions used by RaPower-3 customers claiming depreciation and/or a solar tax credit. The calculation is not based on actual amounts deducted for lens purchases, but were calculated using "average tax rates". There was no evaluation of those deductions on an individual basis. There was no attempt to identify an actual amount of deductions and therefore any actual loss to the Treasury. Nevertheless, even the

[82] ECF 467, 80.
[83] ECF 467, 81.
[84] ECF 467, 82.
[85] ECF 467, 85.

speculative number asserted by Plaintiff does not support the court's ultimate judgment.

The best evidence of what the harm to the U.S. Treasury would be contained in the tax returns of Defendants' customers who actually claimed a deduction or a credit. Plaintiff was in possession of those tax returns, Defendants were not. The judgment is unsupportable.

H. $25,874,066 is Not a Reasonable Approximation of RaPower-3's Gains.

Plaintiff argued the total deposits into RaPower-3 bank accounts may be the appropriate amount for disgorgement. Plaintiff's witness did not use any available information on checks or deposit slips to identify lens sales. (TR.879:1-14). The witness' exhibits include all bank statement transfers, not gross revenues from lens sales. (TR.880:3-25). Her exhibits may be titled "gross receipts" but none limit totals to lens sales. (PLEX 735-TR.881:11-16; PLEX 737-TR.881:25-882:6; PLEX 738-TR882:8-14; PLEX 739-TR.882:21-883:1; PLEX 740-TR.883:2-7.) The revenue from lens sales were not isolated from redeposits or inter-account transfers. (TR.883:25-884:16). The numbers are overstated and unreliable.

I. $5,438,089 is Not a Reasonable Approximation of IAS's Gains.

RaPower purchased $3,077,000 in stock from IAS. (PLEX 852, 507; TR.1812:4-12). That is included in the disgorgement. It is double-counted and

included in both the amount for RaPower-3 and for IAS, despite the court's opposition to do so at closing argument. (TR.2441-2444). This is a double recovery, double-counting, and an overstated and unreasonable approximation of funds received.

All lenses sold by IAS were re-purchased by RaPower-3. (TR.2181:3-8, 2288:22-2289:3). There is no justification for $5,438,089. IAS has no gain from lens sales.

III. PLAINTIFF VIOLATED THE DISCOVERY DISCLOSURE RULES.

A. Damage Evidence Was Not Disclosed.

Plaintiff failed to provide evidence regarding damages prior to trial. The court should not have admitted that evidence, nor relied on it. This Court must review decisions to admit evidence for abuse of discretion. See *United States v. Boeing Co.*, 825 F.3d 1138, 1145 (10th Cir. 2016). "Under this standard, we will not reverse unless the district court's decision exceeded the bounds of permissible choice in the circumstances or was arbitrary, capricious or whimsical." *Id*. (internal quotation marks omitted).

"[B]y its very terms Rule 26(a) requires more than providing-without any explanation-undifferentiated financial statements; it requires a 'computation'

supported by documents."[86] Because Plaintiff provided a description of the damages it intended to pursue, it had an obligation under Fed.R.Civ.P. 26(e) to supplement its disclosure of damages and elaborate on the "income information available to the IRS, income information in the possession of all Defendants, and the financial records and accounts of all Defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme."[87]

Rule 26(e) mandates supplementation of initial disclosures throughout the case. "A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—**must** supplement or correct its disclosure"[88] The timing of supplementation is critical as to whether it is allowable.[89]

Plaintiff over-generalized damages in its Initial Disclosures and never supplemented to enable Defendants to analyze the claim and prepare to confront it at trial. The plaintiff in *Design Strategy*, infra, was barred from putting on trial evidence when it relied on generalized initial disclosures using a broad categorical

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[86] *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).
[87] See Appendix Exhibit 7.
[88] Rule 26(e) (emphasis added).
[89] *AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 79 (D. Mass. 2008) (finding a supplemental calculation untimely when made after the close of discovery because the opposing party was without the means to explore and challenge it).

description such as "all monies paid to [Defendant] . . . based upon breach of fiduciary relationship".[90] That description did not satisfy Rule 26 and was not supplemented before trial.[91] The Plaintiff provided nothing to equip Defendants to respond at trial, and robbed Defendants of the opportunity to hire an expert witness to rebut Plaintiff's calculations.

Plaintiff cannot circumvent Rule 26(a) by referring to documents as the basis for calculations claiming damages are merely "summary calculations."[92]

The remedy for untimely disclosure is excluding evidence, particularly when disclosed on the eve of trial.[93] Late disclosure prejudices the opposing party even when there are scheduling changes, reopening discovery or other delays and increased costs of litigation.[94]

The DOJ/IRS was allowed to introduce untimely exhibits and undisclosed witnesses and Defendants were denied the time, ability, or opportunity to investigate the summaries and calculations and obtain expert witnesses. Had Defendants known of the dubious damage evidence during discovery, they would have retained expert

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[90] *Design Strategy*, 469 F.3d at 292.
[91] *Id*. at 293. See also, *Silicon Knights, Inc., v. Epic Games, Inc.*, 2012 WL 1596722 (E.D.N.C. May 7, 2012) (the court held a description of "several million dollars" was not the specific computation required by Rule 26 because it lacked precision and analysis.)
[92] *See Design Strategy*, 469 F.3d at 292 (finding inadequate the disclosing party's assertion that calculating damages was "simple arithmetic").
[93] *See CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 280 (5th Cir. 2009).
[94] *Id.*; *see also Bean v. Pearson Educ., Inc.*, 949 F. Supp. 2d 941, 953 (D. Ariz 2013).

witnesses to challenge the assumptions and conclusions. Once the ambush was revealed, all discovery had closed.

B. Expert Witness Testimony Was Not Properly Disclosed or Admitted.

Rule 26(a)(2)(B) requires experts and their proposed testimony be disclosed. DOJ/IRS failed to identify any expert on financial calculations, summaries, charts, or explanations. DOJ/IRS claimed their surprise evidence was not expert testimony; only reviewed and compiled deposits from Defendants' accounts and depreciation, and solar tax credits from customers' tax returns.[95] But Defendants were robbed of their opportunity to have an expert witness examine the surprise material and refute the DOJ/IRS's "summary calculations" and "arithmetic." The trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

DOJ/IRS claimed the surprise evidence was "a reasonable approximation of the Defendants' gross receipts"[96] and "the harm to the government that resulted from the Defendants' scheme."[97] The witness testified to much more than tallying numbers. They provided summaries and summaries of summaries.[98] There are mathematical comparisons of different summaries (gross receipts vs. harm to

[95] ECF 332, p. 4.
[96] ECF 329, p. 4.
[97] *Id*.
[98] *Id*. fn 11.

government),[99] which necessarily entailed making assumptions and drawing conclusions as expert witnesses. The testimony and documentation went beyond the ken of a layman. Plaintiff was allowed to use Perez to testify about 1,643 tax returns, including the total depreciation and total solar tax credits, then "appl[y] the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government) from Defendants' scheme."[100] The tax loss (harm to the government) was not disclosed despite Rule 26. The calculations were not mentioned during discovery. There was no hint of the theory of "harm to government."

Because Plaintiff never disclosed its damages, Defendant was never made aware of how disgorgement was calculated. Plaintiff accomplished an ambush leaving Defendants unable to confront Plaintiff's witnesses' calculations and computations. Until trial, Defendants never knew the tax rates applied by Perez. Defendants never knew the individual tax situation for those 1,643 taxpayers. Tax returns are not simple math. They are complex. To address the alleged harm to the Treasury, each individual tax return would have to be compared to a hypothetical tax return recalculated without the solar business deductions. Plaintiff did not do that and Defendants could not use an expert to accomplish it before trial. Plaintiff took tax refunds received by taxpayers and lump-summed those numbers into a

[99] *Id*. fn 13
[100] *Id*. fn 14.

summary of "harm" to the Treasury and attributed that harm to Defendants. Common sense dictates that if the solar energy equipment is withdrawn from the tax calculations, there would be taxes owed or taxes overpaid with refunds owed or deficiencies paid by each taxpayer based on their unique return.

Those complex calculations were missing and assumed numbers were put in summaries and charts. Plaintiff avoided its duty to disclose expert witnesses and produce expert reports timely to surprise Defendants and prevent designating rebuttal experts. The tax code and its implication in this case requires specialized knowledge subject to Fed.R.Evid. 701 and 702 and the Plaintiff was allowed to avoid compliance.

Mancini was not qualified to offer opinion testimony under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). His personal views are meaningless, and non-scientific. He does not meet any of the criteria (see ***Facts Related to Expert Witness Failures***, *supra*): (1) his techniques cannot be and have not been tested; (2) his methods have not been subjected to peer review; (3) he has no known error rate; (4) there are no standards controlling his methods; and (5) nothing he has done has attracted widespread acceptance within a relevant scientific community. His testimony ought to have been excluded.

IV. DEFENDANTS WERE DENIED THEIR RIGHT TO A JURY.

The lower court imposed a legal penalty, not an equitable remedy. Defendants

were entitled to a jury, requested a jury and were denied that right. It was an error to remove the jury at the start of the case and an error to deny the motion to reinstate the jury. Entitlement to a jury trial is a question of law which this court must review de novo. *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995); *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1221 (10th Cir. 2013).

A. Defendants are entitled to a jury because under the reasoning of *SEC v. Kokesh*, the disgorgement sought by Plaintiff is a penalty.

1. *Kokesh v. SEC*; an overview.

The United States Supreme Court unanimously resolved a disagreement among the Circuits over whether disgorgement claims in SEC proceedings are subject to the 5-year statute of limitations.[101] The limiting statute was only implicated if SEC disgorgement is a fine, penalty, or forfeiture.[102] The controlling question decided by the Supreme Court was whether SEC disgorgement constituted a penalty thereby invoking the 5-year limitation statute.[103] The decision reviewed state actions that were a penalty,[104] reasoning "[a] 'penalty' is a 'punishment', whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws."[105] This definition rests on two principles:

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[101] *Kokesh*, 137 S. Ct. at 1641.
[102] *Id*. at 1642.
[103] *Id*.
[104] *Id*.
[105] *Id*.

> (1) "whether a sanction represents a penalty turns in part on 'whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual'"
>
> and;
>
> (2) "a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[106]

The Court then discussed *Brady v. Dal*, and held damages under copyright law are not penal in nature because the statute gives the right of action solely to the private individual (the copyright owner), rather than the public to enforce a wrong.[107] Second, the Court observed because "the whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person," the damages recoverable were not a penalty.[108] Accordingly, a compensatory remedy for a private wrong was not a "penalty."[109]

Next, the Court discussed how it utilized the same principles in the past in construing the statutory predecessor to the limiting statute at issue. In *Meeker v. Lehigh Valley R. Co.*, the Court refused to apply a 5-year limitations period to an order that required a railroad company to refund and pay damages to a shipping company for excessive shipping rates.[110] The Court held that the "words 'penalty or

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[106] *Id.*
[107] *Id.* (citing *Brady v. Dal*, 175 U.S. 148, 154 (1899).)
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1642 (citing *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 421-422 (1915)).

forfeiture' in [the statute] refer to something imposed in a punitive way for an infraction of public law."[111] The Court in *Meeker* further reasoned that a penalty does "[n]ot include a liability imposed [solely] for the purpose of redressing a private injury… Because the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a 'penalty' within the context of the statute of limitations."[112]

a. SEC disgorgement constitutes a penalty when applying the foregoing principles.

Applying this to SEC disgorgement, the Court held such disgorgement constitutes a penalty within the meaning of the limiting statute.[113] First, the "SEC disgorgement is imposed by the court as a consequence for violating what we described in *Meeker* as public laws" because the violation "is committed against the United States rather than an aggrieved individual."[114] The Court also stated that an enforcement action may proceed "even if the victims do not support or are not parties to the prosecution."[115] The Court also relied on the Government's concessions that

[111] *Id*. (brackets in original).
[112] *Id*. (brackets in original); *see also Gabelli v. SEC*, 568 U.S. 442, 451-52 (2013) ("[P]enalties" in the context of §2462 "go beyond compensation, are intended to punish, and label defendants wrongdoers").
[113] *Id*. at 1643.
[114] *Id*.
[115] *Id*.

"[w]hen the SEC seeks disgorgement acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties."[116]

Second, the Court found SEC disgorgement is imposed for punitive purposes. The earliest case emphasized the need "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations."[117] In the years that followed the first case, the Court observed, "it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather courts have consistently held that '[t]he primary purpose of disgorgement orders is to deter violations of security laws by depriving violators of their ill-gotten gains.'"[118]

Finally, the Court stated in many cases SEC disgorgement is not compensatory because the "disgorged profits are paid to the district court, and it is

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[116] *Id*. at 1643; see, e.g., *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993) ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets"); *SEC v. Teo*, 746 F.3d 90, 102 (3rd Cir. 2014) ("[T]he SEC pursues [disgorgement] 'independent of the claims of individual investors' in order to 'promot[e] economic and social policies'").

[117] *Id*. at 1643 (quoting *SEC v. Tex. Gulf Sulphur Co.*, 312 F. Supp. 77, 92 (S.D.N.Y. 1970)).

[118] (quoting S*EC v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997); see also *SEC v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1474 (2nd Cir. 1996) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws"); *Rind*, 991 F.2d, at 1491 ("'The deterrent effect of [an SEC] enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits'").

'within the court's discretion to determine how and when and to whom the money will be distributed."[119] Indeed, "Courts have required disgorgement 'regardless of whether the disgorged funds will be paid to such investors as restitution.'"[120] The Court could not identify any statutory command requiring district courts to distribute the funds to victims.[121] To support this conclusion, the Court relied on prior precedent: "when an individual is made to pay a non-compensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty.[122]

2. Under the principles articulated in *Kokesh*, the IRS disgorgement sought here is penal in nature.

Applying the foregoing principles shows the type of disgorgement in this case imposed by the IRS constituted a penalty. IRS disgorgement is imposed by the courts as a consequence for Defendants' alleged violation of public laws. The Plaintiff's pleadings and motions undeniably made this justification for the remedy here. In the motion to freeze assets, the United States argued repeatedly the "public interest in enforcing the internal revenue laws" justifies its request for an asset freeze, and any disgorgement order would be worthless without an order freezing

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[119] *Id.* at 1644 (citing *Fischbach Corp.*, 133 F.3d at 175).
[120] *See Fischbach Corp.*, 133 F.3d at 176.
[121] *Id.* at 1644.
[122] *Id.* (citing *Porter v. Warner Holding Co.*, 328 U.S. at 402 (distinguishing between restitution paid an aggrieved party and penalties paid the government).

assets necessary to satisfy such an order.[123] In its reply memorandum to strike Defendants' jury demand, the United States stated it brought this action "to disgorge the defendants' ill-gotten gains" under the authority in 26 U.S.C. §§7408, 7402 to issue orders of injunction and disgorgement "as may be necessary or appropriate for the enforcement of the internal revenue laws."[124] Plaintiff has no other legal basis to seek disgorgement other than as a penalty for Defendants' alleged violation of public laws. Like an SEC action, the United States may prosecute this current action even if, as here, the alleged victims "do not support or are not parties to the prosecution."[125]

Second, Plaintiff's disgorgement claim is imposed for punitive purposes. The government seeks to deprive Defendants of their alleged "ill-gotten gains" to provide an effective deterrent to future violations.[126] The deterrent effect of SEC disgorgements is identical to the IRS disgorgement here. Like an SEC action, the deterrent effect sought by the IRS imposing disgorgement would be undermined if violators were not required to disgorge profits. Since sanctions imposed "for the

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[123] ECF 252 at pgs. 8-9.
[124] See ECF 33 at pgs. 3-4 (emphasis added).
[125] *See Kokesh*, 137 S. Ct. at 1644.
[126] *See Barwick*, 2017 U.S. Dist. LEXIS 191626 at *11 (citing *Stinson*, 239 F.Supp.3d at 1326) ("Disgorgement in the amount of a defendant's 'ill-gotten gains' constitutes a 'fair and equitable' remedy as it reminds the defendant of its legal obligations, serves to deter future violations of the Internal Revenue Code, and promotes successful administration of the tax laws.").

purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objection," the disgorgement sought by Plaintiff here is not remedial but instead punitive.[127]

Third, the disgorgement here is not compensatory. In its motion and pleadings, Plaintiff has repeatedly stated disgorged funds shall be paid to the United States.[128] In this case, Defendants are to pay disgorgement directly to the government.

Finally, Plaintiff's disgorgement claim is not remedial because it does not return the parties to the status quo. "The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *United States SEC v. Kahlon*, 873 F.3d 500, 509 (5th Cir. 2017) (citation omitted). Accordingly, disgorgement beyond the reasonable approximation of a defendant's gains it is no longer remedial but punitive.

Here the disgorgement went millions beyond a reasonable approximation and is punitive. Plaintiff, at the close of trial, limited its disgorgement request to

[127] See ECF 31, p. 2; ECF 33, pp. 1, 3, 5.

[128] See ECF 2, p. 43 ("That this Court, under §7402(a), enter an order requiring all Defendants to disgorge to the United States the gross receipts (the amount of which is to be determined by the Court) that Defendants received from any source as a result of the abusive solar energy scheme described herein, together with prejudgment interest thereon.")

$32,796,196.[129] This is the aggregate sum of both non-party XSun and Solco and the named Defendants' banking records.[130] However, the court added $17,229,284 for a total of $50,025,480, nearly doubling Plaintiff's request. This fantastic leap involved manipulating RaPower3's customer database, despite the court's finding that "[m]ost customers have never paid the $3500 cost of a lens and *few have paid the $1050* down payment which is equal to the first full year of tax credit."[131] This is contrary to evidence using the same database showing the total revenue "paid in full" was $17,911.507.[132] The court double counted $3,077,830 because RaPower purchased stock from IAS.[133] The court imposed on Johnson joint and several liability for all amounts despite receiving only $623,449.00.[134] The disgorgement order punishes, not returns to *status quo ante*, and therefore entitles Defendants to a jury.

Because of *Kokesh*, the IRS recognized SEC disgorgement is punitive. IRS prohibits deducting penalties paid under 26 U.S.C. §162(f) and §1.162-21(b)(1), Income Tax Regs.[135] *Kokesh* is broader than a statute of limitations, and establishes disgorgement is a penalty.

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[129] ECF. 412, p. 98.
[130] TR.2440-2452.
[131] TR.2522.
[132] TR.820:19-822:1; TR.886:24-888:8.
[133] TR.2441-2444; PLEX 507, p. 20, 35; TR.1812:4-12.
[134] PLEX 737.
[135] IRS Memorandum No. 201748008.

3. Because the disgorgement sought here is punitive, Defendants are entitled to a jury.

Prior to the *Kokesh* decision, the court struck the jury because "relief sought is equitable in nature."[136] But the Court stated that "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[137] If entitlement to a jury is a close call, then the court should err on the side of caution.[138] The court stated, "[b]ased upon this timeless principle in our jurisprudence the court will allow Defendants to make a motion for a jury trial if penalties become part of this case."[139]

The right to a jury is whenever a case involves rights and remedies traditionally enforced in action at law, rather than in equity or admiralty.[140] "A civil penalty was a type of remedy at common law that could only be enforced in courts of law."[141] Like *Kokesh*, here disgorgement is a penalty because (1) it is imposed here for violation of public laws, (2) it is intended to have the punitive effect of

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[136] ECF 43, p. 2.
[137] See *Id*.
[138] *C.f. Jacob v. New York City*, 315 U.S. 752, 62 S. Ct. 854, 854 (1942) ("the Supreme Court noted that '[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.'").
[139] *Id*. at pp. 2-3 (citing *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).
[140] *SEC v. Commonwealth Chem Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978)
[141] *Tull v. United States*, 481 U.S. 412, 422 (1987)

deterring future wrongdoing, (3) fails to return the parties to the status quo by impermissibly ordering payment in excess of gross receipts. This case involves a common law damage claim and a right to a jury.

4. Solco and XSun Energy Are Non-Parties and Should Not Be Included as Evidence for Damages.

Plaintiff was aware of both entities before suing. Plaintiff used exhibits involving both nonparties. Summary exhibits were based on bank records of Solco I and XSun. Plaintiff deliberately chose to exclude Solco I or XSun as parties.

No evidence proved funds of Solco or XSun came from named Defendants. There is no evidence of Defendants transfering funds into Solco I or XSun's accounts. The only evidence is Solco and XSun funds are not related to the Defendants. The Plaintiff needed separate exhibits (Solco I-PLEX 739, XSun-PLEX 741) to account for these independent funds.

There was no evidence Solco I or XSun participated in the "tax scheme" in this case. Neither maintained a website, participated in multi-level marketing. They have no burden to prove they should be allowed to keep their property. The IRS has the burden to show they have the right to take their property. There is no such proof.

a. The Trial Court Violated Solco and XSun's Due Process Rights.

The US Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) provides a relevant discussion about due process. "Parties whose rights are to be affected are

entitled to be heard; and in order that they may enjoy that right they must first be notified."[142] The right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[143]

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for hearings "at a meaningful time." *Id*. Neither statute provided for notice or an opportunity to be heard *before* seizure. The issue is whether procedural due process requires an opportunity for hearing *before* the State authorizes its agents to seize property upon the application of another. *Id*, citing *Lynch* v. *Household Finance Corp*., 405 U.S. 538, 552. *Stanley* v. *Illinois*, 405 U.S. 645, 647.

This is not a novel principle of constitutional law. The right to a prior hearing has long been recognized under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane* v. *Central Hanover TR.Co.*, 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie* v. *Connecticut*, 401 U.S. 371,

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[142] *Id*. at 80 (citing *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223, 233 (1864). See *Windsor* v. *McVeigh*, 93 U.S. 274; *Hovey* v. *Elliott*, 167 U.S. 409; *Grannis* v. *Ordean*, 234 U.S. 385.)

[143] *Id*. (citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552.)

378, the Court has insisted, whatever its form, opportunity for hearing must be provided before the deprivation occurs.[144]

Without due process, their assets should not be frozen. In *United States v. 51 Pieces of Real Property Rosell, N.M.*, 17 F.3d 1306 (10th Cir. 1994), an action was initiated, the complaining party was named as a defendant, and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id*. Although proceeding under a federal forfeiture statute specifically void of any due process requirements, the Court recognized "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest." *Id*. (citing *Fuentes*, 407 U.S. at 81-82). No such hearing has taken place here. The assets of these parties (and others similarly situated) were

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[144] *See e.g. Bell* v. *Burson*, 402 U.S. 535, 542; *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437; *Goldberg* v. *Kelly*, 397 U.S. 254; *Armstrong* v. *Manzo*, 380 U.S., at 551; *Mullane* v. *Central Hanover TR.Co., supra*, at 313; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152-153; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner* v. *City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut, supra*, at 378-379 (emphasis in original).

simply frozen by court order and then confiscated by the Receiver without any proof or hearing. There was no due process provided these parties.

V. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A PERMANENT INJUNCTION WAS REQUIRED BECAUSE THE SYSTEM DID NOT AND WOULD NEVER WORK.

A. Finding that system will not ever work – when it now does.

On 6/22/18, the lower court stated Defendants had not and will not create electricity. (TR.2521 ("And because power production is not possible with any designs to date power production has never taken place and there is no revenue. The field of towers creates the illusion of effort and success.")) Since then, Johnson Fresnel lenses have successfully generated independently measured electricity. Using the Fresnel lenses mounted in one of the RaPower-3 solar collector arrays, and using a model "Colorado" Sterling Engine built by Infinia, the RaPower Fresnel lenses have generated electricity.[145]

As set out in ***System Works***, supra, several engineers tested and verified the lenses currently produce power.[146] Because the injunction was justified by finding it was "false or fraudulent" to sell solar energy equipment that could never create

[145] Krazcek, Johnny, MET, Jorgensen, Jeffrey, EE PE, *Confirmation of Electrical Power Production Using Johnson Fresnel Lens in the Field Coupled to a Sterling Engine,* September 12, 2018, included in Appendix as Exhibit 69.
[146] Minute by minute readings of electricity generation, attached as Exhibit 70.

electricity, and now evidence shows the opposite, the injunction should be lifted. The permanent injunction is wrong.

There is no decision defining the appropriate standard for injunctive relief under §7402, particularly one abandoning the four-part test applied in the 10th Circuit. The lower court relied on factually and procedurally inapposite authority to this case. *United States v. Latney's Funeral Home* involved appointment of a receiver as a remedy in a civil contempt, not a violation of 26 USC § 6700, and only after the defendant repeatedly failed to comply with an injunction.[147] *United States v. Bartle*,[148] also civil contempt, appointed a receiver only after the defendant failed numerous times to comply with court orders. *Florida v. United States* appointed a receiver only after substantial tax liability appeared and the Government's collection of the tax appeared jeopardized if a receiver was not appointed.[149] Notably, they dealt with civil contempt, where a litigant's non-compliance was properly before the court. None of these relied solely on a statutory grant of authority, but instead considered factors included in or analogous to the four-part tests of the 10th Circuit.

The trial court reached an erroneous conclusion when it required a certain amount of electricity to be created when the statute is silent. As such, remand is appropriate of the issues of enjoinable conduct and the injunction dissolved.

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[147] *United States v. Latney's Funeral Home, Inc.*, 41 F.Supp.3d 24, 37 (D.D.C. 2014).
[148] *United States v. Bartle*, 159 F.App'x 723, 725 (7th Cir. 2005).
[149] *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the novel issue involving application of the *Kokesh* decision to IRS disgorgement and how it relates to the right to jury trial in this case, counsel believes oral argument will be helpful to the Court. A unanimous US Supreme Court in *Kokesh* reversed the 10th Circuit Court concerning the penal nature of SEC disgorgement. Because disgorgement was a penalty, the statute of limitations had run. Treating disgorgement as a penalty, the IRS has ruled such penalties are not tax-deductible. Disgorgement here is also a penalty, entitling Defendants to a jury trial. The IRS has audited and assessed taxes, interest, and penalties against the lens purchasers and want an additional penalty imposed on Defendants.

CONCLUSION

Disgorgement should be disallowed. Judgment and Injunction should be reversed. Further proceedings, if any, should be on remand before a jury with witnesses Mancini, Reinken, Perez and Roulhoc barred from testifying and their exhibits excluded.

Respectfully submitted,

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Attorney for Appellants/Defendants (Digital)

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I hereby certify that a copy of the foregoing APPELLANTS' OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Windows Defender (virus scan up to date) and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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I, Denver C. Snuffer, Jr. hereby certify that on the ____ day of January, 2019, I served a copy of the foregoing **APPELLANTS' OPENING BRIEF,** to the following in manner indicated:

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ATTACHMENTS

1. Memorandum Decision and Order granting Motion to Strike Jury Demand (ECF 43)

2. Order Granting Motion for Protective Order (ECF 196)

3. Order Denying ECF 253 Motion in Limine (ECF 310)

4. Memorandum and Order denying Motion to Reinstate Trial by Jury (ECF 322)

5. Memorandum Decision and Order Granting Defendant's Rule 60(a) Request for Relief Based on Oversight and Confirming Order Denying Trial by Jury (ECF 336)

6. Plaintiff's Initial Disclosures (ECF 337-1)

7. Memorandum Decision and Order denying Motion in Limine to Exclude Damages (ECF 338)

8. Docket Text Order entered on March 29, 2018 (ECF 359)

9. Docket Text Order denying Defendant's Doc 364 Motion in Limine to Strike Plaintiff's Summary Exhibit 752 (ECF 376)

10. Docket Text Order denying Defendant's Doc 364 Motion in Limine to Strike Plaintiff's Summary Exhibits 734-741, 742(A) and 742(B), and Exhibit 750 (ECF 377)

11. Memorandum Decision and Order Denying Defendants' Motion to Continue Trial (ECF 407)

12. Minute Entry for Bench Ruling Denying Defendants' Motion to Strike Dr. Mancini's testimony at trial 04/03/2018

13. Notice of Filing Page 98 of (ECF 412)

14. Initial Order and Injunction After Trial (ECF 413)

15. Bench Ruling Denying Defendants' 52(c) Motion as noted in minute entry on June 22, 2018 (ECF 428) (transcript at 2514:13-15)

16. Court's Order and Injunction (ECF 467)

17. Judgment entered in favor of USA (ECF 468)

18. Amended and Restated Judgment in a Civil Case (ECF 507)

19. Order denying [451] Rule 59(e) and Rule 52(b) Motion (ECF 529)

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

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., et al., Defendants.	MEMORANDUM DECISION AND ORDER GRANTING MOTION TO STRIKE JURY DEMAND Case No. 2:15-cv-828 DN District Judge David Nuffer Magistrate Judge Brooke Wells

Pending before the Court is the United States' Motion to Strike Jury Demand.[1] The court heard argument on Plaintiff's motion on April 27, 2016.[2] Having heard argument and after considering the parties' memoranda the court GRANTS the motion as set forth below.

The United States filed this action against Defendants seeking an injunction under 26 U.S.C. §§ 7402 and 7408 enjoining Defendants from "promoting the abusive solar energy scheme described in the United States' complaint and ordering that [Defendants] disgorge all gross receipts they received from any source as a result of [their scheme]."[3] Plaintiff argues that because equitable remedies are sought there is no right to a jury trial.[4] Defendants object citing to the Seventh Amendment right to a jury trial and arguing that penalties under 26 U.S.C. § 6700 of the Internal Revenue Code are not equitable remedies.

The Seventh Amendment right to a jury trial exists in "'suits in which legal rights . . . [are] ascertained and determined, in contradistinction to those where equitable rights alone . . .

[1] Docket no. 31.

[2] Docket no. 42.

[3] Mtn. p. 2, docket no. 31; Complaint ¶¶ 1 and 2, docket no. 2.

[4] Mtn p. 2.

[are] recognized, and equitable remedies . . . [are] administered.'"[5] The right to a jury trial may also apply to actions created by statue.[6] Analysis of a right to jury trial entails two steps. First, an action is compared with those existing before the merger of the courts of law and equity. Then, the court examines whether the remedy sought is legal or equitable in nature.[7] The second step is "more important that the first"[8] and that is where the court focuses its analysis.

In addition, money damages are not necessarily "legal relief."[9] Damages may be equitable if restitutionary in nature, i.e. they restore the status quo and return the amounts rightfully belonging to another.[10] For example, backpay liability from an employer under Title VII is usually restitutionary in nature.[11] "[A] monetary award 'incidental to or intertwined with injunctive relief' may be equitable."[12]

Here, the sticking point is the possibility of penalties. At oral argument, Defense counsel represented that they would waive their right to a jury trial if the Government would stipulate to not seeking penalties. The Government declined to do so. The problem, however, is penalties are only a possibility and not a certainty in this case. As such, the court believes that based upon the Complaint and current state of the case, the Seventh Amendment right to a jury trial is not implicated. The relief sought here is equitable in nature. However, "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with

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[5] *Granfinanciera v. Nordberg*, 492 U.S. 33, 41 (1989) (quoting *Parsons v. Bedford*, 3 Pet. 433, 4737 (1830)).

[6] *Tull v. United States*, 481 U.S. 412, 417 (1987).

[7] *Id*. 417-18.

[8] *Granfinanciera*, 492 U.S. at 42.

[9] *Chauffeurs, Teamsters and Helpers, Local 391 v. Terry*, 494 U.S. 558, 570 (1990).

[10] *Tull*, 481 U.S. at 424.

[11] *Terry*, 494 U.S. at 572

[12] *Id*. at 571 (quoting *Tull*, 481 U.S. at 424)).

the utmost care."[13] Based upon this timeless principle in our jurisprudence the court will allow Defendants to make a motion for a jury trial if penalties become part of this case.

Accordingly, Plaintiff's motion is GRANTED.

DATED this 2 May 2016.

Brooke C. Wells
United States Magistrate Judge

[13] *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

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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-EJF **ORDER GRANTING UNITED STATES' MOTION FOR PROTECTIVE ORDER** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Upon consideration of the United States' motion for protective order prohibiting Defendants from deposing the United States' trial counsel and related submissions, IT IS HEREBY ORDERED THAT the motion is GRANTED. Defendants shall not depose any representative of the United States Department of Justice, Tax Division.

DATED this 15th day of June, 2017.

Evelyn J. Furse
United States Magistrate Judge

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.	**ORDER DENYING DEFENDANTS' MOTION TO STRIKE THE EXPERT REPORT OF THOMAS MANCINI AND EXCLUDE TESTIMONY AT TRIAL** Case No. 2:15-cv-00828 DN-EJF District Judge David Nuffer Magistrate Judge Evelyn J. Furse

At trial, the United States plans to offer expert witness opinion testimony, under Fed. R. Evid. 702, from Dr. Thomas Mancini. The United States offers Dr. Mancini as an expert in solar energy technology. Defendants moved to exclude Dr. Mancini's testimony, arguing that information about the nature and viability of Defendants' purported solar energy technology is "irrelevant" and Dr. Mancini's testimony is unreliable.[1]

For the reasons stated in the United States' brief in opposition,[2] Defendants' Motion[3] is DENIED and Dr. Mancini will be allowed to testify at trial under Fed. R. Evid. 702.

[1] Defendants' Motion in Limine to Strike the Expert Report of Thomas Mancini and Exclude Testimony at Trial ("Defendants' Motion"), ECF No. 253.

[2] ECF No. 263.

[3] ECF No. 253.

I. The United States' claims in this case.[4]

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.[5] As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy.[6] The technology underlying the solar energy scheme, purportedly invented by Neldon Johnson, uses "solar lenses" on "solar towers."[7] Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC.

[4] The following information is drawn from the United States' complaint, ECF No. 2, and its motion for partial summary judgment, ECF No. 251.

[5] ECF No. 2 and ECF No. 35 ¶ 1(a).

[6] ECF No. 2 ¶ 16.

[7] ECF No. 2 ¶¶ 17, 22.

The government alleges that 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, according to the United States, 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;[8]
- by virtue of their "trade or business," customers may deduct "business" expenses, consisting mostly of depreciation[9] on the lenses, from their ordinary income like wages from their full-time jobs[10]; and
- customers may claim a solar energy tax credit to further reduce their tax liability.[11]

The United States alleges that Defendants' statements are false or fraudulent as to material matters under the internal revenue laws.[12] It also alleges that 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.[13] The United States further alleges 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.[14] According to the government, when Defendants tell customers this falsely inflated purchase price, Defendants make a gross valuation

[8] *E.g.*, ECF No. 252-1, Pl. Ex. 1 at 2-3.

[9] 26 U.S.C. § 162; 26 U.S.C. § 167; ECF No. 252-4, Pl. Ex. 25 at 1-2.

[10] ECF No. 252-3, Pl. Ex. 24; ECF No. 252-6, Pl. Ex. 40 at 12; ECF No. 252-9, Pl. Ex. 214; ECF No. 252-10, Pl. Ex. 216; ECF No. 252-14, Pl. Ex. 492; ECF No. 252-29, Pl. Ex. 674.

[11] 26 U.S.C. § 48; ECF No. 252-4, Pl. Ex. 25 at 2.

[12] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[13] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[14] 26 U.S.C. § 6700(a)(2)(B), (b)(1); ECF No. 2, Counts VII-XI.

overstatement.[15] The United States claims that Defendants have not stopped making these statements and will not stop without an order from this Court permanently enjoining Defendants under § 7408.[16]The United States also seeks to enjoin Defendants under § 7402(a) because it claims an injunction (and other equitable relief including disgorgement) is appropriate for the enforcement of the internal revenue laws.[17]

II. Dr. Mancini's report and testimony.

A. Dr. Mancini's professional experience in concentrating solar power technology spans more than 35 years.

Dr. Mancini has more than 35 years of experience with solar thermal technology, which is the type of solar energy technology the Defendants promote. Dr. Mancini is a Fellow of the American Society of Mechanical Engineers.[18] Throughout the course of Dr. Mancini's career, he has authored more than 70 peer-reviewed publications in the areas of solar power generation, passive solar cooling and active heating and cooling.[19]

Dr. Mancini earned his Ph.D. in Mechanical Engineering from Colorado State University in 1975.[20] For ten years thereafter, Dr. Mancini was a professor at New Mexico State University, where he taught courses on thermodynamics, heat transfer, fluid mechanics and solar energy.[21]

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[15] 26 U.S.C. § 6700(a)(2)(B); ECF No. 2, Counts VII-XI.

[16] ECF No. 251 at 14-15, 36; *see* 26 U.S.C. §§ 6700, 7408; ECF No. 2, Counts VII-XI.

[17] 26 U.S.C. § 7402(a); ECF No. 2 at Counts I-VI.

[18] ECF No. 253-1, Expert Report of Dr. Thomas Mancini ("Mancini Report") at 47. Citations to the Mancini Report will refer to the paragraph number where appropriate, or the ECF-banner page number.

[19] Mancini Report at 47-50; ECF No. 263-2, Pl. Ex. 699, Declaration of Dr. Thomas Mancini ("Mancini Decl.") ¶ 26.

[20] Mancini Report at 46.

[21] Mancini Report at 46.

While at New Mexico State University, Dr. Mancini did research on solar heating and cooling, and solar power systems.[22]

From January 1986 to July 2011, Dr. Mancini worked at Sandia National Laboratories, in Albuquerque, New Mexico.[23] Sandia is a government laboratory which is funded through the United States Department of Energy and is operated by a private company.[24] Among other job titles, Dr. Mancini was the Concentrating Solar Power (CSP) Program Manager at Sandia.[25] In this capacity, Dr. Mancini was responsible for working with the US Department of Energy CSP Program and the National Renewable Energy Laboratory on expanding CSP into the renewable energy marketplace, a project with a budget of more than $50 million.[26] Dr. Mancini was also Chair of the International Energy Agency's Solar Power and Chemical Energy Systems, which is an international group dedicated to developing and deploying CSP technology worldwide.[27] In the 1990s, he was the task leader for the Dish-Engine Development and Project Manager partnership between the Department of Energy and private industry to develop a commercial dish/Stirling power generator.[28]

When Dr. Mancini was at Sandia National Laboratory, his work involved evaluating proposed solar energy technology created by private industry, and opining on whether it would

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[22] Mancini Report at 46.

[23] Mancini Report at 45-46; *see* ECF No. 253-2, Deposition of Dr. Thomas Mancini, Oct. 23, 2017, ("Mancini Dep.") 36:19-38:1, 40:14-42:9.

[24] Mancini Dep. 19:12-22:4.

[25] Mancini Report at 45-46.

[26] Mancini Report at 45-46.

[27] Mancini Report at 45.

[28] Mancini Report at 45.

work, and if so, how to maximize its performance and minimize its costs.[29] Dr. Mancini and his teams followed a structured engineering methodology aimed at understanding the details of the proposed component or solar energy system design and assessing their potential performance and costs.[30] Specifically, a person or entity (an "industry client") would bring to Sandia a design or a prototype.[31] Then Dr. Mancini and his colleagues, following well-established engineering principles, would systematically collect from the industry client detailed documentation of the design and design analyses of the solar thermal system; analyze this information; and evaluate and assess the performance and commercial viability of the components and system proposed.[32]

The information Dr. Mancini and the other Sandia engineers required from the industry client included information that would contribute to the actual, long-term performance and costs of operating a solar thermal system.[33] Such information included all engineering models and the assumptions that affect the accuracy of their results; detailed design drawings that demonstrate the application of engineering analysis to achieve performance results such as mechanical properties and thermal performance; and component and system test results that apply specifically to the conditions under which they are conducted and may differ under other operating conditions or in the transition of going from one condition to another.[34] It was not

[29] Mancini Decl. ¶ 5; Mancini Dep. 19:12-22:4.

[30] Mancini Decl. ¶ 7.

[31] Mancini Dep. 19:12-21:24.

[32] Mancini Decl. ¶¶ 7-9.

[33] Mancini Decl. ¶¶ 8-9.

[34] Mancini Decl. ¶ 9.

typical for Sandia teams to conduct testing at an industry client's facility but they often helped to design and observe tests performed at the industry client's sites.[35]

Dr. Mancini and his colleagues used their knowledge, skills, and other expertise in the scientific and engineering principles that apply to all solar energy technology, including systems analysis, applied optics, thermodynamics, fluid mechanics, heat transfer, experimental methods, and applied mathematics to evaluate the performance and commercial viability of the systems before them.[36] The Sandia technical teams then developed a list of questions for the designer, including questions about what tests the designer had done and was planning to do.[37] They made recommendations to improve the design, including how to address cost concerns of solar energy technology in the interest of bringing electricity on to the national grid at a reasonable, competitive cost.[38]

During his tenure at Sandia National Laboratories, the technical teams evaluated hundreds of solar thermal systems and components using this methodology.[39] Dr. Mancini himself was on the evaluation team for more than 100 solar thermal components and systems including solar concentrators, thermal receivers, various engines, and dish engine systems.[40] The process that Dr. Mancini and his teams used was generally accepted at Sandia.[41] It was structured

[35] Mancini Decl. ¶ 10.

[36] Mancini Decl. ¶¶ 11-13; Mancini Dep. 19:12-21:24

[37] Mancini Dep. 19:12-21:24.

[38] Mancini Dep. 19:12-21:24, 24:22-25:22, 46:18-47:9.

[39] Mancini Decl. ¶ 15.

[40] Mancini Decl. ¶ 16.

[41] Mancini Decl. ¶¶ 14-16.

and detailed, and was based on the application of scientific and engineering principles used throughout the solar energy technology industry.[42]

Dr. Mancini has been consulting on solar energy projects since 2011 through his own business, TRMancini Solar Consulting.[43] He engages in work similar to what he did at Sandia, reviewing system and component designs for concentrating solar energy projects and advising clients on the likely performance and costs of their proposed technology.[44]

B. Dr. Mancini's role in this case.

The United States retained Dr. Mancini:

> a) to explain the basic concepts involved in workable solar energy power generation technology;
>
> b) to evaluate and explain the "IAS Solar Dish Technology" at issue in this case, which includes any equipment installed on sites identified by the Defendants, any technological plans or schematics provided by the Defendants;
>
> c) to determine whether the IAS Solar Dish Technology is currently converting sunlight into energy; and
>
> d) to opine on whether the IAS Solar Dish Technology is commercially viable on any scale (or may become commercially viable on any scale) to convert sunlight into electrical power.[45]

At Dr. Mancini's request, the United States asked Defendants for the kinds of information and documents that Dr. Mancini is accustomed to reviewing in the course of his career at Sandia and in his consulting practice: detailed design information and, because Defendants claim that their purported technology has produced electricity, data and analysis of

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[42] Mancini Decl. ¶ 14.

[43] Mancini Dep. 42:10-43:9.

[44] Mancini Dep. 42:10-45:16.

[45] ECF No. 253 at 2; Mancini Report at 3.

its performance under operation.[46] But, according to Dr. Mancini's report and testimony, Defendants did not produce such information or documents, either about the purported technology's design or performance.[47] Neldon Johnson testified that he does not keep data or results from the testing he claims to have conducted on the IAS system and component parts, including the Fresnel lenses.[48] Johnson's testimony reflects that he does not keep written records of the testing conditions[49] or any written records that would allow anyone to recreate, replicate or otherwise prove Johnson's purported tests and resulting claims about the viability of his purported technology.[50]

Dr. Mancini reviewed the documents Defendants produced in this case and information on www.rapower3.com, along with information and documents provided by third parties.[51] Dr. Mancini reviewed patents Johnson has obtained.[52]

Dr. Mancini attended two site visits to view Defendants' purported solar energy technology, its components, and the places where Defendants manufacture and claim to use such components: the "Manufacturing Facility," the "R&D Site," and the "Construction Site," all in

[46] Mancini Report ¶¶ 48-50.

[47] Mancini Report ¶¶ 48-50.

[48] ECF No. 256-14, Pl. Ex. 579, Deposition of Neldon Johnson, vol. 1, June 28, 2017, 66:1-24; 69:4-10; 150:2-151:17; 152:13-153:4; 164:3-165:7; 186:20-188:19; ECF No. 256-24, Pl. Ex. 681, Deposition of Neldon Johnson, vol. 2, Oct. 3, 2017, 93:22-23; 94:20-23; 102:16-18; 105:3-20; 107:2-12; 108:9-109:7; 111:4-11; 111:18-20; 112:3-5; 114:4-20; 116:14-117:11; 117:14–21; 118:5-10; 119:4-120:10; 122:11-15; 123:2-10; 123:23-124:4; 124:20-125:15; 125:21-127:3; 127:13-15; 129:11-16; 130:12-19; 146:19-25; 147:20-148:1; 151:7-10; 151:20-24; 159:13-19; 161:17-25; 167:8-13; 187:11-188:11.

[49] Johnson Dep., vol. 2, 143:12-18; 144:2-11; 146:12-25.

[50] Johnson Dep., vol. 2, 96:10-22; 104:17-23; 123:11-14;

[51] Mancini Dep. 11:11-12:17, 96:15-21, 119:17-124:25, 138:14-140:6, 141:15-143:5, 152:1-8; *see also* Mancini Report ¶¶ 48-62 and at 51-55 (Appendix II).

[52] Mancini Decl. ¶ 25; Mancini Report at 52; ECF No. 263-1, Pl. Ex. 15.

Millard County, Utah.[53] He visually examined the various components of Defendants' purported technology for hours on each visit, which occurred on January 24, 2017 and April 4, 2017.[54]

During both visits, Dr. Mancini heard from Neldon Johnson about Johnson's purported solar energy technology and its components as he conducted Dr. Mancini around the sites.[55] Before Dr. Mancini's first site visit, he prepared a list of questions he had about information he was missing, and he asked Johnson those questions while on-site.[56]

According to Dr. Mancini, during both of his site visits, "the components of the IAS Solar Dish Technology were not operating, were not assembled as a system, and were not producing electrical power or heat using solar energy."[57] Dr. Mancini did not test any aspect of Defendants' purported solar energy technology.[58] Even if the purported system had been operating, Dr. Mancini's observations suggest that it would be unreasonable for a third party like him to conduct any testing upon it.[59]

It appears from Dr. Mancini's report, testimony, and declaration, that Dr. Mancini assessed the facts he learned through his review of Defendants' documents and other third-party documents produced in this case, and his visual inspections of Defendants' purported solar

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[53] Mancini Report ¶ 54.

[54] *E.g.*, Mancini Report ¶¶ 54, 75, 93-95, 100-115; Mancini Decl. ¶ 23. Dr. Mancini initially testified that the site visit with IRS occurred in January 2016, but remembered later in his deposition that it was actually January 2017. Mancini Dep. 107:14-108:17.

[55] Mancini Dep. 111:20-118:12; Johnson was not present on the tour of the Manufacturing Facility during the April 4 site visit. Mancini Decl. ¶¶ 21-23.

[56] Mancini Dep. 74:1-103:4; Defs. Ex. 1005; Mancini Decl. ¶ 24; *see also* Mancini Dep. 103:7-119:16; Defs. Ex. 1006.

[57] Mancini Report ¶ 42.

[58] *E.g.*, Mancini Dep. 68:15-21.

[59] Mancini Report ¶ 182; *e.g. id.* ¶¶ 154, 179-86, 190, 195; *see also* Mancini Dep. 84:20-86:4.

energy technology.[60] He analyzed these facts in light of his extensive knowledge of concentrating solar energy power systems, and the principles of science and engineering that make such systems work.[61] Part of Dr. Mancini's task was to opine on whether Defendants' purported solar energy technology has the potential to produce electricity on a commercial scale. Therefore, Dr. Mancini used the limited technical information available from Defendants and his own observations on the site visits to "analyze[] the IAS Solar Dish Technology as if it were operating as a system."[62] Because Defendants did not produce the engineering data that Dr. Mancini would normally use for this type of analysis, he used the only information that was available and his own knowledge of scientific, technological, and engineering principles that apply to the components.[63] When he did so, he viewed facts in the light most favorable to Defendants.[64]

After synthesizing the facts of this case through the lens of his extensive expertise,[65] Dr. Mancini arrived at his opinions in this case: 1) "[t]he IAS Solar Dish Technology is in the research Stage 1 of development. The 'Technology' comprises separate component parts that do not work together in an operational solar energy system. The IAS Solar Dish Technology does not produce electricity or other useable energy from the sun"[66] and 2) "[t]he IAS Solar Dish

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[60] Mancini Dep. 119:17-124:25, 141:22-143:5, 152:1-8; s*ee generally* Mancini Report.

[61] *See generally* Mancini Report.

[62] Mancini Report ¶ 87.

[63] Mancini Report ¶ 55; *e.g.*, *id.* ¶¶ 90-92; Mancini Dep. 120:5-127:6.

[64] *E.g.*, Mancini Report at 38, Table 5, "Transient Effects"; Mancini Dep. 125:14-127:6.

[65] Mancini Report ¶¶ 14-208.

[66] Mancini Report at 39, "Conclusion 1."

Technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy"[67].

III. Standard of Review

Federal Rule of Evidence 702 addresses the standard for the admissibility of expert testimony.

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.[68]

"Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[69] The inquiry of scientific reliability is flexible and focuses on principles and methodology.[70] The Supreme Court has offered several non-exhaustive factors that a court may rely on for determining reliability such as, whether the testimony can be tested, has been peer reviewed, has a known or potential rate of error, and has attracted acceptance in the relevant scientific community.[71]

District courts are tasked with the responsibility of serving as the gatekeepers of expert evidence, and must therefore decide which experts may testify and present evidence.[72] Courts are

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[67] Mancini Report at 44, "Conclusion 2."

[68] Fed. R. Evid. 702

[69] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

[70] *See Id.* at 595

[71] *See Id.*

[72] *See* Id. at 579.

given "broad latitude" in deciding "how to determine reliability" and in making the "ultimate reliability determination."[73] The Federal Rules of Evidence, however, generally favor the admissibility of expert testimony.[74] Excluding expert testimony is the exception rather than the rule,[75] and often times the appropriate means of attacking shaky but admissible evidence is through vigorous cross-examination, and the presentation of contrary evidence.[76] "[T]he Federal Rules of Evidence favor the admissibility of expert testimony, and [courts'] role as gatekeeper is not intended to serve as a replacement for the adversary system."[77]

The inquiry into whether an expert's testimony is reliable is not whether the expert has a general expertise in the relevant field, but whether the expert has sufficient specialized knowledge to assist jurors in deciding the particular issues before the court.[78]

Expert testimony is subject to Federal Rule of Evidence 403. "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[79]

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[73] *Kuhmo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 142 (1999), (citing *General Electric Co. v. Joiner*, 522 U.S. 135 (1997)).

[74] *See Daubert*, 509 U.S. at 588.

[75] *See* Fed. R. Evid. 702 Advisory Notes

[76] *See Daubert*, 509 U.S. at 596.

[77] *THOIP v. Walt Disney Co.*, 690 F. Supp. 2d 218, 230 (S.D.N.Y. 2010).

[78] *Kuhmo*, 526 U.S. at 156.

[79] Fed. R. Evid. 403

In determining whether expert testimony is admissible the first step is to determine whether the expert is qualified, and then if the expert is qualified determine whether the expert's opinion is reliable by assessing the underlying reasoning and methodology.[80]

IV. Discussion

For the following reasons, Dr. Mancini and his proposed testimony meet all of the Federal Rule of Evidence 702 requirements.

A. Dr. Mancini has specialized knowledge, skills, experience, and training in the field of concentrating solar power.

For more than 35 years, Dr. Mancini's career has been devoted to the field of concentrating solar power, the precise kind of solar energy technology Johnson claims to have. He has exceptional training in, and knowledge of, the science and engineering concepts required in the field. He has extensive experience actually working with proposed solar energy technology to improve its viability as a commercial product. Dr. Mancini is highly qualified to testify on the topics for which the United States has disclosed him as an expert witness.

B. Dr. Mancini's testimony is reliable.

An expert's testimony must be reliable.[81] For purposes of Fed. R. Evid. 702, that means that the testimony must be based on sufficient facts or data; that the testimony is the product of reliable principles and methods; and that the expert has reliably applied the principles and methods to the facts of the case.[82] An expert's testimony must be grounded "in the methods and procedures of science" and based on actual knowledge, not "subjective belief or unsupported

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[80] *U.S. v. Nacchio*, 555 F.3d 1234, 1241(10th Cir. 2009).

[81] *Daubert v. Merrell Dow Pharma., Inc.*, 509 U.S. 579, 592 (1993); *iFreedom Direct Corp. v. First Tennessee Bank Nat. Ass'n*, No. 2:09-CV-205-DN, 2012 WL 3067597, at *1 (D. Utah July 27, 2012) (Nuffer, J.).

[82] Fed. R. Evid. 702(b)-(d).

speculation."[83] There are many factors that go into the evaluation of whether a proffered expert offers reliable testimony, including the degree of experience and education of an expert; whether the expert's methodology has been generally accepted by the scientific community; whether the expert is "proposing to testify about matters growing naturally and directly out of research [he has] conducted independent of the litigation, or whether [he has] developed [his] opinions expressly for purposes of testifying."[84] All reliability factors share the ultimate purpose of making certain that an expert's opinion "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[85] The Court should generally focus on an expert's methodology rather than the conclusions it generates.[86]

Dr. Mancini's practice, for more than 35 years at both Sandia National Laboratories and in his consulting work, was to receive data, drawings, test results, and other information from the proponent of a solar energy technology system about its design and operation. At times, Dr. Mancini made site visits to see the solar energy technology in construction or operation. Using all of this information, Dr. Mancini and his colleagues applied their understanding of the scientific and engineering principles that apply to such technology (such as systems analysis, applied optics, thermodynamics, fluid mechanics, heat transfer, experimental methods, and applied mathematics) to evaluate whether the proposed technology was viable or could be

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[83] *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003) (citing *Daubert*, 509 U.S. at 589-90); *see also* *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 783 (10th Cir. 1999) (citing *Daubert*, 509 U.S. at 589-93).

[84] *Smith v. Terumo Cardiovascular Sys. Corp.*, No. 2:12-CV-00998-DN, 2017 WL 2985749, at *6 (D. Utah July 12, 2017) (Nuffer, J.); *Daubert*, 509 U.S. at 593-94; *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1233 (10th Cir. 2005); *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 789-90 (3d Cir. 1994); *In re Cessna 208 Series Aircraft Products Liability Litigation*, 2009 WL 3756980, at *6-8 (D. Kan. Nov. 9, 2009); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). *See also* *Bimbo Bakeries USA, Inc. v. Sycamore*, No. 2:13-CV-00749, 2017 WL 1377991, at *4-7, 13 (D. Utah Mar. 2, 2017) (Nuffer, J.).

[85] *Dodge*, 328 F.3d at 1222-23 (citing *Kumho Tire*, 526 U.S. at 152); *see also* *Daubert*, 509 U.S. at 593-94.

[86] *Daubert*, 509 U.S. at 595.

improved. This is a reliable method for evaluating the validity and viability of proposed solar energy technology.[87] Dr. Mancini wrote and presented, for peer review, his research and conclusions using this method.

Here, Dr. Mancini applied the same reliable principles and methodology he has used for more than 35 years to the available facts in this case. Dr. Mancini reviewed the documents Defendants produced, some of which contained technological information. Dr. Mancini attended two site visits, both hours-long, during which he was able to observe the actual purported technology itself, along with the machines that purportedly make certain components. During these site visits, Dr. Mancini heard from Neldon Johnson and asked him questions.

Dr. Mancini applied his broad and deep knowledge, skills, and experience in solar energy technology to the information he learned[88] – just like he did at Sandia and just like he does in his current consulting practice. This is consistent with the ordinary practice of a witness offering expert testimony under Fed. R. Evid. 702.[89]

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[87] *See Bitler*, 400 F.3d at 1235 ("Employing his experience and knowledge as a fire investigator, Boh observed the physical evidence at the scene of the accident and deduced the likely cause of the explosion. Although such a method is not susceptible to testing or peer review, it does constitute generally acceptable practice as a method for fire investigators to analyze the cause of fire accidents. Nothing in Rule 702 or *Daubert* requires more. We conclude that the trial court did not abuse its discretion in finding Boh's personal experience, training, method of observation, and deductive reasoning sufficiently reliable to constitute 'scientifically valid' methodology." (citation omitted)); *Corr v. Terex USA, LLC*, No. CIV.A. 08-1285-MLB, 2011 WL 976718, at *4-6 (D. Kan. Mar. 17, 2011).

[88] *E.g.*, Mancini Report ¶¶ 14-208.

[89] *E.g.*, Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed."); *Bimbo Bakeries*, 2017 WL 1377991, at *13 (allowing testimony from a proffered expert who spoke to a former employee of one of the parties, "visited a Bimbo facility to observe production, asked current employees questions regarding the production processes, examined the finished bread, examined competing companies' breads, considered the ingredients on the labels of all the breads, considered the feel and texture of the breads, and also tasted them") (Nuffer, J.); *id.* at *7 (allowing expert opinion testimony critiquing the work of the opposing party's expert because it was the result of reliable principles and methods: "Dr. Mishra adequately explains why he believes some of Christensen's questions were improper. Dr. Mishra may therefore testify to perceived flaws in Dr. Christensen's questions").

The facts Dr. Mancini observed on his site visits and learned through reviewing documents from Defendants and others in this case are more than sufficient to support his two opinions[90]: 1) that "[t]he IAS Solar Dish Technology is in the research Stage 1 of development. The 'Technology' comprises separate component parts that do not work together in an operational solar energy system. The IAS Solar Dish Technology does not produce electricity or other useable energy from the sun"[91] and 2) that "[t]he IAS Solar Dish Technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy."[92]

Defendants' arguments in support of their motion to exclude Dr. Mancini's testimony are better addressed to the weight of Dr. Mancini's testimony rather than its admissibility.[93] They claim that Dr. Mancini's testimony should be excluded from evidence because 1) he did not personally test Defendants' purported solar energy technology, and 2) he made certain estimates and assumptions the course of his report, to fill gaps left by Defendants' failure to produce data, drawings, or other typical information that any serious solar energy technology enterprise would have readily provided.[94]

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[90] *See generally* Mancini Report ¶¶ 14-208.

[91] Mancini Report at 39, "Conclusion 1."

[92] Mancini Report at 44, "Conclusion 2."

[93] *Ramsey v. Culpepper*, 738 F.2d 1092, 1101 (10th Cir. 1984) ("Mr. Culpepper's complaints about Dr. Simpson's personal unfamiliarity with real estate values and the reliability of the figures underlying his opinion go to the weight of his testimony, not to its admissibility."); *Corr*, 2011 WL 976718, at *4-6.

[94] ECF No. 253 at 4-9.

An expert witness is not required to test the materials at issue personally in order to provide admissible testimony about those materials under Fed. R. Evid. 702.[95] This is particularly true when the testimony at issue goes to "known science" that is "not in dispute."[96] The "known science" here, of the fundamental principles of science and engineering that apply to all solar energy technology systems, is not in dispute. Therefore, if Defendants have concerns about the thoroughness of Dr. Mancini's investigation, they can easily express those through cross-examination and closing argument.[97]

Further, the principles and methodology that Dr. Mancini has used throughout his career, and that he used here, do not require the evaluator of a proposed solar energy technology to test the proposed equipment himself. Dr. Mancini could simply observe the components of Defendants' purported technology, note the information Defendants produced about them, and draw conclusions about this information in light of his 35 years of knowledge, experience, and education on the scientific and engineering principles that apply to all solar energy technology.

Next, Defendants attempt to exclude Dr. Mancini's testimony because he used certain estimates in the course of preparing his report because he was missing basic data for Defendants' purported solar energy technology. All facts suggest that this basic information does not exist because Defendants failed to produce such data, drawings, and other technical information.

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[95] *See* Fed. R. Evid. 703; *Bimbo Bakeries*, 2017 WL 1377991, at *7; *accord Kechi Twp. v. Freightliner, LLC*, 592 F. App'x 657, 669 (10th Cir. 2014) ("[a]n expert is [not] required to interview every potential source of information in order to pass the *Daubert* test"); *Corr*, 2011 WL 976718, at *4-6.

[96] *Bitler*, 400 F.3d at 1236 ("The core dispute—whether copper sulfide particles found on the valve seat in this case were sufficient to cause a leak—is one the district court could properly determine is a question for the jury. In light of this evidentiary dispute, the Bitlers need only establish by a preponderance of the evidence that copper sulfide particles caused the gas explosion in their basement. Had their experts conducted further tests on their water heater's safety valve and established by observation that it did intermittently fail, they may have established causation to a near certainty. But such a high degree of certainty is not required.").

[97] *Kechi Twp.*, 592 F. App'x at 669.

Defendants also argue that Dr. Mancini's ultimate conclusions rest entirely on the reasonable estimates he made to fill gaps in Defendants' data.[98] But Dr. Mancini's opinions are well-supported by many other facts in the report that do not depend on those estimates. Defendants do not challenge the facts Dr. Mancini sets forth, that the purported solar energy technology was disassembled and did not work while Dr. Mancini was on site. Dr. Mancini had no data or other information from Defendants to show that it had ever been fully assembled or worked. So Dr. Mancini analyzed the efficiency of the purported system as if it were assembled and as if it did work. Dr. Mancini used his extensive experience and knowledge of the scientific and engineering principles applicable to solar energy technology to arrive at the estimates he provided, and he gave Defendants the benefit of the doubt in doing so. Dr. Mancini's optical and efficiency analyses are two illustrations of why he believes that Defendants' purported solar energy technology will never be a commercial-grade system that converts sunlight into electrical power or other useful energy. But Dr. Mancini offers many additional reasons, based on the facts of this case and his extensive training and experience, that he believes Defendants' purported solar energy technology will never be a commercial-grade system. It is permissible for an expert witness to offer alternative methods of analysis, this does not render his opinion testimony unreliable.[99] If Defendants wish to cross-examine Dr. Mancini about his estimates, they are free to do so at trial.[100]

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[98] ECF No. 253 at 6.

[99] *Bimbo Bakeries*, 2017 WL 1377991, at *11 (an expert may present alternative analyses to the factfinder).

[100] *See Martin v. Fleissner GmbH*, 741 F.2d 61, 64 (4th Cir. 1984) ("Although, as the defendant has noted, neither witness was an expert on crimpers, both were knowledgeable in the pertinent areas of engineering design and familiar with the processes used by a crimper. This lack of direct experience is not a sufficient basis to reject their testimony, but may affect the weight that testimony is given, a decision properly made by the jury." (footnote omitted)); *Ramsey*, 738 F.2d at 1101 ("Mr. Culpepper's complaints about Dr. Simpson's personal unfamiliarity with real estate values and the reliability of the figures underlying his opinion go to the weight of his testimony, not to its

C. Dr. Mancini's specialized knowledge will help this Court understand the evidence and determine facts in issue.

Dr. Mancini's testimony will give this Court reliable insight into the specialized scientific and technical knowledge required to understand solar energy technology, generally. Dr. Mancini will also explain how solar energy systems work, the kind of knowledge and experience that is required to create and maintain such systems, and the challenges that face any solar energy technology system to generate electricity or heat at a reasonable cost. Dr. Mancini's evaluation of Defendants' purported solar energy technology will assist the Court in understanding what Defendants' purported solar energy technology is and does (or does not do); whether Defendants' purported solar energy technology is currently converting sunlight into useable energy; and whether Defendants' purported solar energy technology is or could be commercially viable on any scale to convert sunlight into electrical power.

Whether Defendants' purported solar energy technology works as Defendants claim is a material matter and is directly at issue in this case.[101] Dr. Mancini's testimony will better equip this Court, with reliable evidence, to determine whether Defendants' statements about that material matter were false or fraudulent, and whether Defendants knew, or had reason to know, that such statements were false or fraudulent.[102] Dr. Mancini's testimony will also shed light on the "correct valuation" for the lenses Defendants sold.[103] If the technology does not work as

admissibility."); *see also Obieli v. Campbell Soup Co.*, 623 F.2d 668, 670 (10th Cir. 1980) (affirming judgment over argument that a new trial should be granted because doctors testified based on erroneous factual assumptions, when "[b]oth of these witnesses were fully examined, both on direct and extended cross-examination, on all matters, including the ones above referred to."); *Cinema Pub*, 2017 WL 1066628, at *7-8.

[101] *E.g.*, ECF No. 202 at 2.

[102] *See* 26 U.S.C. § 6700(a)(2)(A).

[103] *See* 26 U.S.C. § 6700(b)(1)(A).

Defendants claim it does, the correct valuation of a lens may be far less than the $3,000 or $3,500 prices Defendants quoted to customers. Dr. Mancini will provide reliable evidence for this Court to weigh regarding whether Defendants made or furnished gross valuation overstatements when telling customers the purchase price for each lens.[104]

V. Conclusion

Dr. Mancini has extensive knowledge, skills, experience, training, and expertise in the field of concentrating solar power technology, developed over more than 35 years in that industry. He offers reliable testimony, based soundly on the facts and data in this case and using reliable principles and methods, that will assist this Court in understanding the specialized field of concentrating solar power technology and the state of Defendants' purported solar energy technology.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion[105] is DENIED. Dr. Mancini's testimony is admissible under Fed. R. Evid. 702.

Dated February 27, 2018.

BY THE COURT:

David Nuffer
United States District Judge

[104] § 6700(a)(2)(B).

[105] ECF No. 253.

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.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' MOTION TO REINSTATE TRIAL BY JURY** Case No. 2-15-cv-00828-DN District Judge David Nuffer

On January 25, 2016, Defendants filed a Jury Demand.[1] In response, the United States filed a Motion to Strike Jury Demand.[2] Defendants responded in opposition.[3] The United States replied.[4] On April 27, 2016, Magistrate Judge Wells heard from counsel and took under advisement the Motion to Strike Jury Demand.[5] On May 2, 2016, Magistrate Judge Wells granted the Motion to Strike Jury Demand stating that the relief the United States is seeking is "equitable in nature," therefore the "Seventh Amendment right to a jury trial is not implicated."[6] However, Magistrate Judge Wells stated that "the court will allow Defendants to make a motion for a jury trial if penalties become part of this case."[7]

[1] Docket no. 24, filed January 25, 2016.

[2] Docket no. 31, filed February 2, 2016.

[3] Docket no. 32, filed March 4, 2016.

[4] Docket no. 33, filed March 18, 2016.

[5] Minute Order Motion Hearing, docket no. 42, filed April 27, 2016.

[6] Memorandum Decision and Order Granting Motion to Strike Jury Demand, docket no. 43, at 2, filed May 2, 2016.

[7] *Id*. at 3.

Defendants moved to reinstate a trial by jury on February 9, 2018.[8] The United States opposes this Motion.[9] The parties' memoranda have been carefully reviewed. For the reasons set forth below, Defendants' Motion is DENIED.

TIMELINESS

The Motion is untimely. On April 6, 2016, a 10-day bench trial was set for April 16, 2018. The amended scheduling order filed on July 6, 2017 set the motions deadline as November 17, 2017.[10] After input of counsel, on January 25, 2018, the schedule was amended only to split the dates of trial and move the first day of trial up two weeks to April 2, 2018.[11] Split trial dates, not in consecutive order, make a jury trial difficult.

Defendants' Motion relies heavily on *Kokesh v. S.E.C.*[12] to argue that Defendants are entitled to a trial by jury.[13] *Kokesh* was decided in June 2017, over five months before the motions cut-off date. Defendants had ample time to file a timely motion. But Defendants did not file the Motion until February 9, 2018. The Motion was filed over two months after the motions cutoff date; two weeks after the amended scheduling order rescheduling and splitting the trial dates; and less than two months before trial begins on April 2nd. The untimeliness of the Motion by itself warrants denial; however, other arguments will be addressed.

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[8] Defendants' Motion to Reinstate Trial by Jury ("Motion"), docket no, 289, filed February 9, 2018.

[9] United States' Brief in Opposition to Defendants' Motion to Reinstate Trial by Jury ("Opposition"), docket no. 309, filed February 26, 2018.

[10] Docket no. 205, filed July 6, 2017.

[11] Docket no. 284, filed January 25, 2018, "Dates of 10 Day Bench Trial: April 2, 3, 4, 5, 19, 20, 23, 24; May 9; and June 4." The schedule was amended one additional time setting "Dates of 10 Day Bench Trial: April 2, 3, 4, 5, 19, 20, 23, 24, 25, 26; and if necessary May 9; and June 4," docket no. 287, filed February 5, 2018.

[12] *Kokesh v. S.E.C.*, 137 S.Ct. 1635 (2017).

[13] Motion at 2-9.

DISGORGEMENT IS EQUITABLE AND NOT A SUBJECT FOR JURY DECISION

The United States requests "disgorgement, in the nature of restitution, of Defendants' gross receipts from their fraudulent conduct."[14] Defendants argue that this type of disgorgement is a penalty and therefore Defendants are entitled to a jury.[15] Contrary to Defendants' argument, disgorgement is equitable and is not tried by a jury.

The test for determining whether a party has a right to a trial by jury is whether the "action involves rights and remedies of the sort traditionally enforced in action at law, rather than in action in equity or admiralty"[16]. The Ninth Circuit, in *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, stated "[a] claim for disgorgement of profits…is equitable, not legal."[17] "[T]he current law recognizes that actions for disgorgement of improper profits are equitable in nature."[18] Also, the Second Circuit found that "[a] historic equitable remedy was the grant of restitution 'by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives.'"[19] The Second Circuit held there is no right to jury trial in a case seeking "disgorgement of profits in an action brought by the SEC to enjoin violations of the securities laws [because]…the court is not awarding damages to which plaintiff is legally entitled but is exercising…discretion to prevent unjust enrichment."[20] District courts hold bench trials

[14] Opposition at 3.

[15] Motion at 3.

[16] *Securities and Exchange Commission v. Commonwealth*, 574 F.2d 90, 95 (2d Cir. 1978) (quoting *Pernell v. Southall Realty*, 94 S.Ct. 1723, 1729 (1974)).

[17] *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc*., 778 F.3d 1059, 1075 (9th Cir. 2015).

[18] *Id*.

[19] *Securities and Exchange Commission v. Commonwealth*, 574 F.2d at 95 (2d Cir. 1978) (quoting 5 Federal Practice p 38.24(2) at 190.5 (1977)).

[20] *Id*.

where the government seeks injunctive relief pursuant to 26 U.S.C. §7408 and injunctive relief and disgorgement of profits pursuant to 26 U.S.C. §7402.[21]

The United States is seeking an order requiring all Defendants to disgorge "the gross receipts that they received from any source as a result of the solar energy scheme…"[22] The United States contends that the disgorgement they are requesting will compensate the United States; "bring the parties back to their original starting point[;] and ensure that wrongdoers are not enriched by their ill-gotten gains…"[23] This classic disgorgement is an equitable remedy which does not entitle Defendants to a jury trial.

DISGORGEMENT IS INCIDENTAL TO INJUNCTIVE RELIEF

The Supreme Court has held that a monetary award may be an equitable remedy where (1) it is "restitutionary, such as in 'action[s] for disgorgement of improper profits'" or (2) it is "incidental to or intertwined with injunctive relief."[24] The relief that the United States is seeking meets both of these tests. "Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the [victim]."[25] As stated above, the United States seeks disgorgement in order "to compensate the U.S. Treasury for the millions of dollars it has lost due to Defendants' unlawful conduct that resulted in their unjust enrichment."[26] Secondly, even if disgorgement under 26 U.S.C. § 7402 were considered a legal remedy, a jury trial is not required

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[21] *United States v. Mesadieu*, 180 F. Supp.3d 1113 (M.D. Fla. 2016) (finding that disgorgement in the amount of defendant's "ill-gotten gains" constitutes a "fair and equitable remedy," but holds that the Government had not met its burden of proving the proper amount of unjust enrichment subject to disgorgement. *United States v. Lawrence*, 2016 WL 5390569, (S.D. Fla. 2016) (holding that the claim for disgorgement is an equitable one that seeks to divest defendant who was unjustly enriched by operating his business in an unlawful manner).

[22] Complaint, docket no. 2, filed November 23, 2015.

[23] Opposition at 9-10.

[24] *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)).

[25] *Tull*, 481 U.S. at 424 (quoting *Porter v. Warner Holding Co.*, 416 U.S. 363, 375 (1946)).

[26] Opposition at 7.

if the monetary award is "incidental to or intertwined with injunctive relief."[27] Here, "the primary relief the United States seeks is a civil injunction, an equitable remedy."[28] The disgorgement sought here is incidental to injunctive relief and therefore, a jury trial is not required.

KOKESH DOES NOT APPLY

Kokesh v. SEC decided whether disgorgement is a penalty for the purpose of applying a statute of limitation. *Kokesh* is a statutory analysis of terms.[29] The Supreme Court does not state in *Kokesh* that its ruling determines that disgorgement is a penalty in all contexts. And, *Kokesh* certainly did not discuss or overrule the long standing precedent of categorizing disgorgement as an equitable remedy.

ORDER

IT IS HEREBY ORDERED that Defendants' Motion to Reinstate Trial by Jury[30] is DENIED. A 10-day bench trial will begin April 2nd as previously scheduled.

Dated March 7, 2018.

BY THE COURT:

David Nuffer
United States District Judge

[27] *Tull*, 481 U.S. at 424.

[28] Opposition at 3.

[29] *Kokesh*, 137 S.Ct. at 1639 ("A 5–year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. Disgorgement in the securities-enforcement context is a "penalty" within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.").

[30] Defendants' Motion to Reinstate Trial by Jury ("Motion"), docket no, 289, filed February 9, 2018.

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.	**MEMORANDUM DECISION AND ORDER GRANTING DEFENDANTS' RULE 60(a) REQUEST FOR RELIEF BASED ON OVERSIGHT AND CONFIRMING ORDER DENYING TRIAL BY JURY** Case No. 2-15-cv-00828-DN District Judge David Nuffer

Defendants correctly claim the timing of the Memorandum Decision and Order Denying Defendants' Motion to Reinstate Trial by Jury ("Order")[1] was premature and request relief pursuant to DUCivR 7-1(b)(3)(B).[2] A shorter briefing period was not ordered; the Defendants' Motion to Reinstate Trial by Jury ("Motion"), docket no. 289, filed February 9, 2018,[3] was not a motion in limine to which no reply is permitted; and Defendants had until March 12, 2018, to file a reply to Plaintiff's Opposition to Defendants' Motion to Reinstate Trial by Jury, filed February 26, 2018.[4] But the Order was issued March 7, 2018. Defendants have correctly stated that the

[1] Docket No. 322, filed March 7, 2018.

[2] Defendants' Rule 60(a) Request for Relief Based on Oversight ("Request"), docket no. 325, at 2, filed March 8, 2018.

[3] Docket no, 289, filed February 9, 2018.

[4] Request at 2.

Order[5] was entered prematurely. This was the court's error. However, even after the arguments in Defendants' Reply[6] are considered, the Order[7] does not change for the reasons set forth below.

KOKESH IS INAPPLICABLE

Kokesh v. SEC is a statutory analysis of application of a statute of limitations and does not apply to determine right to trial by jury.[8] *Kokesh* is not applicable.

TIMELINESS BARS THE MOTION TO REINSTATE TRIAL BY JURY

In the Reply, Defendants state that they did not learn of "Plaintiff's intention to assert penalties by way of excessive 'disgorgement,'" until Plaintiff filed its Motion to Freeze Assets on November 17, 2017.[9] Defendants argue that the Motion to Reinstate Trial by Jury[10] is not untimely, because it "was brought shortly after they learned of [Plaintiff's] new [disgorgement] theory."[11] This argument is unpersuasive for two reasons. First, the Plaintiff's Motion to Freeze Assets was filed November 17, 2017, and Defendants did not file the Motion to Reinstate Trial by Jury until 84 days later on February 9, 2018. Defendants waited almost three months to file the Motion to Reinstate Trial by Jury. Second, the Complaint filed nearly two and a half years ago states that Plaintiff seeks an order requiring "all Defendants disgorge to the United States the

[5] Docket no. 322, filed March 7, 2018.

[6] Defendants' Reply Memorandum in Support of Motion to Reinstate Trial by Jury ("Reply"), docket no. 326, filed March 8, 2018.

[7] Docket no. 322, filed March 7, 2018.

[8] *Kokesh v. S.E.C.*, 137 S.Ct. 1639 (2017)("A 5–year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. Disgorgement in the securities-enforcement context is a "penalty" within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.").

[9] Reply at 6, *see also* United States' Motion to Freeze the Assets of Defendants Neldon Johnson, Rapower-3, LLC, and International Automated Systems, Inc. and Appoint a Receiver, docket no. 252, filed November 17, 2017.

[10] Defendants' Motion to Reinstate Trial by Jury, docket no, 289, filed February 9, 2018.

[11] Reply at 6.

gross receipts that they received from any source as a result of the solar energy scheme…"[12] Also, the Prayer for Relief requests "[t]hat this Court, under § 7402(a), enter an order requiring all Defendants to disgorge to the United States the gross receipts…"[13] Defendants' claim that they were not made aware of Plaintiff's intention to seek disgorgement of gross receipts until November 17, 2017, is inaccurate because the Complaint filed on November 23, 2015, clearly states the intent of Plaintiff to seek disgorgement. And 84 days, the time between the Motion to Freeze Assets and the Motion to Reinstate Trial by Jury, is not a short and insignificant amount of time. The Motion to Reinstate Trial by Jury is untimely.

THERE IS NO RIGHT TO JURY TRIAL MAKING A BALANCING ANALYSIS IRRELEVANT

Defendants in the Reply assert that their "right to a trial by jury far outweighs" any prejudice to Plaintiff.[14] A balancing analysis is irrelevant because Defendants have no right to trial by jury on the issue of disgorgement, for the reasons stated in the Order.

[12] Complaint for Permanent Injunction and Other Relief, docket no. 2, at 3, ¶ 2.b., filed November 23, 2015.

[13] *Id*. at 43, ¶ b.

[14] Reply at 9.

ORDER

IT IS HEREBY ORDERED that Defendants' Rule 60(a) Request for Relief Based on Oversight[15] is GRANTED. But after considering the Reply Memorandum, the result does not change. The Motion to Reinstate Trial by Jury[16] was DENIED by the Memorandum Decision and Order Denying Defendants' Motion to Reinstate Trial by Jury[17] which is CONFIRMED. The 10-day bench trial will begin April 2nd as previously scheduled.

Dated March 13, 2018.

BY THE COURT:

David Nuffer
United States District Judge

[15] Docket no. 325, at 2, filed March 8, 2018.

[16] Defendants' Motion to Reinstate Trial by Jury, docket no, 289, filed February 9, 2018.

[17] Docket No. 322, filed March 7, 2018.

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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**UNITED STATES' INITIAL DISCLOSURES TO ALL DEFENDANTS** Civil No. 2:15-cv-00828-DN-BCW Judge David Nuffer Magistrate Judge Brooke C. Wells

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure, the United States makes the following initial disclosures:

A. The name and, if known, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.

1. **R. Gregory Shepard**, 858 Clover Meadow Dr., Murray, Utah 84123, 801-699-2284. R. Gregory Shepard is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme (as described in the United States' complaint and hereinafter referred to as "the solar energy scheme"), statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts he has received from the solar energy scheme.

2. **Neldon Johnson**, 4035 South 4000 West, Deseret, Utah 84624. Neldon Johnson is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts he has received from the solar energy scheme.

3. **Roger Freeborn**, 1145 NE Hill Way, Estacada, Oregon 97023 or P.O. Box 1616, Estacada, OR 97023. Roger Freeborn is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts he has received from the solar energy scheme.

4. **Ra-Power3, LLC**. Ra-Power 3, LLC is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts it has received from the solar energy scheme.

5. **International Automated Systems, Inc.** ("IAS"). IAS is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts it has received from the solar energy scheme.

6. **LTB1, LLC ("LTB")**. LTB is a defendant in this matter and likely has discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts it has received from the solar energy scheme.

7. **Customers of any Defendant**. The United States currently does not know the identities of all of defendants' customers. The United States will disclose the names and contact information of the customers it may rely upon at a later date. Defendants' customers likely have discoverable information regarding the solar energy scheme (including about the technology, structure, marketing, revenues, tax implications, and statements made by defendants regarding the solar energy scheme) and about the amount of money paid to any defendant and receipt of any money from any defendant. To date, the United States has identified the following customers it may rely upon. The contact information is updated to the best of the United States' information and knowledge.
    a. **Jean Armand**, P.O. Box 770848, Miami, FL 33177
    b. **Nehemy Cher-Frere**, 5068 SW 139 Street, Hollywood, FL 33027
    c. **Peter and Ranae Gregg**, 38490 Bickford St., Sandy, OR 97055, 503-637-6586
    d. **Nicholas Kontos**, 8637 Franjo Rd., Cutter Bay, FL 33189 or 8932 SW 22nd Terrace, Cutler Bay, FL 33190-1290
    e. **Yolette Mezadieu**, P.O. Box 371444, Miami, FL 33137
    f. **Sam and Gloria Otto**, 2068 Summerwood Dr., Layton, UT 84040, 801-678-1196
    g. **Bruce Shearer**, 6 Bowline Ct., Bellingham, WA, 98229, 360-757-4074
    h. **Sterling Shearer**, 10515 Crest View Ln, Eagle River, AK 99577, 360-220-3575
    i. **Mark and Catherine Sikich**, 8445 Jeffrey Ave. S., Cottage Grove, MN 55016

8. **Sponsors of any Customer.** The United States currently does not know the identities of all of defendants' sponsors. The United States may rely on information from any individual who is identified as a "sponsor" through discovery in this case. Sponsors likely have discoverable information regarding the solar energy scheme (including about the technology, structure, marketing, revenues, tax implications, and statements made by defendants regarding the solar energy scheme) and about the amount of money paid to any defendant and receipt of any money from any defendant. To date, the United States has identified the following sponsor it may rely upon. The contact information is updated to the best of the United States' information and knowledge.
    a. **Paul Brennan**, address currently unknown but believed to be a resident of Utah, 435-632-8081

9. **Distributors of any Defendant.** The United States currently does not know the identities of all of defendants' distributors. The United States may rely on information from any individual who is identified as a distributor through discovery in this case. Distributors likely have discoverable information regarding the solar energy scheme (including about the technology, structure, marketing, revenues, tax implications, and statements made by defendants regarding the solar energy scheme) and about the amount of money paid to any defendant and receipt of any money from any defendant.

10. **Employees or agents of any Defendant.** The United States currently does not know the identities of all of defendants' employees or agents. The United States may rely on information from any individual who is identified as an employee or agent of the defendants. Employees or agents of any defendant are likely to have discoverable information about the structure, operation, maintenance, physical locations, and marketing of defendants' solar energy scheme,, statements made by defendants (including about the technology, structure, marketing, revenues, and tax implications), and about the disgorgement claim.

11. **Banks used by any Defendant for business or personal banking.** The United States currently does not know the identities of every bank used by any defendant for business or personal banking. The United States will disclose the name and contact information for any banks it may rely upon at a later date. Banks used by any defendant are likely to have discoverable information with respect to monies generated from the solar energy scheme which may relate to claims regarding the technology and structure of the solar energy scheme as well as the disgorgement claim.

12. **Matthew Shepard**, address currently unknown, 801-651-2183. Matthew Shepard appears to be employed by RaPower-3 and is likely to have discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts he or any defendant has received from the solar energy scheme.

13. **Other members of the Shepard family.** The United States has not currently identified any additional members of the Shepard family that it may rely upon in this case. The United States will disclose the name and contact information for any other members of the Shepard family it may rely upon at a later date. Other members of the Shepard family are likely to have discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme

(including about the technology, structure, marketing, revenues and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts defendants have received from the solar energy scheme.

14. **Members of the Johnson family, e.g., Glenda, Randale, LaGrand, etc.** The United States has not currently identified any members of the Johnson family that it may rely upon in this case. The United States will disclose the name and contact information for members of the Johnson family it may rely upon at a later date. Members of the Johnson family are likely to have discoverable information regarding the claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants with respect to the solar energy scheme (including about the technology, structure, marketing, revenues, and tax implications), and information regarding the disgorgement claim, including the amount of gross receipts defendants have received from the solar energy scheme.

15. **Advisors of Customers, to include attorneys, Certified Public Accountants (CPAs), or other tax preparers.** The United States currently does not know the identities of the advisors used by the defendants' customers. The United States may rely on information from any individual who is identified as a customer's advisor through discovery in this case. The United States anticipates that these advisors likely have discoverable information that will relate to the solar energy tax scheme, both with respect to claims as to statements made by the defendants and also potentially with respect to how customers claimed items relating to the solar energy scheme on the their tax returns. To date, the United States has identified the following advisors used by customers that it may rely upon. The contact information is updated to the best of the United States' information and knowledge.
    a. **Kenneth Alexander, Wizard Business Center**, 817 Abbiegail Drive, Tallahassee, FL 32303, 805-531,0001
    b. **Bryan Bolander, VanTienderen, Carter & Bolander, P.C.**, 6802 South 1300 East, Salt Lake City 84121, 801-561-8685
    c. **John Howell, Howell Tax Service**, 4708 K Mart Dr., Ste B, Wichita Falls, TX 76308, 940-766-0981
    d. **Richard Jameson, Northstar Tax Services**, 784 S. River Road #348, St. George, UT 84790, 435-669-9225

16. **Advisors used by defendants, to include attorneys, CPAs, accountants, bookkeepers, or other advisors with respect to financial transactions or tax implications of the solar energy scheme.** The United States currently does not know the identities of all the advisors used by the defendants. The United States may rely on information from any individual who is identified as an advisor used by any defendant with respect to the solar energy scheme through discovery in this case. The United States anticipates that these advisors likely have discoverable information relating to defendants' affirmative defense of reliance on advice of professionals. The United States anticipates that these advisors will also likely have discoverable

information relating to the other claims and defenses in this case, including the structure and technology of the solar energy scheme, statements made by defendants to such advisor representing the structure, technology, marketing, revenues, or other aspect of the solar energy scheme, statements made by defendants to their customers, sponsors, distributors, or in marketing the solar energy scheme to the public, and information regarding the disgorgement claim including the financial records of defendants, revenues generated from the scheme by any defendant, and information relating to any defendant's books and records and tax returns.

17. **Millard County Officials**. The United States currently does not know the identities of Millard County officials that it may rely upon in this case. The United States anticipates that Millard County officials likely have discoverable information regarding defendants' operations in Millard County and defendants' compliance with applicable local laws and regulations with respect to the solar energy scheme and any necessary licenses and permits. The United States will disclose the names and contact information for any Millard County official it may rely upon at a later date.

18. **Utility Company Employees or Agents.** The United States currently does not know the identities of the utility company employees or agents that it may rely upon in this case. The United States anticipates that utility company employees or agents likely have discoverable information regarding defendants' operations in Utah, any end product produced by defendants' solar energy scheme (including electricity and/or heat), and defendants' connection to the grid, if any, with respect to defendants' solar energy scheme. The utility company employees or agents may also have discoverable information regarding applicable laws and regulations that may apply to defendants' solar energy scheme and any agreements, applications, or contracts defendants have for production. The United States will disclose the names and contact information for any utility company employees or agents it may rely upon at a later date.

19. **A representative of the Internal Revenue Service** may be needed to authenticate IRS records and documents regarding the claims and defenses in this case or may be needed as a summary witness to identify the extent that the defendants' conduct has harmed the Government.

B. A copy – or a description by category and location – of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

1. Documents produced with these initial disclosures, US000001 through US004267.

2. Videos produced with these initial disclosures.

3. Federal income returns and related schedules (including IRS Forms 1040, 1040X, or applications for tentative refund, Forms 1045) for customers of any defendant for tax years in which a customer claimed any item on such return or form relating to the solar energy scheme. The United States does not believe it has identified all of defendants' customers

4. Statutory Notices of Deficiency for customers of any defendants which include adjustments relating to the solar energy scheme. The United States does not believe it has identified all of defendants' customers and may not have Statutory Notices of Deficiency for every customer because the IRS has not examined all of the defendants customers' tax returns on which customers claimed improper tax benefits relating to the solar energy scheme

5. Defendants' statements regarding the solar energy scheme (including statements about the technology, structure, and/or tax implications) that customers used to understate their tax liability or support their claims to tax benefits. Customers may have included such statements in correspondence to the IRS including in letters requesting review by IRS Appeals or responses to information document requests. To the extent not otherwise produced in Category 1, above, the United States may rely upon additional documents reflecting the defendants' statements, which will be produced at a later date.

6. Bank statements, canceled checks and other proof of payment to defendants for participation in the solar energy scheme. To the extent that the United States identifies these documents and may rely upon them, the United States will produce them.

C. A computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered.

The United States seeks disgorgement of the proceeds that all defendants received for the gross receipts (the amount of which is to be determined by the Court) that they received from any source as a result of their conduct in furtherance of the abusive solar energy scheme described in the complaint, together with prejudgment interest thereon. The amount to be disgorged will be based on income information available to the IRS, income information in the possession of all defendants, and the financial records and accounts of all defendants and any

business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme described in the complaint.

According to the information the United States has obtained to date from the IRS, Shepard earned more than $170,000 from 2010 through 2013 due to activities related to promoting the scheme. Johnson claims to have earned nearly $500,000 from activities related to the scheme in tax years 2012 and 2013 alone. Freeborn has made more than $100,000 from 2011 through 2013 for his activities related to the abusive tax scheme. The United States believes that its information on disgorgement and gross receipts that each defendant received from the solar energy scheme is incomplete at this time and will be obtained from defendants and third parties during the pendency of this case. The United States expects the disgorgement calculation to increase as additional information is produced with respect to the gross receipts each defendant received relating to the abusive tax scheme.

D. For inspection and copying as under Rule 34, any insurance agreement under which and insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Insurance agreements are not applicable to the United States' claims.

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[signature on following page]

Dated: April 22, 2016

CAROLINE D. CIRAOLO
Acting Assistant Attorney General
Tax Division

/s/ Erin R. Hines
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, the foregoing document was sent via email to the following and a copy was sent via FedEx with the accompanying documents to the following:

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/s/ Erin R. Hines
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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.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' [319] MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING DAMAGES RELATING TO DISGORGEMENT OF FUNDS** Case No. 2-15-cv-00828-DN District Judge David Nuffer

Defendants have moved to exclude "Plaintiff's proposed evidence regarding damages relating to disgorgement of funds" because "Plaintiff has failed to timely disclose any computation…of damages" and "to timely designate an expert" witness.[1] Plaintiff responded in opposition.[2] Defendants replied.[3] For the reasons set forth below, Defendants' Motion is DENIED.

Defendants seek, pursuant to Rule 26(a)(1)(iii), to prohibit the Plaintiff from introducing evidence of disgorgement because "Plaintiff failed to properly and timely disclose" "any documents or other evidentiary material on which any computation of damages or disgorgement

[1] Defendants' Motion in Limine to Exclude Testimony Regarding Damages Relating to Disgorgement of Funds ("Motion"), docket no. 319, at 1, 9, filed March 5, 2018.

[2] United States' Memorandum in Opposition to Defendants' Motion in Limine to Exclude Testimony Regarding Damages Relating to Disgorgement of Funds ("Opposition"), docket no. 332, filed March 12, 2018.

[3] The court will not consider Defendants' Reply Memorandum in Support of Motion in Limine {Doc. 319) to Exclude Testimony Regarding Damages Relating to Disgorgement of Funds, docket no. 337, filed March 13, 2018, because pursuant to the Trial Order Defendants are not entitled to a reply and Defendants' Reply is longer than the three-page limit prescribed in the Trial Order, docket no. 288, filed February 7, 2018.

is based.".[4] Plaintiff responds that "Rule 26(a)(1) does not require disgorgement calculations to be disclosed, and [they] disclosed all information that supports [their] disgorgement calculations."[5] This is correct. "Disgorgement is not a damages remedy, and therefore 'the disclosure required by Rule 26(a)(1)(A)(iii) is inapplicable.'"[6] Furthermore, Plaintiff "timely disclosed the bank records and tax returns underlying [their disgorgement] calculations."[7]

Defendants claim they would be prejudiced by Plaintiff's ability to "put on evidence of damages or disgorgement that Plaintiff failed to properly and timely disclose."[8] Plaintiff responds "[i]t is nonsensical [for Defendants] to claim prejudice because [Plaintiff] did not disclose information [Defendants possess]."[9] Defendants should know the total amount of lenses sold and how much money was derived from those sales. Defendants are "not prejudiced by the [Plaintiff's] failure to disclose a precise calculation of disgorgement because [they are] in at least as good of a position, if not better, as the [Plaintiff] to calculate the ill-gotten gains [they] received."[10] Moreover, Defendants have repeatedly withheld information from Plaintiff regarding the basis for disgorgement, despite being ordered to do so.[11]

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[4] Motion at 1-2.

[5] Opposition at 2, ¶ I.

[6] *United States v. Stinson*, 2016 WL 8488241, at *7 (M.D. Fla. 2016) (quoting *S.E.C. v. Razmilovic*, 2010 WL 2540762, at *2 (E.D.N.Y. 2010)).

[7] Opposition at 3.

[8] Motion at 2.

[9] Opposition at 3.

[10] *United States v. Stinson*, 2016 WL 8488241, at *7 (citations omitted).

[11] Magistrate Judge Furse determined that Defendants failed to comply with a court order requiring Defendants to produce the documents which are now the basis for Defendants' prejudice claim in this Motion. Defendants claim Plaintiff did not disclose the documents Defendants did not produce. *See* Order Granting United States' Expedited Motion for Sanctions Against Defendants, docket no. 235, filed October 25, 2017; *see also* Order Granting United States' Expedited Motion to Compel Defendants to Produce Documents, docket no. 218, filed September 12, 2017 (Defendants shall produce the computer program that purportedly tracks customers and all solar lens purchase agreements with customers).

Defendants also complain that they have not had the opportunity to examine experts who must necessarily present disgorgement evidence.[12] Plaintiff asserts that "[n]o specialized expertise is required to perform the [disgorgement] calculations."[13] Plaintiff will present "evidence on disgorgement through summary witnesses who reviewed the same voluminous documents that [were] timely disclosed to Defendants, and who will be available for cross-examination."[14] These witnesses reviewed Defendants' bank accounts and tax returns of Defendants' customers and synthesized this information into Excel to "calculate Defendants' gross receipts and estimate the harm to the Treasury."[15] Assuming sufficient foundation is laid and the testimony is not otherwise objectionable, a witness with "personal knowledge or perception acquired through review of records" may testify from her lay opinion testimony.[16] In this situation, no expertise is required.

ORDER

IT IS HEREBY ORDERED that

(1) Defendants' Motion[17] is DENIED.

(2) The parties shall meet and confer and make an attempt to find a time for Defendants to depose JoAnna Perez and Amanda Reinken, only on the subject of the exhibits as

[12] Opposition at 7-9.

[13] Opposition at 4, ¶ III.

[14] *Id.* at 3; *see also* United States' Memorandum in Opposition to Defendants' "Objection to Plaintiff's Pretrial Witness List and Request to Strike," docket no. 329, at 3, filed March 9, 2018.

[15] Opposition at 3.

[16] *United States v. Lemire*, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (allowing non-expert testimony summarizing the documents in evidence already before the jury, about which he had personal knowledge from reviewing the transcripts and exhibits); *Qwest Corporation v. City of Santa Fe*, 2013 WL 12239494, at *1 (D.N.M. 2013) (citing Burlington N. R.R. Co. v. State of Neb., 802 F.2d 994, 1004-05 (8th Cir. 1986)).

[17] Docket no. 319, filed March 5, 2018.

to which they will testify and their preparation of those exhibits. Neither deposition shall consume more than three hours.

(3) The parties must submit briefs on or before noon March 26, 2018 on the measurement and proof of a disgorgement amount. Specifically, the parties must provide legal authority for (1) measuring disgorgement by the amount of (a) taxes avoided by investors in Defendant RaPower; (b) gross profit of RaPower; (c) net profit of RaPower; (d) income of individual defendants from RaPower; or any other measure, and (2) who, in the event net profit is a proper measure, bears the burden of proof on expenses RaPower incurred in its business.

Dated March 14, 2018.

BY THE COURT:

David Nuffer
United States District Judge

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Case Name: USA v. RaPower-3 et al
Case Number: 2:15-cv-00828-DN-EJF
Filer:
Document Number: 359(No document attached)

Docket Text:
DOCKET TEXT ORDER - Pursuant to the Memorandum Decision and Order [338] the Parties submitted briefs on the issue of disgorgement [351] [352]. The Parties' briefing and supporting documentation have been carefully reviewed. This Order finds:
-A party is not unjustly enriched if the gains he acquired flow from any legitimate business activity.
-A claimant bears the burden of showing the disgorgement amount is a reasonable approximation of defendants unjust enrichment.
-Unjust enrichment may be shown by gross receipts or increase in net assets.
-A defendant is free to introduce evidence showing that unjust enrichment is something less than the amount put in evidence by plaintiff. Defendant has the burden of proving entitlement to a credit or deduction for business expenses, which may include refunds to customers.
-However, defendant is not entitled to a credit for costs or expenses incurred in an attempt to defraud the claimant.
-Tax credits or depreciation deductions by defendants' customers might be a measure of disgorgement, but are not a required measure of disgorgement.
-Individuals may be held personally liable for an entity's debt, if the individuals' unjust enrichment was directly derived from using the entity as a conduit for fraud.
-Defendants may, when appropriate by transmission of funds from one to another, be jointly and severally liable for disgorgement.
Docket text only. No attached document. Signed by Judge David Nuffer on 03/29/2018. (ms)

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Case Name: USA v. RaPower-3 et al
Case Number: 2:15-cv-00828-DN-EJF
Filer:
Document Number: 376(No document attached)

Docket Text:
DOCKET TEXT ORDER denying Defendants' [364] Motion in Limine to Strike Plaintiff's Summary Exhibit 752 is DENIED for the following reasons: (1) The United States was not required to disclose the Excel spreadsheet Perez used to create her summary (Exhibit 752) because Defendants were given sufficient time to inspect the underlying documents, the tax returns (produced May 15, 2017, September 5, 2017, and September 15, 2017), and therefore, there is no reason to give the Defendants the benefit of Plaintiff's work product in preparing the spreadsheet. (2) These summaries qualify under Rule 1006. The admission of summaries under Rule 1006 is within the sound discretion of the court. (3) Exhibit 752 is not more prejudicial than probative and therefore does not violate Rule 403. Exhibit 752 adds substantial probative value, saves time and increases convenience by summarizing voluminous tax records. The Defendants may challenge Exhibit 752 on cross-examination. (4) Defendants failed to cite any case law to support their arguments of lack of relevance. (5) "Harm to the Treasury," depreciation expenses, and tax credits may be relevant to a proper measure of disgorgement. Signed by Judge David Nuffer on 04/04/2018. Docket text only. No attached document. (ms)

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Case Number: 2:15-cv-00828-DN-EJF
Filer:
Document Number: 377(No document attached)

Docket Text:
DOCKET TEXT ORDER - Defendants' [365] Motion in Limine to Strike Plaintiff's Summary Exhibits 734 - 741, 742(A), 742(B), and 750 ("Exhibits") is DENIED for the following reasons: (1) The United States was not required to disclose the Excel spreadsheet Reinken used to create her summaries in Exhibit 734 through 741 because Defendants were given sufficient time to inspect the underlying documents (the bank records) after they were produced March 30, 2017, and therefore, there is no reason to give the Defendants the benefit of Plaintiff's work product in preparing the spreadsheet. (2) The admission of these summaries which qualify under Rule 1006 is within the sound discretion of the court. (3) The Exhibits are far more probative than prejudicial and therefore do not violate Rule 403. The Exhibits add substantial probative value by summarizing voluminous bank records, saving time and increasing convenience. Defendants may challenge the Exhibits' on cross-examination. (4) Defendants failed to cite any case law to support their arguments. (5) Plaintiff indicates it no longer intends to offer Pl. Ex. 750. (6) The format conversion issue related to Exhibits 742A and 742B was caused by Defendants' form of production of their database in a non-native format. (7) The lack of information about amounts paid for lenses in Exhibits 742A and 742B is due to the non-production of that data from Defendants. (8) Defendants have been free to prepare their own summaries from the bank records and from their database. Signed by Judge David Nuffer on 04/04/2018. Docket text only. No attached document. (ms)

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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.	**MEMORANDUM DECISION AND ORDER DENYING DEFENDANTS' [403] MOTION TO CONTINUE TRIAL** Case No. 2-15-cv-00828-DN District Judge David Nuffer

Defendants moved to continue trial because Mr. R. Gregory Shepard, a named defendant, is ill, may have a heart procedure, and may be unable to attend trial.[1] Plaintiff responded in opposition.[2] Defendants replied.[3] Defendants' Motion is made on a permissible basis.[4] But it is denied.

The eleventh through eighteenth days of this bench trial are scheduled to resume June 21, 2018.[5] This case, which is three years old, was originally set for ten days of trial.[6] Plaintiff

[1] Defendants' Motion Request for a Continuance of Trial on the Basis of Litigant's Health ("Motion"), docket no 403, at 1, filed June 15, 2018.

[2] United States' Memorandum in Opposition to Defendants' Motion to Continue ("Opposition"), docket no. 404, filed June 15, 2018.

[3] Defendants' Response to the United States' Opposition to the Motion to Continue Trial on the Basis of Litigant's Health ("Reply") docket no. 405, filed June 15, 2018.

[4] "...we should observe that illness of a litigant severe enough to prevent him from appearing in court is always a legitimate ground for *asking* for a continuance." *Davis v. Operation Amigo, Inc*., 378 F.2d 101, *103 (1967) (emphasis added).

[5] See docket "Bench Trial Updated Schedule" filed April 27, 2018.

[6] Scheduling Order, docket no. 37, filed April 6, 2016.

has rested after presenting 16 witnesses, including Mr. Shepard.[7] Plaintiffs examined witnesses for nearly thirty-two hours while Defendants cross-examined those witnesses for nearly twenty-three hours.[8] Mr. Shepard testified for seven hours, nearly three of which were cross examination.[9] Eleven depositions were designated and have been read.[10] The designated portions of Mr. Shepard's deposition consisted of well over one hundred pages.[11]

The Complaint[12] alleges eleven causes of action including Injunction under § 7402(a) and Injunction under § 7408. Plaintiff seeks to enjoin a fraudulent tax scheme and an order for disgorgement of profits.[13] Evidence received to date indicates that Defendants' revenue from this scheme for the years 2009-2016 may exceed $35,000,000[14] and that tax benefits taken by Defendants' customers for the years 2013-2016 may exceed $14,000,000. Defendants continue to market their product and encourage customers to take tax benefits. Just before trial, Defendants announced they would satisfy a debt by transfer of lenses to existing customers who could take tax benefits based on the market value of the lenses.[15] Defendants will not cease activities and Plaintiff will not cease to be adverse without adjudication.

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[7] Minute Entries for proceedings held before Judge David Nuffer, docket no. 372, filed April 2, 2018; docket no. 374, filed April 3, 2018; docket no. 378, filed April 4, 2018; docket no. 380, filed April 5, 2018; docket no. 386, filed April 19, 2018; docket no. 388, filed April 20, 2018; docket no. 391, filed April 23, 2018; docket no. 392, filed April 24, 2018; docket no. 393, filed April 25, 2018; and docket no. 396, filed April 26, 2018.

[8] Transcript of Proceedings April 2-5, April 19-20, and April 23-26, 2018.

[9] Transcript of Proceedings, April 23, 2018, page 1580, line 18 to page 1624, line 19; and April 24, 2018, page 1636, line 24 to page 1752, line 5.

[10] Docket nos. 297-307, filed February 26, 2018.

[11] Docket no. 306, filed February 26, 2018.

[12] Docket no. 2, filed November 23, 2015.

[13] *Id*. at ¶¶ 2(b) and 198(b).

[14] Exhibits 735, 736, 737, 738, 739, 740 and 741.

[15] Exhibit 796.

Defendants seek to continue trial based on the assertion that "Mr. Shepard cannot attend trial at the time prescribed due [sic] his illness, nor can his treatment be delayed to accommodate trial."[16] In the Motion, Defendants state Mr. Shepard has some heart issues and is scheduled for diagnostic testing on June 22, 2018, the second day of resumed trial, to determine if a heart stent or open heart surgery is necessary.[17] If a stent will repair Mr. Shepard's heart damage, the procedure will be done that same day, June 22, 2018[18] and if open heart surgery is necessary it will be scheduled "as soon as the doctor's schedule will allow."[19] The motion and reply do not indicate that Mr. Shepard's condition came on before or after the ten days of trial already completed, during which he did not appear ill at ease or impaired in any way as he attended and testified.

In *Fillippon v. Albion Vein Slate Co.*, the Supreme Court stated "that the orderly conduct of a trial…essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings... "[20] But if a litigant is "ably represented at trial by counsel [then] '[t]here is no constitutional right of a litigant to be personally present during the trial of a civil proceeding'."[21] There is no dispute that defense counsel represents Mr. Shepard and counsel will be present at trial. Therefore, whatever rights Mr. Shepard may have to be present at trial are fully protected by the ability of defense counsel to be present and represent him at trial.

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[16] Motion at 2.

[17] *Id*. at 1.

[18] Reply at 2.

[19] Motion at 1-2.

[20] *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, *81 (1919).

[21] *Kulas v. Flores*, 255 F.3d 780 (9th Cir. 2001) quoting *Faucher v. Lopez*, 411 F.2d 992, 996 (9th Cir.1969).

Mr. Shepard voluntarily absented himself from portions of the first ten days of trial. During the first ten days of trial, Mr. Shepard never sat at counsel's table.

This trial was originally scheduled to last only ten days. During the first ten days of trial, it became apparent that the parties were going to need more time. Defendant has had ample opportunity to cross examine witnesses, including Mr. Shepard. Coordinating the calendars of the parties, counsel and the court was very difficult. After input of counsel, the additional seven days of trial were set for June 21, 22, 25-29, 2018.[22] These dates were made available by cancelling other planned hearings and events. Plaintiff's counsel travels from Washington, D.C. No additional trial dates are available for the foreseeable future.

For the reasons set forth, Defendants' Motion[23] is DENIED.

ORDER

IT IS HEREBY ORDERED that

(1) Defendants' Motion[24] is DENIED.

(2) Trial will proceed as scheduled on June 21, 22 and 25-29.

(3) On or before 5:00 pm June 19, 2018, Defendants must notify the court and the parties whether Mr. Shepard will testify on Thursday, June 21, 2018.

(4) On or before Friday June 22, 2018, Defendants may designate additional portions of Mr. Shepard's deposition and Plaintiff shall respond to the designations on or before Tuesday June 26, 2018.

[22] See docket "Bench Trial Updated Schedule," filed April 27, 2018.

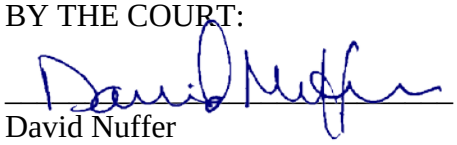
[23] Docket no. 403, filed June 15, 2018.

[24] *Id.*

(5) On or before noon Wednesday June 20, 2018, Defendants shall file a trial schedule with anticipated witnesses and length of direct and re-direct examination, allowing 60% of the time for cross and re-cross examination, with completion of all witnesses by noon Thursday June 29, 2018.

Dated June 18, 2018.

BY THE COURT:



David Nuffer
United States District Judge

Disgorgement: Neldon Johnson for XSun Energy, LLC

XSun Energy, LLC
Gross Receipts 2011-2016

Grand Total: $1,126,888

Years	Sum of Amount
2011	$442,355.43
2012	$660,462.57
2013	$21,298.73
2014	$1,170.10
2015	$813.17
2016	$788.18
Grand Total	$1,126,888.18

Plaintiff Exhibit 741

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Disgorgement: Neldon Johnson Summary

Where From	Amount
Solco I, LLC	$3,434,992
Xsun Energy, LLC	$1,126,888
Total	**$4,561,880**

And Neldon Johnson should be jointly and severally liable for the disgorgement of RaPower-3, LLC and International Automated Systems:

Where From	Amount
Total From Above	$4,561,880
RaPower-3, LLC	$25,874,066
IAS	$5,438,089
(Joint/Several RaPower-3 and IAS)	($3,077,839)
Total	**$32,796,196**

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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.	**INITIAL ORDER AND INJUNCTION AFTER TRIAL** Case No. 2:15-cv-00828 DN-EJF District Judge David Nuffer Magistrate Judge Evelyn J. Furse

This is an interim order for partial injunctive relief entered after trial, but before entry of a complete set of findings and conclusions which will support much broader relief.

Defendants Neldon Johnson, R. Gregory Shepard, and former defendant Roger Freeborn were each involved in the organization of, and participated in sales of interests in, the plan or arrangement, and the plan or arrangement that constitutes this fraudulent tax scheme.

Defendants made statements regarding allowability of tax deductions and credits from participation in the plan or arrangement; told prospective customers, and customers, about the structure of the transactions; and told them about Johnson's solar energy technology. They sold solar lenses by emphasizing the purported tax benefits but knew or had reason to know that their statements were false or fraudulent as to material matters, for the following reasons:

a. Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy;

b. the only way a customer has "made money" from buying a lens is from the purported tax benefits;

c. no customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser; and

d. no customer has been paid a bonus;

e. customers are not required to pay the full down payment, much less the full purchase price for a lens; and

f. advice from independent professionals did not support Defendants claims about tax benefits.

Defendants knew, or had reason to know:

a. that Johnson, and not the customers, controlled the customers' purported "solar lens leasing businesses";

b. that the customers do not have special expertise or prior experience in the solar lens leasing business;

c. that their customers were not in a "trade or business";

d. that the lenses were not "placed in service";

e. that the lenses were not held for production of income from the lenses;

f. that that the full "purchase" price of the lenses was not at risk in the year a customer signed transaction documents;

g. that their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income;

h. that the IRS disallowed their customers' depreciation deductions and solar energy tax credits and that the customers were not entitled to depreciation deductions and solar energy tax credits;

i. that the Oregon Tax Court rejected their customers' depreciation deductions and solar energy tax credits.

In connection with sales to customers, Defendants made gross valuation overstatements as to the value of the solar lenses.

Defendants knew, or had reason to know, that their statements were false or fraudulent. Their claims of reliance on legal advice fails. Their claimed reliance was not reasonable. The advice documents do not support the Defendants' position.

An injunction and other equitable relief are necessary and appropriate to enforce the internal revenue laws of the United States. At this early point, partial relief is ordered to prevent ongoing and significant fraud.

ORDER

IT IS HEREBY ORDERED that this notice be immediately placed on www.rapower3.com and www.rapower3.net and www.iaus.com and any other site controlled by Defendants which is used in relation to marketing of lenses:

> THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in U.S. v. RaPower-3, LLC., et al., Case No., 2:15 cv 828, has determined that tax information provided by Neldon Johnson, RaPower-3, LLC, International Automated Systems (IAUS), XSun Energy, LLC, SOLCO I LLC, Greg Shepard, and others associated with

them regarding solar energy lenses is false. Tax information related to solar energy lenses must not appear on this site until further order of the court.

Defendants shall file a Declaration of Compliance, attesting that all tax related information has been removed from the websites and attaching copies of the web pages, on or before Friday June 29, 2018.

Dated June 22, 2018.

BY THE COURT:

David Nuffer
United States District Judge

head, but I can definitely research that and submit it.

THE COURT: Okay. All right. Thank you.

I appreciate counsel giving me the materials that were sent to me over the noon hour. That's all my questions. Thanks.

MS. HEALY-GALLAGHER: Thank you.

THE COURT: I want to thank counsel for their responsiveness, their adaptation to the changes in schedule. As the parties have both said today, many of the facts in this case are not at issue. It's the effect of those facts that are at issue, and I guess it's my job to define the effect of those facts.

At the outset I'm denying Docket Number 394, the motion to dismiss; and Docket 401, the motion for judgment as a matter of law, both made under Rule 52(c).

The meaning of this case in a sentence is minimal investment of money for outsized tax benefits. That's the foundation of everything that runs through this case. The defendants' enterprise is one of massive scope. The best evidence that I have shows over $50 million in revenue has been received without any productive result except allowing customers to take at least $14 million in tax benefits from the United States Treasury.

It appears that defendants may have sold as many as 50,000 in lenses, which at the usual market price of $3500

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.	**MEMORANDUM DECISION AND ORDER FREEZING ASSETS AND TO APPOINT A RECEIVER** Civil No. 2:15-cv-00828 DN EJF District Judge David Nuffer

This order GRANTS the United States' second motion to freeze Defendants' assets and appoint a receiver, ECF Doc. No. 414, filed June 22, 2018.

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 on or before 2010.[1] The United States also seeks disgorgement of Defendants' ill-gotten gains from the promotion of their abusive tax scheme. [2]

The United States previously moved for an order freezing the assets of Defendants Neldon Johnson, RaPower-3, and IAS's assets and for an order appointing a receiver on

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

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

November 17, 2017.[3] On March 2, 2018, the United States' motion was denied without prejudice 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."[4] The Motion for Partial Summary Judgement was also denied in that same order.[5] Trial is now completed. The Court made extensive findings on the record at the end of trial;[6] intends to enter detailed Findings of Fact and Conclusions of Law including a disgorgement order; and has already entered an interim injunction based on summary findings[7] and a preservation order.[8] On the basis of the evidence adduced at trial, as laid out below, the United States' motion is granted.

[3] ECF Doc. No. 252. The United States did not include Shepard in its original motion to freeze defendants' assets.

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

[5] *Id.*

[6] ECF Doc. No. 409, filed June 21, 2018.

[7] Initial Order and Injunction After Trial, ECF Doc. No. 413, filed June 22, 2018.

[8] ECF Doc. No. 419, filed June 27, 2018.

I. 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.[9]

2. Johnson claims to have invented certain solar energy technology that involves solar thermal lenses placed in arrays on towers.[10]

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.[11]

4. Johnson also directed that IAS install solar lenses in those towers.[12]

5. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[13]

6. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[14]

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[9] 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.

[10] 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.

[11] 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.

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

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

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

7. Johnson drafted some promotional materials to describe the arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[15]

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.[16]

9. He told IAS's initial salespeople what he understood the tax laws to mean.[17]

10. R. Gregory Shepard has been an IAS shareholder since the mid-1990s.[18] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[19]

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.[20]

12. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[21]

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

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

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

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

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

[20] 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.

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

13. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[22] XSun Energy,[23] and RaPower-3, LLC.[24] SOLCO I and XSun Energy are not defendants in this action.

14. Johnson created RaPower-3 in 2010. He is it manager and the sole decision-maker for the company.[25]

15. Once formed, RaPower-3, rather than IAS, sold solar lenses to individuals.[26]

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.[27]

17. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[28]

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).[29]

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[22] 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.

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

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

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

[26] 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.

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

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

[29] 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.

19. Among other things, Shepard created the website www.rapower3.com[30] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[31]

20. Shepard gets paid for his work with RaPower-3 through his company, Shepard Global.[32]

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.[33] Shepard also uses the IAUS and RaPower-3 Forum and emails to communicate with RaPower-3 members and prospective members.[34]

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 Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[35]

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[30] 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.

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

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

[33] 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.

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

[35] *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.

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.[36]

24. From 2009 through 2016, RaPower-3 had received at least $25,874,066 from its role in the solar energy scheme.[37]

25. From 2008 through 2016, IAS has received at least $5,438,089 from its role in the solar energy scheme.[38]

26. From 2011 through 2016, XSun Energy has received at least $1,126,888 from its role in the solar energy scheme.[39]

27. From 2010 through 2016, SOLCO I has received at least $3,434,992 from its role in the solar energy scheme.[40]

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

29. Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480.[41]

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

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

[38] 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.

[39] 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.

[40] 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.

[41] Exhibit 749.

30. From 2008 through 2016, Shepard received $702,001 from his role in the solar energy scheme.[42]

31. While selling the solar lenses, Defendants told customers they could buy "lenses" and claim tax benefits.[43]

32. 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.[44]

33. 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.[45]

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

[43] 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.

[44] *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.

[45] 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").

34. 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 purchased the lenses.[46]

35. Starting in 2010, RaPower-3 sold lenses for a price of $3,500 per lens.[47] Johnson determined the price that RaPower-3 would charge for the lenses.

36. 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.[48]

37. 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.[49]

38. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[50]

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[46] 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.

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

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

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

[50] 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.

39. Over the years, Defendants told customers about Johnson's purported solar energy technology and the progress being made by Defendants.[51] Defendants emphasized progress being made despite their knowledge that the system was not up and running.[52]

40. 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.[53]

41. 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.[54]

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[51] *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.

[52] 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.

[53] 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.

[54] 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.

42. LTB, which by contract was to operate and maintain the solar energy project and specifically the lenses, has never done anything; it has never had a bank account, any employees, or any revenue.[55]

43. 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.[56]

44. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[57]

45. 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.[58]

46. 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:

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[55] 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

[56] 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.

[57] *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.

[58] 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.

customers' or prospective customers' tax preparers/CPAs, the Internal Revenue Service, the Oregon Department of Revenue, the Oregon Tax Court Magistrate Division, and the Department of Justice.[59]

47. 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.[60] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[61]

48. Shepard has also advocated for customers under audit before the IRS.[62] He has given customers the arguments to make before the IRS and documents to submit while under audit.[63]

49. 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.[64]

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[59] *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).

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

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

[62] Pl. Ex. 10.

[63] 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.")).

[64] 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.

50. Defendants have caused serious harm to the United States Treasury as a result of their solar energy scheme.[65] Defendants' customers claimed at least $14,207,517 of improper tax refunds as a result of Defendants' scheme for tax years 2013 through 2016.[66]

51. 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.[67]

52. 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 or by the announced result in the case.[68]

II. The injunctive relief requested by the United States – in the form of an asset freeze and appointment of a receiver – is necessary or appropriate to enforce the Internal Revenue Laws.

Under 26 U.S.C. § 7402, this Court has the authority to impose an asset freeze and appoint a receiver to take control of Defendants IAS and RaPower-3's assets and business operations..[69] Section 7402(a) encompasses a broad range of powers necessary to compel

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[65] 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.

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

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

[68] 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

[69] 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."

compliance with the tax laws.[70] 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,[71] appointing receivers to assist in collection of federal tax liabilities or otherwise ensure compliance with the internal revenue laws,[72] and freezing a defendant's assets.[73] The statute alone provides sufficient authority to issue an injunctive order freezing Defendants' assets.

Examination of the typical factors in imposing equitable relief before final adjudication is not necessary but demonstrates the propriety – and necessity – of this action. 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

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[70] *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).

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

[72] *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).

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

whatever damage the proposed injunction may cause the opposing party; and 4) that the injunction would not be adverse to the public interest.[74] The Court finds that while 26 U.S.C. § 7402(a) provides explicit authority for the relief requested, the United States, as the moving party, also meets its burden under the preliminary injunction standard for the relief requested.[75]

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.[76] As the Court has found, the 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; [77] that

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[74] *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.

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

[76] 26 U.S.C. § 7402(a) (emphasis added).

[77] *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).

Defendants made false or fraudulent statements about the tax benefits to be obtained from purchasing a solar lens; [78] and that Defendants knew or had reason to know that their statements were false or fraudulent pertaining to a material matter,[79] 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 their proceeds is at least $50,025,480. 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

[78] *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.

[79] *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).

will have full unfettered access to the funds illicitly obtained to the detriment of the United States.[80] 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.[81] 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 June of 2012[82] and throughout the course of this litigation.[83] Defendants have moved assets into

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

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

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

[83] 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.

foreign jurisdictions[84] and both Johnson[85] and Shepard[86] have taken steps to frustrate the collection of a potential disgorgement award. Without 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.

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. [87] 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

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[84] 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.

[85] 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.

[86] 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 wife. Pl. 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).

[87] *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).

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 experimentation 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.[88] As such, the balance of harms weighs in favor of the United States and for relief to be granted.[89]

D. An injunction will benefit, not disserve, the public interest.

The public interest is served by issuing the injunctive relief requested by the United States. The public has an interest in enforcement of the tax laws.[90] Taxpayers have an interest in being protected from suffering the results of other taxpayers improper tax benefits. 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

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[88] *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.).

[89] *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.")

[90] *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.

million. Defendants should not be permitted to profit from their illicit activities. The public interest is also served in ensuring that Defendants do not dissipate assets that can be used to satisfy any disgorgement award this Court may order or otherwise compensate those harmed by Defendants' abusive tax scheme.[91]

E. A receiver is necessary or appropriate to effect the asset freeze.

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.[92] Second, the appointment of a receiver is authorized by the inherent equitable power of a federal court.[93] The Court finds that the appointment of a receiver is necessary and appropriate in this case. Defendants' solar energy tax scheme involves false or fraudulent statements and the possible dissipation of assets.[94] Given Defendants' reluctance to cooperate in discovery regarding assets and ownership structure[95], a receiver is necessary to enforce the internal revenue

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[91] 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)).

[92] 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).

[93] *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.

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

[95] ECF Doc. No. 218.

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 shall provide, within 30 days, the names of three possible receivers as well as a proposed order detailing the powers and responsibilities that the United States proposes the Court vest within the receiver. The Court may appoint from that list or otherwise. The proposed order should include all powers conferred upon a receiver under the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and any additional equitable powers that the United States requests.

Unless otherwise ordered by the Court,[96] the proposed order shall provide:

1. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers and general and limited partners of IAS under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at 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.

2. The Receiver shall have the following general powers and duties:

    a) To use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, accounts, trusts, funds, securities, credits, stocks, bonds, effects, goods, chattels, intangible property, real property, lands, premises, leases, claims, rights

[96] The parties may move for modification of these terms.

and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (""Receivership Property");

b) To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;

c) To manage, control, operate and maintain the Receivership Property and hold in his/her possession, custody and control all Receivership Property, pending further Order of this Court;

d) To use Receivership Property for the benefit of the Receivership, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his/her duties as Receiver;

e) To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, members, shareholders, trustees and agents of the Receivership Defendants;

f) To engage and employ persons in his/her discretion to assist him in carrying out his/her duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, or forensic experts;

g) To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;

h) The Receiver is authorized to issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure;

i) To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver;

j) To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates; and,

k) To take such other action as may be approved by this Court.

3. The Receivership Defendants are directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

4. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver which would interfere with or prevent the Receiver from performing his/her duties.

5. The Receivership Defendants shall cooperate with and assist the Receiver in the performance of his/her duties.

6. The Receiver shall promptly notify the Court and counsel for the United States of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

7. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with his/her fiduciary obligations in this matter.

8. The Receiver and his/her agents, acting within the scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

9. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities.

10. Within 60 days from the entry of the order appointing the Receiver, the Receiver shall file and serve an accounting of the Receivership Estate, reflecting (to the best of the Receiver's knowledge) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates. The Receiver shall also detail his/her efforts in

locating Receivership Property and what, if any, additional efforts need to be undertaken to provide a full accounting of each Receivership Estate to this Court.

11. The Receiver's fees shall be paid by the Receivership Defendants or from the Receivership Estates upon approval of the Court, with prior notice and opportunity for the United States to respond to any fee application.

12. The Receiver shall distribute the estate to:

a. First Priority: The Internal Revenue Service, up to $14,207,517. This payment shall be paid in full before any distributions to the Second Priority claims.

b. Second Priority: The taxpayers who file claims with the Receiver with sufficient evidence of:

i. Their investment and all amounts received by payment or credit from Defendants including rental payments, bonus payments, salaries, distributions, and commissions and overrides or similar payments due to multilevel marketing; and

ii. The resolution of all the taxpayer's issues with the Internal Revenue Service.

Payments to claimants shall be made on a pro rata basis of the amount paid by the claimant to Defendants less all amounts received by the claimant from Defendants.

III. Order

IT IS HEREBY ORDERED that the United States' second motion[97] to freeze the assets of Defendants RaPower-3, LLC, Neldon Johnson, International Automated Systems, Inc. and R. Gregory Shepard and to appoint a receiver is GRANTED and IT IS HEREBY ORDERED THAT:

1. This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of the following Defendants: RaPower-3, LLC, Neldon Johnson, International Automated Systems, Inc. and R. Gregory Shepard (collectively, the "Receivership Defendants").

2. The United States shall provide within 30 days, the names of three possible receivers, with information regarding their qualifications, along with a proposed order of the specific powers and responsibilities that the Court should grant to the receiver in this case.

3. Except as otherwise provided herein, all assets of the Receivership Defendants are frozen until further order of this Court ("Receivership Property"). Accordingly, all persons and entities with direct or indirect control over any Receivership Property, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing such Receivership Property. This freeze shall include, but not be limited to Receivership Property that is on deposit with financial institutions such as banks, brokerage firms and mutual funds, shares of stock, and any patents or other intangible property.

[97] ECF Doc. No. 414, filed June 22, 2018.

4. The Receivership Defendants, their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, and each of them, shall hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any assets, funds, or other properties (including money, real or personal property, securities, choses in action or property of any kind whatsoever) of the Receivership Defendants. This applies to assets held by Receivership Defendants or under their control, at any time after inception of this action, whether such assets were or are held in the name of any Receivership Defendant or for their direct or indirect beneficial interest wherever situated. The Receivership Defendants shall direct each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding such assets, funds, or other properties of any Receivership Defendant to hold or retain within their control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.

5. The trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Defendants are restrained except as they may act in the ordinary course of business and shall not exercise their powers or take action inconsistent with this order. They are notified that upon appointment of the Receiver they shall likely be dismissed. and have no authority with respect to the Receivership Defendants' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver.

6. The Receivership Defendants are directed to preserve all paper and electronic information of, and/or relating to, the Receivership Property.

The assets of Receivership Defendants Neldon Johnson and R. Gregory Shepard shall be frozen but each Defendant shall be allowed to withdraw on a monthly basis, monies for basic living expenses based on the IRS national standards. Defendants must account for these funds on or before the 15th of each month following the expenditure in the form required by the Receiver. The sums which may be withdrawn are:

IRS National Standards	Neldon Johnson	R. Gregory Shepard
Housing & Utilities (Based on location)	$1,347.00	$1,806.00
Food, Clothing & Other Expenses	$1,202.00	$1,202.00
Out of pocket health costs	$114.00	$114.00
Transportation (National Standard)	$497.00	$497.00
Monthly Total	**$3,160.00**	**$3,619.00**

7. To the extent that any Receivership Defendant requests the use of Receivership Property, such application shall be made to the Court. After the appointment of a Receiver, requests for the use of funds shall be made to the Receiver and any party may dispute the Receiver's decision by filing a motion with this Court.

8. The appointment of a Receiver shall not, without further order, deprive any Defendant of the right to appeal orders in this case or otherwise defend this action through counsel (paid from sources other than Receivership Property) of Defendants' own choice.

Signed August 22, 2018.

BY THE COURT

David Nuffer
United States District Judge

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, and NELDON JOHNSON Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 2:15-cv-00828 DN District Judge David Nuffer

OVERVIEW

This case was tried over 12 days in April and June 2018.[1] The United States presented testimony from 25 witnesses, both live and via deposition designation. Defendants rested their case without calling a single witness, but they thoroughly examined each witness called by the United States, including Defendants Neldon Johnson and R. Gregory Shepard. Defendants' thorough cross examination of Shepard and Johnson[2] did not lend any credibility to their case. More than 650 exhibits were received into evidence.[3] On June 22, 2018, immediately after closing arguments, partial findings of fact were delivered from the bench, concluding that Defendants engaged in a "massive fraud" for which they would be enjoined and disgorgement

[1] *See* Minute Entries for Trial, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 372, 374, 378, 380, 386, 388, 391-93, 396, 409, 415.

[2] The United States examined Johnson live on direct and redirect examination for a total of 272 minutes while Defense counsel cross- and recross-examined him for 590 minutes. The United States examined Shepard live on direct and redirect for 86 minutes while Defense counsel cross- and recross-examined him for 174 minutes.

[3] Bench Trial Witness and Exhibit Lists, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 416.

(continued...)

would be ordered.[4] An interim order of injunction issued requiring that, no later than June 29, Defendants (1) post a notice on their websites that this Court found tax information Defendants provided was false and (2) remove tax information from their websites.[5] As requested, the United States submitted draft findings of fact and conclusions of law before trial, as did Defendants. Then, following trial, revisions and additional findings were delivered to the parties. The United States submitted revised draft findings of fact and conclusions of law,[6] and Defendants objected.[7] After careful consideration of all this testimony, evidence,] submissions and materials, these final Findings of Fact and Conclusions of Law are filed.

[4] Gov. Ex. BK0001, T. 2515:5-11.

[5] *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 413.

[6] ECF No. 463.

[7] [Defendants'] Objections re: Findings of Fact and Conclusions of Law, ECF No. 452.

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I. Introduction

For more than ten years, Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc. ("IAS"), LTB1, LLC ("LTB"), R. Gregory Shepard, and Roger Freeborn[8] have promoted an abusive tax scheme centered on purported solar energy technology featuring "solar lenses" (called, herein, the "solar energy scheme") to customers across the United States. The evidence shows, however, that the solar lenses were only the cover story for what Defendants were actually selling: unlawful tax deductions and credits. Defendants have repeatedly engaged in conduct subject to penalty under the Internal Revenue Code.[9] Defendants' conduct has caused serious harm to the United States Treasury and the system of honest and voluntary tax compliance. Defendants received more than $50 million dollars from the solar energy scheme at the expense of the United States Treasury. Defendants will be enjoined from promoting their abusive solar energy scheme and ordered to disgorge their gross receipts to mitigate the harm their conduct caused the Treasury.[10]

[8] Defendants filed a notice of Freeborn's death on December 17, 2017. ECF No. 267. He will be dismissed as a defendant. Fed. R. Civ. P. 25(a)(1). Facts about Freeborn's conduct are included herein, nonetheless, because his conduct helps explain the facts and circumstances described and it is relevant to whether the remaining Defendants engaged in certain penalty conduct under 26 U.S.C. § 6700(a)(2).

[9] 26 U.S.C. § 6700(a)(2)(A), (a)(2)(B).

[10] 26 U.S.C. §§ 7402(a), 7408(b).

II. Findings of Fact

A. Defendants organized (or assisted in the organization of) a plan or arrangement, and participated (directly or indirectly) in the sale of an interest in the plan or arrangement.[11]

1. Neldon Johnson

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.[12]

2. Johnson claims to have invented certain solar energy technology.[13]

3. Johnson's purported solar energy technology involves solar thermal lenses placed in arrays on towers.[14]

4. His idea is that the lens arrays will track the sun as it moves across the sky during the day.[15]

5. His idea is that radiation from the sun would hit the lens, which would then bend and intensify the radiation in a specific point called a "solar image."[16]

6. His idea is that the solar image would hit a receiver which would be suspended underneath the lenses.[17]

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[11] 26 U.S.C. § 6700(A)(1).

[12] ECF 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 (June 28, 2017).

[13] Johnson Dep., vol. 1, 134:19-135:2; Pl. Ex. 509 at video clip 12_4_38-5_15.

[14] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 12_4_00-4-23; Johnson Dep., vol. 1, 139:23-144:19.

[15] Pl. Ex. 504 at 14.

[16] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

[17] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

7. Groups of 32 lenses grouped in a circular shape are attached to one receiver in his current design. Four of these collectors are attached to a single pole.

8. Many poles with receivers installed have no collector or mechanism to transmit energy from a receiver to a generator.

9. The site in Delta Utah currently has approximately 90 towers.

10. The beam of concentrated light would then heat a heat transfer fluid in the receiver.[18]

11. The heat transfer fluid – oil, molten salt, water, or another heat transfer fluid – Johnson has not decided, to date, which to use[19] – would then be pumped to a heat exchanger[20].

[18] Johnson Dep., vol. 1, 139:23-144:19.

[19] Johnson Dep., vol. 1, 151:18-163:3.

[20] Johnson Dep., vol. 1, 139:23-144:19.

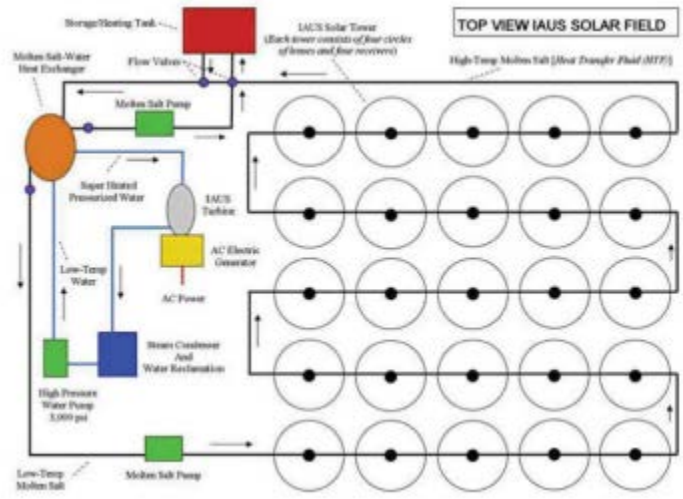
(continued...)

12. The heat exchanger would use the heat to boil water and create steam.[21]

13. Johnson's idea is that the steam would turn a turbine, which would generate electricity.[22]

14. His idea is that the electricity would then be sent onto electric wires.[23]

15. The wires would be connected to the electrical grid.[24]



16. Once the lenses were installed and "started up," the "operation and maintenance" of the lenses would be turned over to a company called LTB, LLC.[25]

17. LTB, LLC, is another entity that Johnson created and controls.[26]

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[21] Johnson Dep., vol. 1, 139:23-144:19.

[22] Johnson Dep., vol. 1, 139:23-144:19.

[23] Johnson Dep., vol. 1, 139:23-144:19.

[24] Johnson Dep., vol. 1, 139:23-144:19.

[25] Pl. Ex. 94 at 2.

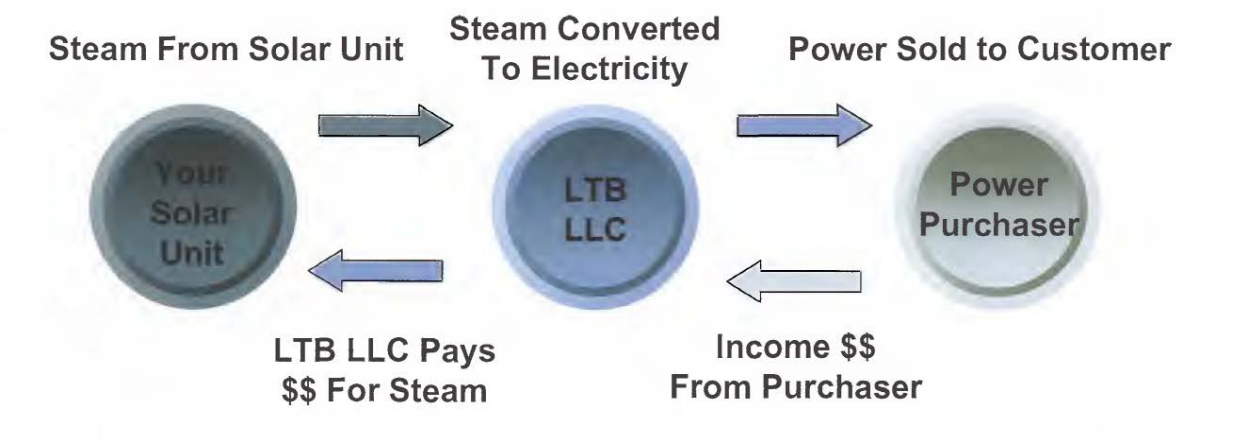
[26] LTB, LTB1, and still another entity called LTB O&M, LLC, are all Johnson-created and -controlled entities. Pl. Ex. 673, Deposition Designations for LTB1, LLC, ("LTB1 Dep.") 8:11-13:23 (July 1, 2017). The only difference between them is their names. *Id.* For all practical purposes, Johnson makes no distinction between the entities; each has come into existence because the prior LTB-entity was dissolved in its state of incorporation. *Id.* Because all contracts described herein reference "LTB," the Court will use that name going forward. *See also* Pl. Ex. 77 at 2 ("Contact info. for LTB, LLC is Neldon Johnson, 801-372-4838").

(continued...)

18. According to Johnson, LTB would maintain and operate the lenses and "market the power generated by the solar units."[27]

19. LTB would pay lens owners an annual payment of $150 "[o]nce the Owner's Alternative Energy System(s) are installed and producing revenue."[28]

20. Johnson illustrated this idea as early as 2006[29] as follows:



21. Johnson took some college classes in the sciences and engineering in or before 1975 but does not have a college degree in any subject.[30]

22. Neither Johnson, nor anyone else connected with him or one of his entities, has ever operated or maintained a solar energy power plant of any kind.[31]

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[27] Pl. Ex. 531 at 2. Over the years, Defendants have used terms like "solar unit" or "alternative energy system" to mean "lens." *See* Johnson Dep., vol. 1, 185:11-186:9, 192:1-193:12, 242:25-243:5; Pl. Ex. 685, Deposition Designations for R. Gregory Shepard ("Shepard Dep."), 61:24-63:4 (May 22, 2017); Pl. Ex. 462 at 1. The only things that IAS and RaPower-3 have ever sold are "lenses." Johnson Dep., vol. 1, 185:18-19; Pl. Ex. 682, Deposition Designations for RaPower-3, LLC ("RaPower-3 Dep.") 32:25-33:3 (June 30, 2017).

[28] Operation and Maintenance Agreements, Pl. Ex. 121 (April 18, 2016), 510 (November 23, 2011), 512 (December 29, 2014), 537 (draft), 555 (August 29, 2008) and 621 (undated, unsigned).

[29] Pl. Ex. 581, Deposition Designations for International Automated Systems, Inc., ("IAS Dep."), 162:1-165:9, 171:10-173:20 (June 29, 2017); Pl. Ex. 532 at 6; *see also* Pl. Ex. 531.

[30] Pl. Ex. 681, Deposition Designations for Neldon Johnson, vol. 2, 43:23-44:1, 69:8-71:5, 81:18-23 (Oct. 3, 2017).

[31] RaPower-3 Dep. 12:25-15:12, 61:10-62:15; LTB1 Dep. 8:11-14, 19:16-31:9.

(continued...)

23. 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.[32]

24. Johnson also directed that IAS install solar lenses in those towers.[33]

25. To date, those are the only towers that Johnson has built, and the only lenses that he has had installed.[34]

26. Johnson promotes this purported solar energy technology through the IAS website, radio spots, and social media.[35]

27. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[36]

28. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[37]

29. He also created a bonus incentive program for people who bought lenses, to spread the word about the solar lenses and sell them to more and more people.[38]

30. Johnson decided that the bonus program would be a cheaper and more effective way to sell lenses than doing conventional advertising.[39]

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[32] IAS Dep. 62:15-64:1; Pl. Ex. 8A at 12-13; Shepard Dep. 128:6-129:1, 172:23-173:3.

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

[34] IAS Dep. 62:15-64:1; Johnson Dep., vol. 1, 88:20-89:10; Pl. Ex. 509 at video clip 12_4_00-4-23.

[35] *E.g.*, Pl. Ex. 2; Johnson Dep., vol. 1, 240:2-17; IAS Dep. 242:10-247:22; Pl. Ex. 539; Pl. Ex. 731 at "JohnsonN Show - KNRS 11-18-17.mp3."

[36] *See* RaPower-3 Dep. 36:4-39:8.

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

[38] Johnson Dep., vol. 1, 228:19-234:17.

[39] Johnson Dep., vol. 1, 228:19-234:17.

(continued...)

31. Johnson drafted some promotional materials to describe this arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[40]

32. 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.[41]

33. He told IAS's initial salespeople what he understood the tax laws to mean.[42]

2. R. Gregory Shepard

34. R. Gregory Shepard's role was not in inventing the technology, but rather the marketing, sales and disseminating false information regarding the availability of tax benefits to customers.

35. Shepard has been an IAS shareholder since the mid-1990s.[43] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[44]

36. IAS paid Shepard (and its other salespeople) a commission of 10 percent of the money generated from his sales.[45]

37. Shepard's professional background, before becoming involved with the solar energy scheme, was in sports performance as a coach and trainer.[46]

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

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

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

[43] Shepard Dep. 43:19-46:1.

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

[45] Shepard Dep. 70:14-72:8; Pl. Ex. 463.

[46] Shepard Dep. 27:2-30:24.

(continued...)

38. 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.[47]

39. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[48]

40. Shepard never questioned how Johnson determined that purchasers of solar lenses were purportedly eligible for a depreciation deduction and the solar energy tax credit.[49]

41. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[50] XSun Energy,[51] and RaPower-3, LLC[52].

42. Johnson created RaPower-3 in 2010. He is its manager and the sole decision-maker for the company.[53]

43. Once formed, RaPower-3, not IAS, sold solar lenses to individuals.[54]

44. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.[55]

[47] 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.

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

[49] Shepard Dep. 284:23-286:3.

[50] 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.

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

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

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

[54] RaPower-3 Dep. 32:16-33:14; *see* IAS Dep. 23:22-25:22.

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

(continued...)

45. If a person wants to sell solar lenses through RaPower-3, that person need only sign up to become a "distributor."[56]

46. RaPower-3 encourages distributors to bring still more people in to the multi-level marketing system and build an extensive "downline."[57]

47. RaPower-3 pays its distributors as much as 10 percent commission on lens sales in each distributor's respective downline.[58]

48. 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).[59]

49. Changing from a direct-sales model through IAS to an internet-ready, multi-level marketing model through RaPower-3 led to "[h]undreds of people across the nation purchas[ing] solar lenses."[60]

50. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[61]

51. When Johnson started RaPower-3, Shepard transitioned from being an IAS salesperson to a RaPower-3 distributor.[62]

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[56] RaPower-3 Dep. 32:22-34:9.

[57] *See* RaPower-3 Dep. 36:4-39:8, 49:10-15; Pl. Ex. 683, Deposition Designations for John Howell ("Howell Dep.") 63:16-64:11, 150:2-20 (Aug. 23, 2017); Pl. Ex. 595, Pl. Ex. 596.

[58] RaPower-3 Dep. 36:4-39:8. Zeleznik Dep. 125:9-128:13; Pl. Ex. 60; *see also* Aulds Dep. 157:1-8; Pl. Ex. 398.

[59] RaPower-3 Dep. 39:9-41:2; Pl. Ex. 511; LTB1 Dep. 39:6-25; Pl. Ex. 61.

[60] Pl. Ex. 8A at 9; Pl. Exs. 669, 742A, 742B, 749;; T. 858:12-863:16.

[61] Pl. Ex. 8A at 9; Pl. Ex. 749; T. 758:10-793:2.

[62] RaPower-3 Dep. 48:8-49:1. By January 2015, Shepard had approximately one thousand people on his RaPower-3 email distribution list. Shepard Dep. 305:11-19.

(continued...)

52. Shepard considers himself and other distributors in the RaPower-3 system as "team members."[63]

53. But Shepard, who gave himself the title "Chief Director of Operations" for RaPower-3 to sell more lenses, is the team member "at the top."[64]

54. Among other things, Shepard created the website www.rapower3.com[65] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[66]

55. Shepard gets paid for his work promoting RaPower-3 through his company, Shepard Global.[67]

56. On the RaPower-3 website, Shepard describes the technology and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the site with the transaction documents.[68]

57. Shepard uses the Forum to communicate with people who have already bought lenses and who own IAS stock.[69]

58. 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

[63] Shepard Dep. 113:8-115:3.

[64] Shepard Dep. 102:11-103:3, 113:8-115:3, 123:6-15; *see also* RaPower-3 Dep. 108:5-18

[65] Shepard Dep. 25:22-26:8; Pl. Ex. 459; *see also* Pl. Exs. 1, 5, 19, 20-21, 24-25, 34, 352, 419, 674, 676, 678-80.

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

[67] T. 1293:8-1304:1; 1412:18-1415:10.

[68] *See* Pl. Ex. 688, Deposition Designations for Roger Freeborn ("Freeborn Dep.") 23:2-24:14 (May 31, 2017); Pl. Ex. 490; Pl. Ex. 689, Deposition Designations for Peter Gregg ("Gregg Dep.") 56:20-57:13.

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

(continued...)

Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[70]

59. He organized at least one "RaPower[-]3 National Convention" in 2012, at which Johnson spoke.[71]

60. When other RaPower-3 distributors have issues or questions, they look to Shepard for guidance and advice, and to be the conduit to Johnson.[72]

3. Roger Freeborn

61. Shepard told Roger Freeborn about RaPower-3, asked Freeborn if he wanted to buy lenses, and brought Freeborn into his multi-level marketing downline.[73]

62. The two men knew each other through a company Shepard used to own, Bigger, Faster, Stronger ("BFS").[74] BFS sold athletic equipment and strength and conditioning programming primarily to high schools and middle schools around the country.[75]

63. Freeborn was a teacher and football coach, and taught BFS clinics around the country.[76]

64. When Freeborn started selling lenses for RaPower-3, at the end of a BFS clinic, he would "talk to the coaches about the possibility of creating a fundraising program to raise money for their sport" through the sale of RaPower-3 solar lenses.[77]

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

[71] Shepard Dep. 302:8-303:23; RaPower-3 Dep. 140:4-145:15; Pl. Ex. 504; Pl. Exs. 114, 270.

[72] Shepard Dep. 113:8-115:3, Pl. Ex. 469; Pl. Ex. 189 at 1-3.

[73] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18; .

[74] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18.

[75] T. 901:8-903:14; Freeborn Dep. 15:21-18:18.

[76] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18, 28:2-11, 107:10-108:21; Pl. Ex. 503; T. 904:21-905:9.

[77] Freeborn Dep. 98:10-102:6; Pl. Ex. 246.

(continued...)

65. Freeborn was a prolific salesman for RaPower-3, especially among the teachers and coaches that he reached through BFS's customer list.[78]

66. Freeborn called himself the "National Director" of RaPower-3.[79]

67. Freeborn's information about IAS, RaPower-3, the transactions and the technology underpinning the solar energy scheme, and the tax benefits purportedly associated with buying lenses came from Johnson, Shepard, and Freeborn's own observations on his site visits.[80]

68. Freeborn used marketing materials that Shepard sent him and created his own to send or present to customers.[81]

69. Freeborn also organized webinars for people to hear from him and Shepard about RaPower-3.[82] He spoke at the 2012 "National Convention" that Shepard organized.[83]

70. Because Freeborn lacked a background in federal tax, Freeborn relied on Johnson's assurance that Johnson would pay his attorneys' fees if he ever ran into trouble because of RaPower-3.[84]

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[78] Shepard Dep. 115:11-117:10; T. 935:17-936:20; Freeborn Dep. 46:2-47:17; Pl. Ex. 493 (partial Freeborn downline list); Pl. Ex. 54; Pl. Ex. 697, Deposition Designations for Brian Zeleznik ("Zeleznik Dep.") 19:9-23, 45:16-46:11; 51:7-56:13 143:7-20, 23-145:10 (Aug. 2, 2016); Pl. Ex. 56; Pl. Ex. 62; Gregg Dep. 21:18-22:9, 34:6-25, 39:9-19 (Nov. 16, 2016); Pl. Ex. 693, Deposition Designations for Frank Lunn, IV ("Lunn Dep.")33:24-37:20 (Aug. 1, 2016).

[79] Freeborn Dep. 44:7-45:23; Pl. Ex. 492 at 2.

[80] Shepard Dep. 117:18-118:11; Freeborn Dep. 20:15-22:23, 28:19-34:18; *see also* Pl. Ex. 109 at 1-3.

[81] Freeborn Dep. 48:2-55:1; Pl. Exs. 496, 497; *see* Pl. Ex. 492 at 2 (directing customers to www.rapower3.com); Pl. Ex. 294. Freeborn Dep. 86:10-93:7; Pl. Ex. 501; Pl. Ex. 85.

[82] Pl. Ex. 237.

[83] Pl. Ex. 504 at 5. Topic: "The Ra3 role behind the scenes."

[84] Freeborn Dep. 102:7-108:21; Pl. Ex. 412 at Response to Interrogatory No. 7 (Freeborn stated that he is "SELF-EDUCATED" in the field of federal income taxes and energy tax credits.).

(continued...)

71. At Johnson's direction, Shepard fired Freeborn from RaPower-3 in June 2013.[85]

72. Freeborn continued, however, to collect commissions on solar lens sales through his downline through at least the end of 2016.[86]

73. IAS or RaPower-3 paid Freeborn more than $230,000 in commissions for his sales of solar lenses and sales of solar lenses in his downline.[87]

74. Freeborn generated, through a "charitable foundation," approximately $75,000 more in commissions for lens sales.[88]

4. Orders Placed by Customers

75. By careful derivation of data from a proprietary database (consisting of 18 MB of data, with 13 tables)[89] maintained by defendants, Lamar Roulhac was able to extract data used in analysis of financial transactions. Extracted data was placed into three tabs in an Excel spreadsheet to which an analytical tab was added.[90]

76. The extracted data in the Excel spreadsheet was totaled to show that the total sale price of orders placed with defendants by customers was between 50,025,480.00[91] to 50,097,672.15.[92]

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[85] Freeborn Dep. 55:14-56:28; Shepard Dep. 118:12-119:14; Pl. Ex. 80.

[86] Pl. Ex. 678. The United States served these Requests for Admission on December 29, 2016. *Id.* at 6. Freeborn never responded. Accordingly, all Requests are admitted. Fed. R. Civ. P. 36(a)(3).

[87] Pl. Ex. 678. Freeborn Dep. 98:10-102:6.

[88] Freeborn Dep. 72:2-10, 98:10-102:6; Pl. Ex. 498, 499 & 500.

[89] T. 754:19-755:9.

[90] Pl. Ex. 749; T. 754:24-757:8; 758:10-759:4.

[91] Pl. Ex. 749, "Order Product" table of the Defendants' database.

[92] Pl. Ex. 749, "Order" table of the Defendants' database.

(continued...)

77. Many of those sale records show the word "full" in the comments field which would tend to show payment in full. The sum of those records is $17,911,507.[93]

78. Some of those record comments show an export to QuickBooks. But no QuickBooks data file was provided by defendants.[94]

79. Amanda Reinken testified that she made an analysis of data provided from defendants showing customers and lenses purchased and found that between 45,205[95] and 49,415[96] lenses had been purchased. At the usual sales price of $3,500 each, this represents gross sales of between $158,217,500 and $172,952,500. At the stated down payment price of $1,050 each, this would represent revenue of $47,465,250 to $51,885,750. At the lowest possible payment level of $105 per lens, this would represent revenue of $4,746,525 to $5,188,575.

Lenses purchased	**Price per lens**	**Gross sales**	**Stated down payment**	**Revenue**	**Lowest down payment**	**Revenue**
45,205	$3,500	$158,217,500	$1,050	$47,465,250	$105	$4,746,525
49,415	$3,500	$172,952,500	$1,050	$51,885,750	$105	$5,188,575

Although there was some testimony that not all customers paid the full down payment, Defendants offered no credible evidence to show the amount by which these amounts could or should be reduced.

[93] T. 820:19-822:1.

[94] T. 785:4-11.

[95] Pl. Ex. 742A.

[96] Pl. Ex.724B.

(continued...)

5. Receipts by Lens-Selling Entities

80. By extraction from 32,000 pages of bank records for accounts of all defendant entities other than LTB, Reinken extracted the total amount of deposits to the defendants' accounts.[97]

81. From 2009 through early 2018, RaPower-3 received at least $25,874,066 from its role in the solar energy scheme.[98]

82. From 2008 through 2016, IAS received at least $5,438,089 from its role in the solar energy scheme.[99]

83. From 2011 through 2016, non-defendant XSun Energy received at least $1,126,888 from its role in the solar energy scheme.[100]

84. From 2010 through 2016, non-defendant SOLCO I received at least $3,434,992 from its role in the solar energy scheme.[101]

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

86. Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480.[102]

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[97] T. 863:18-875:15.

[98] Pl. Ex. 735; T. 863:18-868:24; *see also* Pl. Exs. 742B, 749.

[99] Pl. Ex. 738; T. 869:1-25; Pl. Ex. 852 at 59; T. 257:7-258:20, 271:9-272:12, 293:1-294:11, 312:5-15; Pl. Ex. 371; Pl. Ex. 507 at 20, 35; T. 1812:4-12.

[100] Pl. Ex 740; T. 871:9-872:8; 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.

[101] Pl. Ex. 739; T. 863:18-866:18; 870:3-871:8; 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..

[102] T. 758:10-777:10; Pl. Ex. 749.

(continued...)

87. While Johnson testified that substantial sums were expended in his work on the solar energy project, these sums were spent from funds received only by reason of the deceptive information on tax benefits that Defendants provided, described below. Further, the expenditures were in aid of a solar energy production system that, as described below, had and has no reasonable possibility of success.

88. Much of these "substantial sums" were paid to Johnson and his family members or entities.[103]

6. Receipts by Johnson and Shepard

89. From 2008 through 2016, Johnson, personally, received $623,449 from his role in the solar energy scheme.[104] In 2012, the year the IRS began investigating the solar energy scheme, and since, direct payments to Johnson dropped to zero or near zero.[105]

90. Johnson controls the flow of money among his entities and directs payments from their funds to himself and his immediate family members.[106]

91. From 2006-2017, Shepard has received at least $702,001 either directly or through his entities, from his role in the solar energy scheme.[107]

7. The Role of Tax Return Preparers Selected by Defendants

92. Shepard directs customers to use tax return preparers who are familiar with the Defendants' "solar energy" project and important to the solar energy scheme, like John Howell,

[103] T. 1808:16-1814:24, T. 1816:16-1818:22.

[104] Pl. Ex. 737; T. 874:5-875:11.

[105] Pl. Ex. 737; *see* Pl. Ex. 10 at 2; Shepard Dep. 311:2-313:2.

[106] RaPower Dep. 101:19-102:15; T. 1808:16-1814:24, T. 1816:16-1818:22; Pl. Exs. 649; 743-44; 748.

[107] Pl. Ex. 411 at 16-17; Pl. Ex. 445; T. 1296:14-1304:1, 1596:5-1598:15.

(continued...)

in Wichita Falls, Texas; Kenneth Alexander in Florida; and Richard Jameson in St. George, Utah.[108] They have prepared the majority of returns for RaPower-3 customers on which solar energy credits and depreciation were claimed.[109]

93. Jameson testified at trial. His presence in the case demonstrates how Defendants rely on people with minimal qualifications, sophistication and expertise. Though the areas of science and law involved in Defendants' enterprise are complex, Defendants do not themselves have the expertise that would be expected in a legitimate enterprise of this complexity, and they do not associate with, employ or retain persons with expertise.

94. Jameson is an enrolled agent with the IRS with an office in St. George, Utah, who is not a CPA, has no degree in accounting, has a masters of science in taxation, and has worked at H&R Block, a tax preparation service. [110]

95. Jameson prepared tax returns for clients based on his review of documents such as the Equipment Purchase Agreement, O&M Agreement, and placed in service letter, and proof of the client's payment for lenses.[111]

96. The number of tax returns Jameson prepared for RaPower-3 customers increased every year from 2012 to the present.[112]

97. Jameson wrote a letter to the IRS for a client stating "As a matter of fact, I have been to the site and have seen the home that is currently being powered by the lenses in the

[108] Pl. Exs. 242-245; Pl. Ex. 597; Gregg Dep. 121:14-25; Pl. Ex. 606; T. 826:23-830:17, 1304:4-1305:7; Pl. Ex. 334.

[109] Pl. Ex. 752 at 1.

[110] T. 1319:11-16; 1221:11-1223:23.

[111] T. 1225:13-25.

[112] T. 1228:18-1229:14.

(continued...)

testing of the units. Attached are pictures of the home that I took on site when I was there." However, Jameson admitted he had no idea if the home was actually powered by solar energy or if his client's lenses were installed at that time.[113] Jameson relied on "placed in service" letters as his sole evidence that the client's lenses were used.[114]

98. While he did not see generation of electricity, he was told that the house on site was powered by the project components.[115]

99. Jameson wrote another letter to the IRS for a different client stating that the lenses produce heat that "can be used to heat a building, a greenhouse, to produce clean drinking water and yes steam to drive a turbine that would product [sic] power."[116] But he did not know if the client's lenses did any of these things.[117]

100. Jameson never asked Johnson who would pay for electricity, heat, or water generated by solar lenses, and did not see heat captured by solar lenses used in any way other than to burn a piece of wood[118] or make "a hole in the ground that would, you know, fry things. It was pretty hot."[119]

101. Jameson never asked Shepard who would pay for electricity, heat, or water generated by solar lenses.[120]

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[113] Pl. Ex. 637; T. 1258:16-1263:20.

[114] T. 1228:11-14, 1265:21-1266:4.

[115] T. 1234:1-1235:7, 1263:11-16.

[116] Pl. Ex. 163.

[117] T. 1268:3-1269:14.

[118] T. 1232:2-1233:25.

[119] T. 1314:7-1315:1.

[120] T. 1236:15-1237:2.

(continued...)

102. Jameson recommended that he prepare a draft tax return for a person so that the person could see the potential tax liability so the person could decide whether to make a RaPower-3 purchase.[121]

103. Jameson attached the letters from Kirton McConkie[122] and The Anderson Law Center[123] (described below) to letters sent to materials he sent to IRS auditors "to establish the basis for a request for abatement [of] penalties under reasonable cause because this information was provided to the clients and they didn't know any better."[124]

104. Though Jameson was aware that LTB was not acting as a lessee on lenses at the time, Jameson testified under oath in the Oregon Tax Court that he visited the LTB facility.[125]

105. While Jameson is aware the Oregon Tax Court has ruled against his clients, his opinion has not changed.[126]

106. His hostility toward the IRS was evident during his testimony.[127]

107. Jameson's memory and credibility were shown to be deficient in his testimony by his demeanor and by specific instances of contradictions with his deposition.[128]

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[121] Pl. Ex. 632; T. 1253:15-1256:21.

[122] Pl. Ex. 362.

[123] Pl. Ex. 23.

[124] T. 1252:21-1253:7.

[125] T. 1278:22-1279:18.

[126] T. 1279:19-1280:11.

[127] T. 1309:25-1310:15, 1345:9-1346:9.

[128] T. 1234:8-1235:7, 1238:2-1245:1, 1253:15-1256:21; Pl. Ex. 637, T. 1258:16-1262:22; Pl. Ex. 163, T. 1268:3-1269:14, 1278:6-1279:18, 1309:22-1312:9.

(continued...)

8. Defendants' Roles in Tax Audits of Customers

108. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[129]

109. 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.[130] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[131]

110. Shepard has also advocated for customers under audit before the IRS.[132] He has given customers arguments to make before the IRS and documents to submit while under audit.[133]

111. 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.[134]

9. Post-Litigation Conduct

112. The United States filed this injunction case in November 2015.[135]

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

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

[131] *See, e.g.*, Howell Dep. 221:16-223:18; Pl. Exs. 605, 608; T. 1221:20-25, 1247:17-1249:9; Pl. Ex. 637.

[132] *E.g.* Pl. Ex. 10.

[133] Pl. Ex. 49; 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.")).

[134] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23; Zeleznik Dep. 142:7-143:1.

[135] ECF No. 2.

(continued...)

113. Johnson is paying for Shepard's and Freeborn's attorneys' fees to defend this case.[136]

114. To date, Johnson, Shepard, IAS, and RaPower-3 continue to organize sales of solar lenses, and participate (directly or indirectly) in the sale of solar lenses.[137]

115. 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.[138]

116. Shepard testified that the only change in his behavior since the United States filed this case is that he "bowed [his] back and [is] fighting harder."[139]

[136] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23.

[137] Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Ex. 539; ; Pl. Exs. 424, 426, 679, 731-33, 901, 903.

[138] Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

[139] Shepard Dep. 314:1-5.

B. In connection with organizing or selling any interest in a plan or arrangement, Defendants made or furnished (or caused another person to make or furnish) statements regarding the allowability of any deduction or credit because of participating in the plan or arrangement.[140]

117. 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.[141]

118. 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.[142]

119. According to Defendants, one of the reasons their customers may claim these tax benefits is that their customers "materially participated" in their purported solar lens leasing business.[143]

1. Defendants told customers, and prospective customers, about the structure of the transactions.

120. The structure and pricing of the transactions that purportedly create the customers' solar lens leasing business have changed over time.

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[140] 26 U.S.C. § 6700(A)(2)(a).

[141] *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.

[142] Pl. Ex. 1 at 2-3 ("Tax Question" Nos. 4-5). 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"). A collection of Freeborn's statements: Freeborn Dep. 47:24-53:18; Pl. Exs. 214, 294, 492, 496, 499, 501.

[143] *E.g.*, Pl. Ex. 1 at 3; Pl. Ex. 43.

(continued...)

121. As early as 2005, Johnson directed that IAS "lease" the solar lenses to customers.[144]

122. Customers paid $9,000 for leasing the lenses from IAS.[145]

123. Shepard leased lenses from IAS in 2005.[146]

124. According to the lease agreement, IAS would build solar towers and install the customers' lenses at a specific site – in the case of Shepard's lenses, Yermo, California.[147]

125. At the same time a customer leased the lenses from IAS, he signed a sublease agreement with LTB.[148]

126. The idea was that, once IAS had installed (for example) Shepard's lenses in Yermo, California, LTB would take over operation and maintenance of Shepard's lenses to generate revenue for Shepard.[149]

127. Shepard's lease agreement states that IAS will provide him "plans, specifications and other documentation and engineering as required to obtain approval" to operate the lenses from "local state and federal agencies" at an "undetermined" time.[150]

128. IAS set benchmarks for additional approvals and for installation of Shepard's lenses based on that "undetermined" date for plans.[151]

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[144] Shepard Dep. 57:7-59:3; Pl. Ex. 462; LTB1 Dep. 43:16-46:24; T. 914:6-916:13; Pl. Exs. 91-92.

[145] Pl. Ex. 462 at 2.

[146] Pl. Ex. 462.

[147] Pl. Ex. 462.

[148] Shepard Dep. 57:7-59:3, 73:1-74:2; Pl. Exs. 462, 464.

[149] LTB1 Dep. 43:16-46:24; Pl. Ex. 464 at 2.

[150] Pl. Ex. 462 at 1.

[151] Pl. Ex. 462 at 2.

(continued...)

129. In 2006, Johnson changed the transaction's structure. Instead of a customer leasing lenses from IAS, the customer would buy lenses.[152]

130. At that time, the total price for a lens was $30,000, but the customer paid only $9,000 in down payment."[153]

131. IAS financed the remaining $21,000, interest free.[154]

132. According to the 2006 contract, the $21,000 would be paid by the customer in $700 annual payments over 30 years.[155]

133. But the obligation to start paying $700 annually would only begin five years *after* IAS installed and began operating the customer's lens at a specific "Installation Site" in Delta, Utah.[156]

134. Shepard's contract, which he signed on December 22, 2006, required IAS to install and "startup" his lenses within seven days: on or before December 29, 2006. [157]

135. According to the contract, if IAS failed to "furnish, deliver, install and startup" the lenses by December 31, 2007, it would refund the Shepard's down payment of $9,000.[158]

136. IAS continued to sell lenses with, generally, the same or similar transaction terms through 2009.[159]

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[152] Pl. Ex. 8A at 7; Pl. Ex. 93; Pl. Ex. 94.

[153] Pl. Ex. 93; Pl. Ex. 94 ¶ 3; *see also* Pl. Ex. 532 at 7-8.

[154] Pl. Ex. 531 at 2.

[155] Pl. Ex. 94¶ 3.

[156] Pl. Ex. 94¶ 3.

[157] *E.g.*, Pl. Ex. 94 ¶ 3.

[158] Pl. Ex. 94 ¶ 7.

[159] IAS Dep. 182:16-183:4; Pl. Ex. 533; *see also* Pl. Exs. 95, 181, 535; IAS Dep. 196:21-198:19.

(continued...)

137. Freeborn bought his first lenses from IAS under these terms in August 2009.[160]

138. With the transition to RaPower-3 in 2010, Johnson changed the price of a lens to $3,500.[161]

139. Customers also started purchasing lenses via the internet at rapower3.net.

140. 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.[162]

141. 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.[163]

142. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[164] The lack of price negotiation is because the customer is not focused on buying a lens but on buying a tax benefit package. A high price results in large tax benefits. Testimony to the contrary from lens purchasers is not credible because they face serious tax consequences from the adjudication of the truth of this solar energy scheme.

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[160] Pl. Ex. 533.

[161] Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition Designations for Robert Aulds ("Aulds Dep.") 141:3-13, 146:17-147:5 (March 14, 2017). For a time, the price for a lens was $3,000. *E.g.*, Pl. Ex. 346 at 1 ("Kevin purchased 10 systems. Each system costs $3,000. Therefore his total purchase price is $30,000.")

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

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

[164] 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; T. 1247:7-9; Lunn Dep. 114:11-115:4; T. 1078:17-1079:2; T: 987:3-12; Zeleznik Dep. 67:3-12.

(continued...)

143. The Equipment Purchase Agreement states the number of lenses the customer purportedly purchases from RaPower-3.[165]

144. The contract states that RaPower-3 will install and "startup" the lenses the "Installation Site," which is "a site yet to be determined."[166]

145. The Installation Site is "any place that Neldon [Johnson] wants it to be."[167]

146. There is no date-certain in the Equipment Purchase Agreement by which the customer's lenses must be installed in a tower and producing revenue.[168]

147. Instead, the "Installation Date" is defined as "the date the [lens] has been installed and begins to produce revenue."[169]

148. RaPower-3 commits that each lens will sustain a specific "energy production rate" for the first five years from the "Installation Date."[170]

149. If the lenses do not sustain the promised "energy production rate," the buyer may terminate the Equipment Purchase Agreement and is not obligated to pay any remaining balance for his lenses.[171]

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[165] Pl. Ex. 25 at 1; Pl. Ex. 511. The contract uses the term "Alternative Energy System," which is undefined in the contract itself. *See generally* Pl. Ex. 511. It means "solar lens." IAS Dep. 181:9-182:5; Pl. Ex. 181; T. 914:13-919:24 ; Pl. Exs. 92, 94; *see* Shepard Dep. 57:7-59:6; Pl. Ex. 462.

[166] Pl. Ex. 511 at 1.

[167] Shepard Dep. 157:18-24; Pl. Ex. 119 at 1.

[168] *See generally* Pl. Ex. 511.

[169] Pl. Ex. 511 at 2.

[170] Pl. Ex. 511 at 4-5.

[171] Pl. Ex. 511 at 5; Shepard Dep. 234:14-235:4; Pl. Ex. 475.

(continued...)

150. At the same time the customer electronically signs the Equipment Purchase Agreement, the customer electronically signs an Operation and Maintenance Agreement ("O&M") with LTB. [172]

151. According to Defendants, by signing the O&M, the customer is "holding out for lease" his solar lenses to LTB.[173]

152. The O&M states that once a customer's lenses are installed at a "Power Plant" on the "Installation Site" (defined only by reference to the Equipment Purchase Agreement), LTB will operate and maintain the customer's lenses to produce revenue.[174]

153. According to the O&M, LTB is "entitled to receive all revenue" from sales, but will make a quarterly "rental payment" to the customer for using that customer's lens(es) to produce the energy it will sell.[175]

154. In a single year, the total rental payments to any customer for a single lens may not exceed $150.[176]

155. There is no date-certain in the O&M by which a customer's lenses are required to begin producing revenue.[177]

156. 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.[178]

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[172] Pl. Ex. 121; Pl. Ex. 25 at 1. Defendants maintain that LTB is the committed entity on the O&M, despite the contract being on RaPower-3 letterhead and being signed by "Seller," "Neldon Johnson," Director of "RaPower-3." Johnson Dep., vol. 1, 219:2-223:23; *e.g.*, Pl. Exs. 511, 512. *See also* ECF No. 22 ¶ 25, ECF No. 23 ¶ 25.

[173] Pl. Ex. 121; Pl. Ex. 25 at 1; Pl. Ex. 557 at 1; Pl. Ex. 473; Pl. Ex. 533 at 2.

[174] Pl. Ex. 121 at 1, 2, 4.

[175] Pl. Ex. 121 at 4.

[176] Pl. Ex. 121 at 4.

[177] *See generally* Pl. Ex. 121, 512.

[178] 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.

(continued...)

157. The Equipment Purchase Agreement states that the full price of a single lens is $3,500.[179]

158. But a typical solar lens customer does not pay the full price upon signing the Equipment Purchase Agreement.

159. Instead, a customer pays for his lenses in the following stages.[180]

160. First, he pays $105 per lens at the time he signs the Equipment Purchase Agreement, often near the end of the calendar year.[181]

161. Second, he pays an additional $945 on or before June 30 of the following year, for a total of $1,050.[182]

162. This leaves $2,450 remaining on the $3,500 lens purchase price.

163. The Equipment Purchase Agreement states that the customer will begin paying off the remaining $2,450 once the customer's lens has been installed and producing revenue for five years.[183]

164. For the first five years of revenue production, the customer will receive $150 yearly rental payment per lens.[184]

[179] Pl. Ex. 511 at 2.

[180] Pl. Ex. 511 at 2.

[181] Pl. Ex. 511 at 2.

[182] Shepard Dep. 150:17-153:21; Pl. Ex. 119 at 2, Pl. Ex. 511 at 2.

[183] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[184] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

(continued...)

165. After the first five years, LTB will take the customer's $150 annual rental payment and divide it between the customer and RaPower-3: $82 per year for RaPower-3 to pay off the outstanding balance and $68 for the customer/lens owner.[185]

166. LTB will make these payments for 30 years.[186]

167. RaPower-3 provides nearly interest-free financing for the $2,450 debt remaining on each lens.[187]

168. The only security for the customer's promise to pay is the lens itself.[188]

169. Defendants do not check customers' credit.[189]

170. At times, the Equipment Purchase Agreement has provided that, if the tax laws change after the date the customer signs the contract in a way that "materially reduce[s] any tax benefit" of the agreement to the customer, the customer may retroactively reduce the number of lenses he bought on the date of signing.[190]

171. Also, if a solar lens customer no longer desires to "own" lenses, Johnson will refund the person's money and let them out of the contract.[191]

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[185] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[186] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[187] *E.g.*, $82 per year times 30 years is $2,460. Thus, according to the Equipment Purchase Agreement, RaPower-3 would collect $10 per lens in interest, for financing $2,450 for at least 30 years.

[188] Pl. Ex. 511 at 3.

[189] Pl. Ex. 677 at 2.

[190] Pl. Ex. 511 at 4 (2014 contract); Pl. Ex. 119 at 4 (2012 contract); Pl. Ex. 174 (2010 contract).

[191] Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468; Pl. Ex. 282 (In January 2015, Shepard told customers being audited that "[w]e . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction.").

(continued...)

172. From time to time in the past, a solar lens customer could also sign a "bonus referral contract."[192]

173. The bonus contracts, over time, varied in the amount a customer could purportedly earn, and the basis for the customer's payout – either the first billion dollars in IAS gross sales or the second billion dollars in IAS gross sales.[193]

174. If a customer signed a bonus contract before May 23, 2011, the bonus contract states that the customer will be paid a maximum of $6,000 per lens the customer bought based on a percentage of IAS's first billion dollars in gross sales.[194]

175. If a customer signed a bonus contract between May 24, 2011 and February 29, 2012, the contract states that the customer will be paid a maximum of $2,000 per lens the customer bought during that time period based on a percentage of IAS's first billion dollars in gross sales.[195]

176. If a customer purchased lenses and signed a bonus contract between March 1, 2012 and July 31, 2014, the contract states that the customer will be paid a maximum of $2,000 per lens the customer bought during that time period based on a percentage of IAS's second billion dollars in gross sales.[196]

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[192] Johnson Dep., vol. 1, 228:19-234:17; Pl. Ex. 185 at 3; *compare* ECF No. 2 Compl. ¶ 25 *with* ECF No. 22 ¶¶ 25 & 32; Pl. Ex. 1.

[193] ECF No. 22 ¶ 32.

[194] ECF No. 22 ¶ 32; *see also* Pl. Ex. 297.

[195] ECF No. 22 ¶ 32.

[196] ECF No. 22 ¶ 32.

(continued...)

177. Defendants told customers that the bonus contract was the key to being able to claim a depreciation deduction related to the solar lenses because the promise of the bonus made the "system . . . profitable in order to meet IRS requirements."[197]

178. Johnson told a customer in 2010 that "[t]his bonus program makes certain that each purchase was made for an economic reason. This reason would be such that anyone would see the value of the transaction as to its economic values beyond just a tax savings."[198]

179. But Johnson has not offered bonus contracts since July 2014.[199]

2. Defendants told customers, and prospective customers, about Johnson's purported solar energy technology.

180. Defendants told customers, and prospective customers, about Johnson's purported solar energy technology.[200]

181. Over the years, Shepard touted "[g]reat progress"[201] having been made on component parts of the technology through "[e]laborate testing"[202] and "research and development"[203] of "technologies needing refinement"[204].

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[197] Johnson Dep., vol. 1, 234:18-237:15; Pl. Ex. 185 at 1; IAS Dep. 203:7-204:6; Johnson Dep., vol. 1, 235:17-25; Shepard Dep. 261:17-262:7; Pl. Ex. 1 at 3 ¶ 5; Pl. Ex. 340.

[198] Pl. Ex. 185 at 1; *see also* Pl. Ex. 34.

[199] ECF Doc. 22 ¶ 32.

[200] *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 (including Freeborn) on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Ex. 491; T. 1351:19-1352:24, 1398:4-1399:18; Pl. Ex. 441. 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; T. 1381:1-1387:12; 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.

[201] Pl. Ex. 8A at 10.

[202] Pl. Ex. 8A at 10.

[203] Pl. Ex. 8A at 7.

[204] *E.g.*, Pl. Ex. 8A at 8; Pl. Ex. 504 at 5-7, 10-22.

(continued...)

182. Shepard and Freeborn also told customers and prospective customers to expect construction of new towers, beyond the 19 towers on the R&D Site.[205]

183. As early as November 2006, Shepard said that IAS had "a goal of finishing 50 Solar Pods before the end of the year for those who were previously on the lease program. . . . For new investors, [IAS] has a goal to put up 50 additional Solar Pods before year's end."[206]

184. Freeborn stated, in June 2010, "Neldon Johnson of IAUS and [R. Gregory] Shepard are hard at work bringing [the rental] income stream into operation. We are very close to making putting [*sic*] everything together and becoming fully operational perhaps before the end of the summer."[207]

185. Then, in February 2012, Freeborn told customers that "the IAUS energy fields are about to be erected."[208]

186. In June 2012, Defendants told participants in the "RaPower[-]3 National Convention" about "what's been accomplished in the last year" with respect to research and development, manufacturing, and construction.[209]

187. In July 2012, Shepard wrote to customers "[n]ow that the R&D is done and the Manufacturing Plant is completed along with the manufacturing of so many components is done [*sic*], CONSTRUCTION WILL BEGIN THIS MONTH."[210]

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[205] *E.g.*, Pl. Exs. 216, 246, 270.

[206] Pl. Ex. 93.

[207] Pl. Ex. 246.

[208] Pl. Ex. 216 at 1.

[209] Pl. Ex. 504 at 5-4.

[210] Pl. Ex. 270.

(continued...)

188. In November 2012, Shepard told a customer that there were "21,000 lenses in inventory" and "150 towers ready to install" with "$15M" in the bank."[211]

189. In July 2013, Shepard told one customer "I THINK ALL 19 TOWERS ARE UP NOW. WE ARE JUST ABOUT READY TO FLIP THE SWITCH".[212] But in August 2013, Shepard told customers being audited by the IRS that a photo attached to his email showed "the main tower. There will be 17 to 18 satellite towers that will feed the main tower's turbine and heat exchanger producing 1.5 megawatts of power."[213]

190. In November 2013, Shepard told customers "[w]e are doing great down in Delta."[214]

191. He identified one tower as "fully completed," "another ten satellite towers nearly completed," and an additional four towers "not yet complete."[215]

192. Shepard told customers that "[t]hese fifteen towers will complete the first project. Probably in two weeks, the 2d project will begin. It will consist of 150 towers. All towers and trusses have already been delivered. All the lenses have been framed and many other components have already been made."[216]

[211] Shepard Dep. 172:9-179:17 *and* Pl. Ex. 141.

[212] Pl. Ex. 329 at 1.

[213] Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1.

[214] Pl. Ex. 348 at 1

[215] Pl. Ex. 348 at 1

[216] Pl. Ex. 348 at 1

(continued...)

193. Shepard also told customers that "[t]he dual axis hydraulic tracking systems were working with the new Ram. The lenses heated up our molten salt storage container to over a thousand degrees."[217]

194. As of June 2014, Shepard wrote to customers "[t]wenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014."[218]

195. In December 2015, Shepard heard from a customer who was "a little worried about the amount of time that it is taking to get those lenses on towers and generating rental income."[219]

196. Shepard assured the customer that "The extra time was getting the mass production and installation capabilities up to 25 towers a day. That has pretty much been completed. I'm pretty sure that the first quarter of 2016 will be a very good one for us. It will all work out."[220]

197. When the customer asked if Shepard could say if he thought "the lenses will be on towers and generating rental income in 2016," Shepard responded "I very much think so!"[221]

198. Defendants have also told customers about progress toward obtaining a contract to sell power to a third party purchaser.[222]

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[217] Pl. Ex. 348 at 1

[218] Shepard Dep. 179:21-183:8; Pl. Ex. 420 at 1.

[219] Pl. Ex. 159.

[220] Pl. Ex. 159.

[221] Pl. Ex. 159.

[222] Pl. Exs. 157, 185 at 2, 292.

(continued...)

199. In 2010, Johnson assured a customer that "[w]e do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service."[223]

200. In August 2013, Shepard told customers that 18 or 19 towers would be producing 1.5 megawatts of power which would "soon be put on power poles going to Rocky Mountain Power which is Utah's largest utility company."[224]

201. In April 2015, Shepard told customers that "we are now in the process of negotiating a [power purchase agreement] for the first set of towers that will be going up,"[225] such that rental income from their lenses could start soon.

202. Over the years, Shepard and Freeborn also told customers to expect bonus contract payouts "soon."[226]

3. Defendants sold solar lenses by emphasizing the purported tax benefits.

203. 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.[227]

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[223] Pl. Ex. 185 at 2.

[224] Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1; *see also* RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267 at 1 ("The first project will consist of 15 towers that will produce about 1.5 Megawatts for Rocky Mountain Power. We are almost done.").

[225] Shepard Dep. 204:15-209:11; Pl. Ex. 292.

[226] *E.g.*, Pl. Ex. 61 at 1 (In 2010, "They have really started putting an emphasis on the bonus contract which seems to indicate that we are close."); Pl. Ex. 48 at 1 (In 2012, "Rental income & Bonus payments are expected to begin soon."); Pl. Ex. 49 at 1 ("Rental and bonus income should start in 2014.").

[227] Johnson Dep., vol. 1, 247:11-248:12; Pl. Ex. 490 at 9-10; *see also* 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; *See* Lunn Dep. 188:18-189:20.

(continued...)

204. In the materials he wrote in 2006, Johnson included four pages on the tax benefits of buying a lens, due to depreciation and the solar energy tax credit.[228]

205. Defendants tell customers to calculate both the deduction and the credit based on the full price of a lens, not the amount the customer actually pays.[229]

206. Defendants also tell customers that they may use deductions related to solar lenses to offset the customers' active income, like W-2 wages from employment.[230]

207. Johnson wrote that "[t]he person buying a [lens] receives a $9,000 tax credit from the IRS for each [lens] purchased. . . . The retail value of IAUS's [lens] is $30,000. The federal tax credit at 30% of $30,000 is $9,000."[231]

208. Johnson connected the amount of depreciation a purchaser could take to the impact of the tax credit: "Half of the tax credit ($4,500) must be subtracted from the $30,000 purchase amount when using it to calculate depreciation of the equipment. Therefore, only $25,000 of the $30,000 value can be depreciated."[232]

209. Johnson presented tables for purchasers who were in different tax brackets to illustrate the tax-reducing effect of buying lenses and claiming a depreciation deduction and the solar energy tax credit for them.[233]

210. At the same time, Johnson told people they could[234]:

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[228] Pl. Ex. 531 at 3-6.

[229] *E.g.*, Pl. Ex. 24 at 1; Pl. Ex. 43 at 1; Pl. Ex. 531 at 2-3 (using prices Johnson established in 2006).

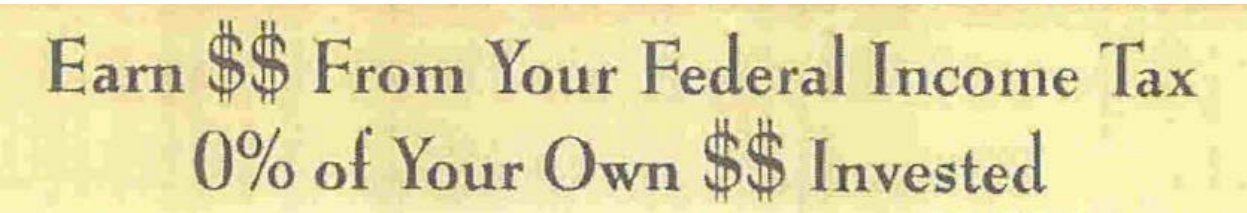
[230] Pl. Ex. 181 at 2 ¶ 6; Pl. Exs. 30, 40 at 4, 146, 147 at 1, 205, 346.

[231] Pl. Ex. 531 at 3.

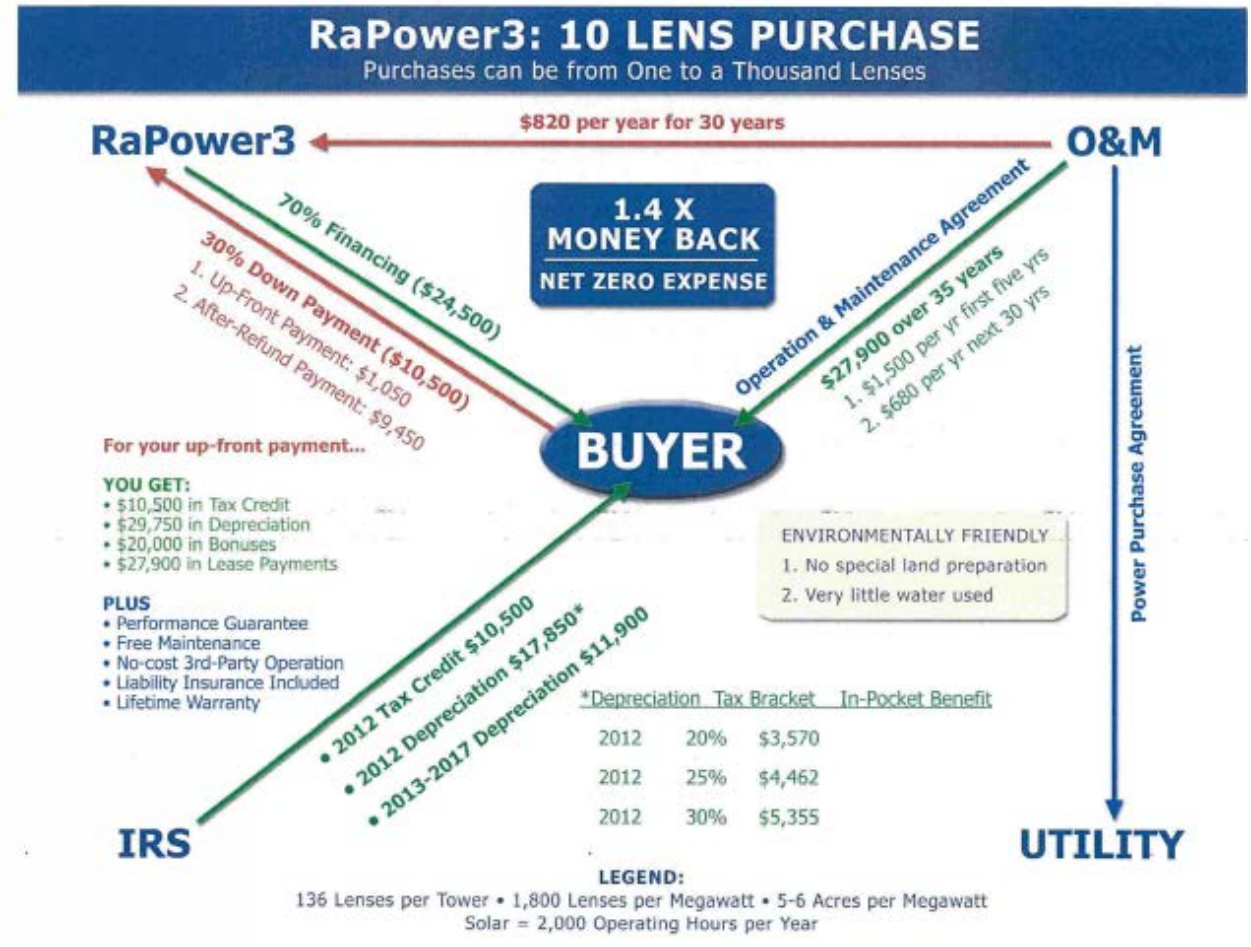
[232] Pl. Ex. 531 at 3.

[233] Pl. Ex. 531 at 4-6.

[234] Pl. Ex. 532 at 12.



211. Defendants also illustrated the tax benefits and flow of money this way:[235]



212. Shepard offered a way for a prospective or returning customer to "determin[e] how many solar lenses you should buy": "look at the taxes you paid last year and what you expect to pay this year."[236]

[235] Pl. Ex. 496; *see also* Pl. Exs. 497, 777 at 1-2.

[236] Shepard Dep. 232:4-234:10; Pl. Exs. 20, 24, 474; *see also* Pl. Ex. 597.

(continued...)

213. According to Shepard, the "objective" is to "zero out your taxes while maximizing your ability to bring clean, renewable energy to our country."[237]

214. To accomplish this objective, Shepard gave prospective customers the formula to decide how many lenses to buy: take the customer's anticipated tax liability for the current year and multiply it by a number that "has been designed to give most taxpayers 1.5 times their money back in relation to their total down payment. For example, for a $10K down payment . . . you may get back at least $15K in tax benefits."[238]

215. Shepard showed customers and prospective customers how to calculate those tax benefits[239]:

Example: Taxable 2014 Liability is projected to be $10,000 plus there was $10,000 paid in 2013 taxes. (10,000 + 10,000 X .00085 = 17.

Purchase Price: 17 systems X $3,500 = $59,500.

Down Payment: 17 systems X $1,050 = $17,850.

Tax Credit: $59,500 X 30% = $17,850.

Depreciation (Net Operating Loss): One half of the tax credit is $8,925. Subtract that from the purchase price of $59,500 = $50,575.

216. Shepard showed the financial bottom line for a prospective lens buyer[240]:

Money Details:
1. You purchased 9 systems and paid $9,450 as a down payment.
2. After your tax refund of $10,000 in 2014, you will have made $550 thanks to your RaPower3 purchase plus you will make about another $4,800 over the next four years.
3. Your profit is created by your depreciation.
4. Don't forget the rental income of $150 X 9 X five years = $6,750
and $68 X 9 X 30 years = $18,360 (for a total of $25,110).

[237] Shepard Dep. 232:4-234:10; Pl. Ex. 20 at 2; Pl. Ex. 24 at 1; T. 1130:2-23; Pl. Ex. 158.

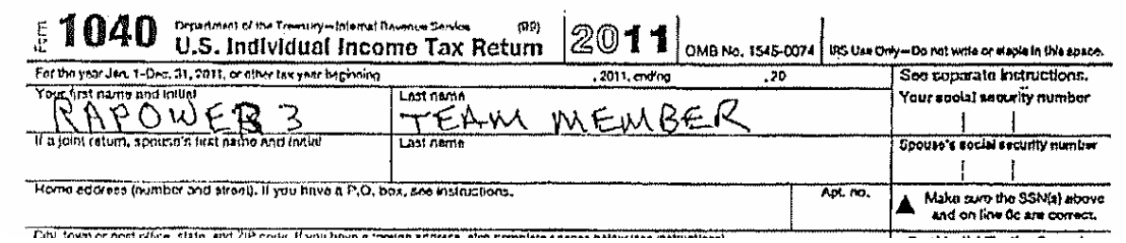
[238] Pl. Ex. 20 at 2.

[239] Pl. Ex. 24 at 1; *see also id.* at 2.

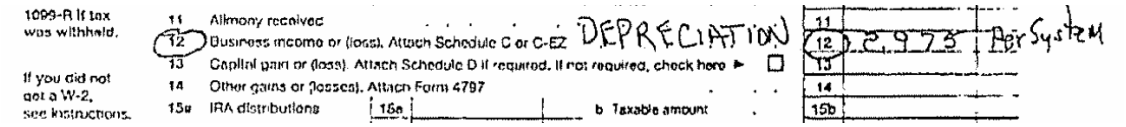
[240] Pl. Ex. 24 at 1; *see also* Pl. Ex. 20 at 2.

(continued...)

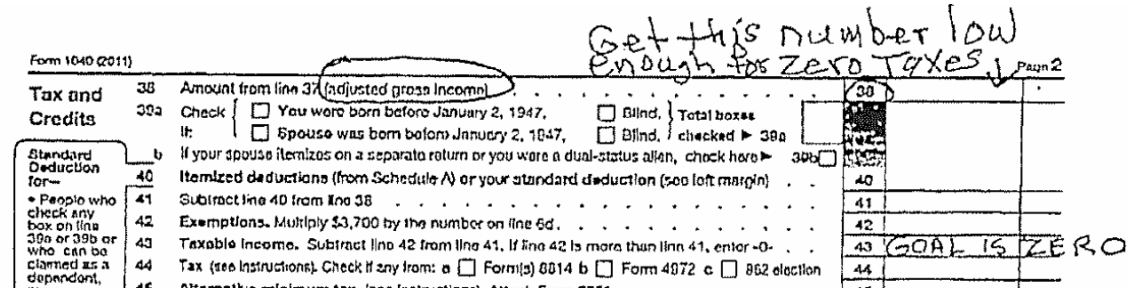
217. Put more simply, Shepard showed customers exactly where and how, on a federal individual income tax return, to enter numbers to "zero out" their tax liability[241]:


Form 1040 Department of the Treasury—Internal Revenue Service (99) U.S. Individual Income Tax Return 2011 OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.
For the year Jan. 1–Dec. 31, 2011, or other tax year beginning , 2011, ending , 20
Your first name and initial: RAPOWER 3 Last name: TEAM MEMBER
If a joint return, spouse's first name and initial Last name
Home address (number and street). If you have a P.O. box, see instructions. Apt. no.
See separate instructions. Your social security number
Spouse's social security number
Make sure the SSN(s) above and on line 6c are correct.

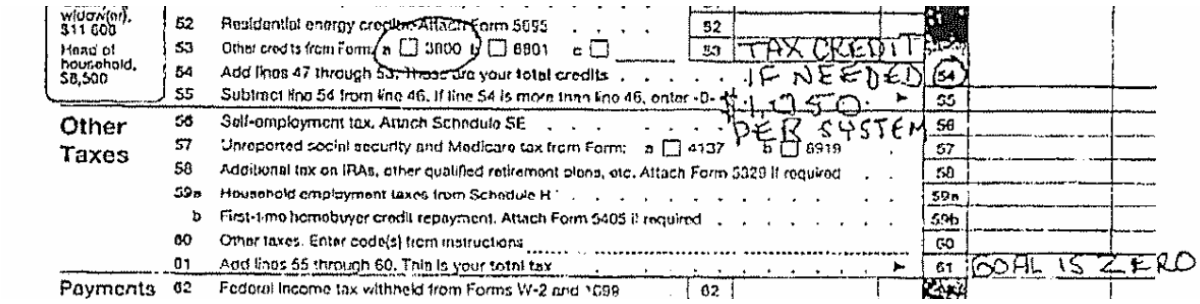
. . .


1099-R if tax was withheld.
If you did not get a W-2, see instructions.
11 Alimony received
12 Business income or (loss). Attach Schedule C or C-EZ DEPRECIATION 12,975 Per System
13 Capital gain or (loss). Attach Schedule D if required. If not required, check here ▶
14 Other gains or (losses). Attach Form 4797
15a IRA distributions 15a b Taxable amount 15b

. . .

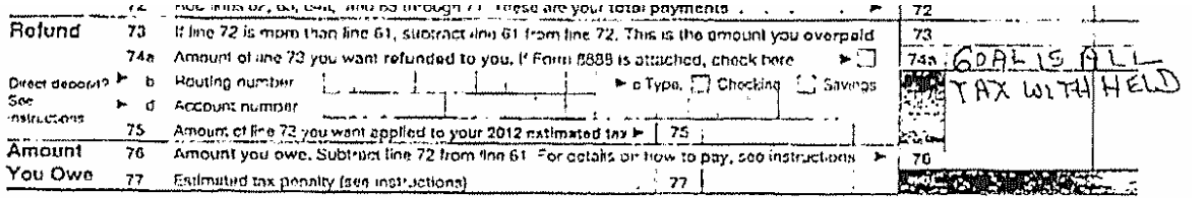

Get this number low enough for zero Taxes
Form 1040 (2011) Page 2
Tax and Credits
38 Amount from line 37 (adjusted gross income)
39a Check If: You were born before January 2, 1947, Spouse was born before January 2, 1947, Blind, Blind, Total boxes checked ▶ 39a
b If your spouse itemizes on a separate return or you were a dual-status alien, check here ▶ 39b
Standard Deduction for— • People who check any box on line 39a or 39b or who can be claimed as a dependent,
40 Itemized deductions (from Schedule A) or your standard deduction (see left margin)
41 Subtract line 40 from line 38
42 Exemptions. Multiply $3,700 by the number on line 6d.
43 Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0- GOAL IS ZERO
44 Tax (see instructions). Check if any from: a Form(s) 8814 b Form 4972 c 962 election

. . .


widow(er), $11,600
Head of household, $8,500
52 Residential energy credits. Attach Form 5695
53 Other credits from Form: a 3800 b 8801 c TAX CREDIT IF NEEDED
54 Add lines 47 through 53. These are your total credits
55 Subtract line 54 from line 46. If line 54 is more than line 46, enter -0- $1,750. PER SYSTEM
Other Taxes
56 Self-employment tax. Attach Schedule SE
57 Unreported social security and Medicare tax from Form: a 4137 b 8919
58 Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required
59a Household employment taxes from Schedule H
b First-time homebuyer credit repayment. Attach Form 5405 if required
60 Other taxes. Enter code(s) from instructions
61 Add lines 55 through 60. This is your total tax GOAL IS ZERO
Payments
62 Federal income tax withheld from Forms W-2 and 1099

. . .

[241] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 13; Lunn Dep. 164:12-171:1; *see also* Shepard Dep. 241:18-243:8; T. 1130:2-23; Pl. Ex. 158; Pl. Ex. 490 at 9-10.



218. Shepard encouraged customers to sell lenses to others by emphasizing the tax benefits. He wrote, in one promotional document, "Remember, if your people are happy, meaning they received all their tax benefits, then they will purchase even more systems. That means you make commissions all over again. . . . Have your people make a copy of their refund check so the both of you can use it as a valuable tool in your presentations."[242]

219. Freeborn told customers "you can be tax free like GE for 15 years" by buying lenses.[243] Freeborn gave customers the following calculations[244]:

> Fourth, there are certain numbers that all RaPower3 team members need to have down per system:
> 1. Retail Price - $3500;
> 2. Full Down Payment - $1050;
> 3. Up Front/Enrollment Cost - $105;
> 4. Federal Energy Credit - $1050;
> 5. Bonus - $2,000;
> 6. Residual Income - $150/year first 5 years, $68/year the next 30 years;
> 7. Depreciation - $2,975, 50% Bonus depreciation the first year;
> 8. Rule of thumb – multiply Line 55 of From 1040 by 6, and then multiply that sum by .0007 to determine the number of systems to be purchased to offset federal income taxes through 2016. Remember, your client can always purchase more systems to extend his tax free status beyond 2016 since the tax credits may be forwarded 20 years.

[242] Pl. Ex. 504 at 8; T. 1603:1-1604:7

[243] Pl. Ex. 220; *see also* Pl. Ex. 207 ("With this program you are awarded the . . . tax privileges that General Electric gets, i.e., pay no federal taxes. In fact, full [par]ticipation makes you tax free till [*sic*] 2020.").

[244] Pl. Ex. 501 at 2; *see also* Freeborn Dep. 71:2-20; Pl. Ex. 499. Freeborn and his brother created a charity that they used to sell solar lenses. Pl. Exs. 498, 499, 500. The "charity" sold at least 450 lenses. Pl. Ex. 498.

(continued...)

220. Freeborn told people in his downline to start with the following pitch if they wanted to sell more lenses[245]:

> 1. Listen for the tax return complaining conversations
>
> 2. Ask the M A G I C Question: "Do you like figuring (Paying) taxes?"
>
> 3. Explain to them your experience: "Well neither do I; that's why I DON'T pay any. Would you like to learn how not to as well?"

221. Shepard and Freeborn also assisted customers with preparing their federal income taxes to claim a depreciation deduction and solar energy tax credit as a result of buying solar lenses.[246]

222. Shepard told people how to complete their tax returns "properly" to claim the tax benefits purportedly associated with buying solar lenses.[247]

223. As Shepard told other RaPower-3 "leadership" team members in 2011, "I have someone from Florida that is FAXING his 1040 return to me. I told him that I can tell him in two minutes if his CPA did it right."[248]

224. Shepard has corresponded with tax professionals to give them information and instruction about the transactions and the technology that purportedly qualify their customers for the tax benefits Defendants promote.[249]

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[245] Pl. Ex. 85 at 3; *see also* Pl. Ex. 214.

[246] *E.g.*, Pl. Exs. 88, 109, 674 ("TAX TIME SUCCESS STORIES" note customers having received help from Shepard and Freeborn to complete taxes). Pl. Ex. 323; Gregg Dep. 127:19-128:8; *see also* Pl. Ex. 218 (offering information from RaPower-3 to support claimed tax benefits on customers' returns); Pl. Ex. 217 (offering instructions on how to use TurboTax to claim tax benefits).

[247] *E.g.* Shepard Dep. 243:11-244:14; Pl. Ex. 43 at 1.

[248] Shepard Dep. 241:1-14; Pl. Ex. 112.

[249] Shepard Dep. 210:20-211:24; Pl. Ex. 471; Pl. Ex. 346.

(continued...)

225. Shepard also advises customers under audit on how to respond to the IRS to defend disallowed and lens-related depreciation deductions and solar energy tax credits.[250] Shepard advised customers not to answer the IRS's questions for information about the solar energy scheme.[251]

226. RaPower-3 has touted "success stories" on its website. None of the "success stories" involved the actual production of solar energy.[252]

227. Rather, all of the so-called "success stories" involved customers receiving the substantial tax benefits that Defendants promote. [253]

228. Defendants have not changed their promotion in any appreciable way since 2005, with one exception.[254]

229. In mid-2016, after this lawsuit was filed, Johnson changed the way RaPower-3 and Shepard promoted the tax benefits purportedly connected with solar lenses.[255]

230. According to Shepard and Johnson, a customer may still buy lenses on the same terms described above, and claim depreciation and the solar energy tax credit.[256]

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[250] *E.g.*, Pl. Ex. 70 at 1-2; Pl. Ex. 71; Pl. Ex. 325; Gregg Dep. 136:4-6; 10-14; 137:3-12; Pl. Ex. 330 at 2; Gregg Dep. 147:5-148:10, 149:1-7.

[251] Gregg Dep. 57:18-58:4; Pl. Ex. 298 ("**Solar Energy Tax Scheme Interview Questions:** Some of you may have been asked to fill out this questionnaire with 11 questions. . . . Simply say that you don't believe RaPower[-]3 is a tax scheme and then ask for written facts as to why they think that it is a scheme." (emphasis in original)).

[252] *E.g.* Pl. Ex. 674.

[253] *E.g.* Pl. Ex. 674.

[254] Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

[255] Shepard Dep. 244:22-250:11. Recently, Defendants also began promoting a "home system" for solar energy production. Pl. Ex. 680. They tell customers that they can get the home system "for free" if customers "use[] the federal tax solar credit program correctly." *Id.* at 1.

[256] Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

(continued...)

231. But the customer may instead pay a lower price, *not* claim depreciation, and still claim the solar energy tax credit.[257]

232. Customers are likely still claiming depreciation for lenses they bought after Johnson made this change.[258]

C. Defendants knew or had reason to know that their statements were false or fraudulent as to material matters.[259]

233. Defendants knew, or had reason to know, that their customers were not in a trade or business of leasing out solar lenses and, therefore, that their customers were not allowed the depreciation deduction or solar energy tax credit.[260]

234. This is because Defendants knew, or had reason to know, the following facts throughout the entire time they promoted the solar energy scheme:

1. Defendants knew, or had reason to know, that Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy.

235. Johnson testified that he has "generated electricity" using lenses on the R&D Site a "hundred times,"[261] but no one other than him has seen it happen[262].

236. Johnson testified that he could have "put power on the grid" at "any time since 2005" and he "could have done that easily"[263].

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[257] Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

[258] Howell Dep. 233:9-234:3; Pl. Ex. 749 (showing lens sales made as recently as February 2018); Pl. Ex. 752; T. 824:19-837:25.

[259] 26 U.S.C. § 6700(A)(2)(a).

[260] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 8.

[261] Johnson Dep., vol. 1, 164:3-165:17.

[262] Johnson Dep., vol. 1, 164:3-165:17; Shepard Dep. 129:17-131:18; Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

[263] RaPower-3 Dep. 163:15-166:18

(continued...)

237. But Johnson testified that, since 2005, he has made a "business decision" not to put electricity on the grid.[264]

238. Johnson also testified that every time he thinks he is finished and ready to connect to a third-party purchaser, he finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system.[265] So he has never been finished.[266]

239. Johnson has not produced data (for example, from testing the components alone or as a purported system), research, or third-party validation, to support his ideas of how he claims his system would work, or records of it working.[267]

240. Johnson has no records of electricity production or of any other application of energy to a useful purpose.

241. In 2005, when he first began selling solar lenses, Shepard knew that IAS was "still a long ways away" from generating electricity for a third-party purchaser[268] and that "more research and development had to be done . . . to make the technology economically viable"[269].

242. To date, Shepard has never seen the lenses in the towers at the R&D Site generate electricity.[270] He testified at trial that he was "not sure that [he had] seen everything work right

[264] RaPower-3 Dep. 163:15-166:18.

[265] RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[266] RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[267] *E.g.*, Johnson Dep., vol. 1, 69:8-10, 109:10-16, 151:18-153:4, 164:3-165:17, 177:13-179:24.

[268] Shepard Dep. 46:2-47:12.

[269] Shepard Dep. 54:17-24.

[270] Shepard Dep. 129:17-131:18.

(continued...)

now simultaneously to produce electricity"[271] and that "that "no solar lens is putting electricity on a grid."[272]

243. Johnson has told Shepard that they have done so "for R&D purposes."[273]

244. As of December 2013, Shepard advised customers that Defendants' "intention . . . is to produce electricity."[274] Nonetheless, as recently as February 19, 2016, Shepard admitted having "no proof that [the purported solar] towers are up and running."[275]

245. Freeborn never saw the lenses in the towers that currently stand at the R&D Site generate electricity.[276]

246. Nonetheless, Freeborn believed that because he saw lenses concentrate heat on an early site visit, he had "proof of concept" that they would be used in a system to generate electricity.[277]

247. Freeborn thought that the other components of the system "would all be added later."[278]

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[271] T. 1693:1-5.

[272] T. 1729:19-25.

[273] Shepard Dep. 129:17-131:18.

[274] Pl. Ex. 602.

[275] Pl. Ex. 279 at 1; *see also* Shepard Dep. 187:14-195:3 (noting that a prospective lens purchaser in or around 2013 "wanted to see a project up and running before they committed," which Shepard could not show them); Pl. Ex. 470 at 6-7; Pl. Ex. 602.

[276] Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

[277] Freeborn Dep. 28:19-34:18.

[278] Freeborn Dep. 28:19-34:18. In early 2010, Freeborn told customers he would be sending out a "video [he] shot with Neldon while [he] visited the site last week." Pl. Ex. 213 at 1.

(continued...)

248. Freeborn testified that getting the "individual parts" of Johnson's purported technology to "work in concert . . . seems to be the hurdle."[279]

249. Johnson has no concrete plan to connect his purported solar energy technology to the electrical grid, such that a third party could purchase electricity generated.[280]

250. There are extensive requirements Defendants must meet before "putting electricity on the grid," particularly through Rocky Mountain Power, a component of PacifiCorp.[281]

251. PacifiCorp would require Defendants to obtain an "interconnection agreement," which would give Defendants permission physically connect their purported energy generating facility to PacifiCorp's equipment.[282]

252. Defendants do not have an interconnection agreement with PacifiCorp.[283]

253. As of April 2017, there was no grid connection to the IAS system to the power grid. Instead, there is a brown pole with wires dangling from the top.[284] There is no transmission line or power substation near Defendants' site with sufficient capacity to carry the power Johnson claims his system can generate.[285]

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[279] Freeborn Dep. 95:3-13; *see also* Pl. Ex. 412 at Response to Interrogatory No. 10 ("I am unaware of the status of production [of energy], whether or in what form and measurements.").

[280] Johnson Dep., vol. 1, 111:11-114:3; Pl. Ex. 509 video clip 18_2_27-2_39 at timestamp 14:21:28; Johnson Dep., vol. 1, 115:24-120:13.

[281] *E.g.*, Pl. Ex. 713, Deposition Designations for PacifiCorp ("PacifiCorp Dep.") 15:22-16:15, 68:1-69:8, 71:2-76:22, 78:6-81:15, 82:1-18, 83:2-95:23, 97:1-12, 107:18-114:8 (Nov. 15, 2016); Pl. Ex. 196; Pl. Ex. 198B; Pl. Ex. 199.

[282] PacifiCorp Dep. 73:13-17.

[283] PacifiCorp Dep. 115:4-117:15.

[284] Exhibit 509 video clip 18_0_4_09-4_25 at 14:23:16; T. 108:5-109:11.

[285] T. 109:12-111:5.

(continued...)

254. Johnson has never sold power to Rocky Mountain Power, the only power company in the area of the test site.[286] No power purchase agreements have ever been signed with any end-user.[287] This did not stop Johnson from telling a lens purchaser, in March 2010, that "we do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service."[288]

255. The IAS website contains intentional misrepresentations about the laws obligating power producers to buy power from generators of renewable energy and the status of agreements between IAS and PacifiCorp/Rocky Mountain Power.[289]

256. Dr. Thomas Mancini testified as the United States' expert witness on concentrating solar power ("CSP"). Dr. Mancini earned his Ph.D. in Mechanical Engineering from Colorado State University in 1975. For ten years thereafter, Dr. Mancini was a professor at New Mexico State University, where he taught courses on thermodynamics, heat transfer, fluid mechanics and solar energy. From January 1985 to July 2011, Dr. Mancini worked at Sandia National Laboratories, in Albuquerque, New Mexico. Among other job titles, Dr. Mancini was the CSP Program Manager at Sandia. Dr. Mancini has been consulting on solar energy projects since 2011 through his own business, TRMancini Solar Consulting. He engages in work similar to what he did at Sandia, reviewing system and component designs for concentrating solar

[286] T. 1779:9-11

[287] T. 2238:15-21.

[288] Pl. Ex. 185.

[289] Pl. Ex. 901; 1781:2-1786:23.

(continued...)

energy projects and advising clients on the likely performance and costs of their proposed technology.[290]

257. At the United States' request, Dr. Mancini reviewed the documents Defendants produced in this case and information on www.rapower3.com, along with information and documents provided by third parties. He reviewed patents Johnson has obtained. Dr. Mancini attended two site visits to view Defendants' purported solar energy technology, its components, and the places where Defendants manufacture and claim to use such components. During both visits, Dr. Mancini heard from Neldon Johnson about Johnson's purported solar energy technology and its components as he conducted Dr. Mancini around the sites. [291]

258. Dr. Mancini credibly testified that Johnson's purported solar energy technology does not produce electricity or other useable energy from the sun.[292]

259. Johnson's purported solar energy technology consists, and has always consisted, of separate component parts that do not fit together in a system that will operate effectively or efficiently.[293] For example, there is no evidence the turbine will work in the system.[294]

260. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate marketable electricity.[295] There is no evidence they ever have orever will.[296]

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[290] T. 40:21-43:18.

[291] T. 69:1-73:12

[292] T. 49:23-50:2.

[293] T. 86:4-86:8, 119:5-120:19.

[294] T. 140:21-141:5.

[295] T. 75:14-24, 86:1-16, 90:11-97:4, 106:13-22, 162:17-25.

[296] T. 162:17-25 .

(continued...)

261. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to heat or cool a structure.[297] They never have and they never will.[298]

262. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to provide hot water for use in a structure.[299] They never have and they never will.[300]

263. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate solar process heat.[301] "Solar process heat" is heat from the sun that accomplishes some function or application, like heating potash to speed the process of turning it into fertilizer. Shepard testified that that the lenses produce heat and the only application that he heard of for that heat was to burn wood, grass, shoes, a man, and a rabbit.[302] These are not examples of using heat from the sun for a useful application. The lenses never have been used to generate heat for some function or application, and they never will.[303]

264. Johnson's purported solar energy technology is not now, has never been, and never will be a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy.[304]

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[297] *See* T. 49:23-50:7. .

[298] T. 161:17-162:24.

[299] *See* T. 49:23-50:7..

[300] T. 161:17-162:24.

[301] *See* T. 49:23-50:7.

[302] T. 1735:24-1737:5.

[303] T. 161:17-162:24, 105:13-106:9..

[304] T. 49:23-50:7, 111:17-112:10.

(continued...)

265. The project does not have the numbers of people with intellectual capacity in terms of training and background sufficient to produce or develop a commercial system.[305] Johnson has no documentation of the credentials of any persons working on the project, except his own, which shows he has no degree.[306] There is no evidence that anyone involved in the project has experience needed for the regulatory compliance required to place power on market.[307]

266. Johnson's project has none of the documents which would be typical of a solar power project, including a detailed analysis of each of the components; computer models of the different components; computer models of a proposed system or multiple systems; tests that showed the performance of the individual components; systems tests that showed the actual power output solar energy input, what the issues were and identified; a complete suite of engineering drawings and component interface documents; documents reflecting how the project as a whole would conduct operations or be monitored during operations; a list of materials for all of the components and for the system itself; and the cost estimate of the components in the system.[308] If a system was close to being operational, these documents would be in place.[309]

267. Dr. Mancini's qualifications, his demeanor on the witness stand and answers during direct and cross examination, and the comprehensive fit of the whole of his testimony

[305] T. 112:4-119:4.

[306] T. 115:10-116:25.

[307] T. 115:10-116:25.

[308] T. 75:25-78:19, 123:23-124:2, 157:22-159:7.

[309] T. 78:10-78:13.

(continued...)

together show that he is credible and his conclusions and observations are reliable, without any significant exception or question.

268. Further, Defendants did not have a present a qualified to testify as an expert under Fed. R. Evid. 702 to rebut Dr. Mancini's testimony. They proffered Johnson, but he was excluded because his testimony was not based on sufficient (and verifiable) facts or data and was not the product of reliable and accepted principles and methods.[310] There was insufficient proof that he reliably applied scientific or engineering principles and methods to the facts of this case.[311]

269. Although Johnson has claimed to have received evaluations of his technology from people like the Dean of Electrical Engineering at Stanford University and other experts, Johnson could not identify any of them by name.[312] Defendants offered no evidence from them.

270. The complete lack of third party verification of any of Johnson's designs, in light of the unconventional design of his systems, demonstrates that Johnson does not have the capability of designing a system that can produce usable products from solar energy, that his claims of capability are not credible, and that he misrepresents the truth about his systems, their viability and third party confirmation of his skills and systems.

271. Further, Johnson claims to have done the work himself to test all of the components of his purported solar energy technology thousands of times and that they work. But he has no data from those tests, other than videos.[313] No such videos were presented at trial.

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[310] T. 2104:5-2107:16.

[311] T. 2104:5-2107:16.

[312] T. 1756:16-1768:13; Pl. Ex. 553.

[313] T. 1773:13-1774:9.

(continued...)

272. Johnson has no record that his system has produced energy. There are no witnesses to his production of a useful product from solar energy. He testified that when he tests, he "will do it usually on the weekends when no one was around because [he] didn't want people to see what [he] was doing with it."[314] This explanation of a lack of witnesses is not credible and indicates his statements regarding testing are false. Johnson's statements about the experiments are fabricated in order to create an impression of success which is not based in fact.

273. The complete lack of records or witnesses to any useful production of energy, combined with the unconventional design of his systems, demonstrates that Johnson does not have the capability of designing a system that can produce usable products from solar energy, and that his claims to the contrary are not credible. Further, it is logical to conclude that his system cannot produce usable products from solar energy.

274. Johnson appeared confused during some of his testimony and exhibited difficulty in comprehending questions and responding to them. More than most witnesses, he shuffled pages in exhibits because he had difficulty finding materials at issue. He also exhibited confrontational behavior on direct and cross-examination. He found it very hard to be responsive to questions.

275. For example, Johnson gave an unintelligible explanation of why he has not put power on the grid since 2005:

> Q. BY MR. SNUFFER: Mr. Johnson, you have testified that you could have produced power at any time since 2005. Do you recall making that statement?
> A. That's correct.
> Q. On what basis do you make that statement?
> A. All I'd have to do is raise the temperature of the water and drive it through the turbines. That isn't the problem.
> MS. HEALY-GALLAGHER: Objection; foundation.

[314] T. 2024:3-17.

> THE COURT: Well, he's trying to get it. He said on what basis. So I'm overruling that objection.
> Q. BY MR. SNUFFER: You said that wasn't the problem. What is the problem?
> A. The problem with a business program over just fun and games is making money. And up until now the whole project relies upon the cost of developing a power plant. And the cost and the maintenance still wasn't overcome in 2005 on the heat exchangers that now which we didn't even know in 2005 we could do it, and that's why we went solar. But solar turned out to be a 20-hour thing. And that paper kind of shows what you're talking about. You see what I'm saying?[315]

276. Johnson's inability to communicate coherently or answer questions posed challenges for his counsel but also demonstrates his lack of coherent thought. [316] His conclusions are not supported by valid reasoning, rendering his tax analysis, engineering analysis, financial analysis, marketing analysis, and business analysis, all suspect. Johnson's failure to put energy on the grid or to have an agreement to do so, demonstrates the lack of viability of his designs and construction.

277. Johnson's methodology and lack of overall plan or predictability render his conclusions about the status of his work unreliable, and in many cases false. His statements are particularly false when they pertain to more than a single component or a single element of a component. His work pattern moves from one detail to the next, without a comprehensive strategy for conclusion, except to keep working. This method renders unreliable any statements about the capacity of his overall system to create any useful production. His statements about his overall system do not have supporting facts, but are merely opinions, goals and aspirations. But he and Shepard, as communicator, amplifier and marketer, speak in conclusory absolutes, deceiving customers and prospective customers.

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[315] T. 2013:13-2014:8.

[316] T. 1928:15-1931:13, 2275:18-2277:11.

2. Defendants knew, or had reason to know, that the only way a customer has "made money" from buying a lens is from the purported tax benefits.

278. Shepard and Freeborn sold the lenses by telling people "There's three ways you can make money [from owning a lens]. You can do it through tax benefits, you can do it through the rental program, and you can do it through the bonus program."[317]

279. But they both knew that the only way a customer has ever "made money" from buying a lens is through the tax benefits; no customer has earned money from rental income or income from a bonus contract.[318]

a. No customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser.

280. The only towers that currently exist are the same towers that Johnson built in 2006: the (at most) 19 towers on the R&D site.[319]

281. Assuming 19 towers, at most 2,584 lenses have been installed.[320]

282. According to Johnson, he owned the lenses that were originally installed in the towers in 2006.[321]

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[317] Shepard Dep. 92:17-94:13, 241:1-14; Pl. Ex. 112 ("The first way to make money at RaPower[-]3 is with taxes. So we need to make sure everyone is maximizing their return."); Freeborn Dep. 82:16-83:19; Pl. Ex. 246; *see also* Freeborn Dep. 48:2-55:1; Pl. Exs. 48 at 1, 496, 497.

[318] T. 1734:9-1738:23; Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commissions 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.*

[319] RaPower-3 Dep. 80:16-18.

[320] *See* Shepard Dep. 129:17-131:2 (assuming 18 towers installed rather than 19).

[321] IAS Dep. 63:24-67:3.

(continued...)

283. Since that date, Johnson testified, as customers purchased lenses, ownership of different lenses in the towers transferred from him to the customer.[322]

284. Johnson testified that he created another entity, Cobblestone Centre, LLC ("Cobblestone"), to construct towers and install lenses.[323]

285. His idea is that once the towers are constructed and the lenses installed, he would have LTB take over operation and maintenance of the towers and lenses.[324]

286. No customer has authorized Cobblestone to install his lenses.[325]

287. Shepard knows that an entity named Cobblestone exists, but does not know anything else about it.[326]

288. Hundreds, if not thousands, of customer "lenses" are *not* installed in towers.[327] They are in undifferentiated stacks of pallets of uncut plastic sheets in a warehouse in Millard County, Utah.[328]

[322] IAS Dep. 63:24-67:3.

[323] LTB1 Dep. 32:8-34:6.

[324] LTB1 Dep. 32:8-24.

[325] LTB1 Dep. 38:25-39:5.

[326] Shepard Dep. 123:16-124:6.

[327] *See* Shepard Dep. 39:13-42:5, 60:21-61:17; Pl. Ex. 460.

[328] T. 102:2-21; Pl. Ex. 460.

(continued...)

289. Plaskolite ships IAS rectangular sheets of grooved plastic, in pallets wrapped in still more plastic.[329]

290. Before any rectangular sheet of plastic can be installed on a tower, Cobblestone must cut the rectangle into triangles and add frames to the plastic triangles.[330]

291. Whether a customer's plastic lens is purportedly on a tower or in a pallet inside a warehouse, Defendants do not know which customer owns which lens.[331]

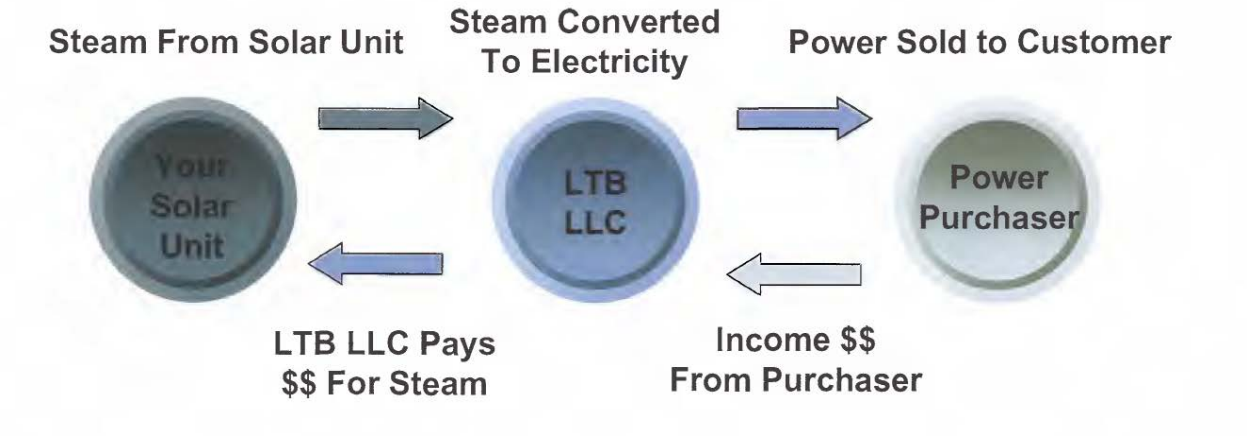
[329] Johnson Dep., vol. 1, 192:15-197:1; *compare* Pl. Ex. 2 *with* Pl. Ex. 460.

[330] Johnson Dep., vol. 1, 52:20-53:2, 74:11-14, 192:15-197:1; LTB1 Dep. 32:8-24.

[331] Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; Pl. Ex. 669, at 1 ("RaPower[-]3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17.

(continued...)

292. After 11 years of selling lenses, Johnson's technology has never generated energy for which a third-party "power purchaser" has paid[332] according to Johnson's vision from 2006[333]:



293. In fact, LTB has never done anything; it has never had a bank account, any employees, or any revenue.[334]

294. Shepard first heard about LTB when he obtained his first lenses in 2005. [335]

295. At that time, he did not ask about LTB's experience with operating and maintaining solar energy equipment.[336]

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[332] Johnson Dep., vol. 1, 164:3-165:17, 167:22-168:3, 172:4-17. Johnson testified that he or RaPower-3 (and not a third party power purchaser) paid a single customer a single check for having used her lenses to generate electricity that was used at Johnson's former grocery store in 2010. (RaPower-3 Dep. 6:18-7:23; Pl. Ex. 188.) The United States disputes that this customer was paid for the production of electricity, and instead submits that Johnson sent the customer a check because her CPA inquiring about the promised income from "energy sales." (RaPower-3 Dep. 18:9-19:3; Pl. Ex. 690, Deposition Designations for Roger Halverson ("Halverson Dep.") 43:22-53:24 (Oct. 18, 2016); Pl. Exs. 185, 186). Even if the Court were to credit Johnson's testimony, it does not change the analysis herein.

[333] IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531; LTB1 Dep. 71:25-74:21, 88:7-17.

[334] T. 2232:3-22; LTB1 Dep. 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; Pl. Ex. 464; LTB1 Dep. 69:6-74:21, 90:19-91:8.

[335] Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

[336] Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

(continued...)

296. Shepard simply signed the agreement to lease his lenses to LTB. [337]

297. Shepard does not know what LTB did with his lenses after they had been subleased.[338]

298. Shepard does not know from whom LTB would collect any rent that it might pay him some day.[339]

299. Shepard knows, and has known since 2005, that LTB has never generated any income using his lenses.[340]

300. Shepard knows that no customer has been paid for the use of his or her lenses.[341]

301. He does not know who owns LTB, who runs it, or whether it has any expertise in operating and maintaining solar lenses,[342] although he does believe that Johnson is connected to LTB in some fashion[343].

302. He has never asked Johnson why LTB has never made a rental payment.[344]

303. In 2013, however, Shepard reported to customers that LTB was "considering using the solar lenses they are renting from RaPower[-]3 Team Members to provide heat and water for crop production in greenhouses."[345]

[337] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[338] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[339] Shepard Dep. 153:22-154:4.

[340] Shepard Dep. 34:18-35:24, 61:24-63:4, 73:1-76:15; Pl. Ex. 464; Pl. Ex. 602 at 1-2.

[341] Shepard Dep. 34:18-35:24, 67:1-12 93:17-94:13; Pl. Ex. 279 at 1; Pl. Ex. 602 at 1-2.

[342] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[343] Shepard Dep. 96:19-100:4; Pl. Ex. 77.

[344] LTB1 Dep. 86:20-87:9.

[345] Pl. Ex. 557.

(continued...)

304. Johnson has told customers that LTB "placed [their lenses] in service" because LTB "has utilized solar energy from [the customer's lenses] for the purpose of assisting IAS in research and development" for various components of Johnson's solar energy technology.[346]

305. In July 2016, Shepard has told customers the same thing: that LTB "rents your solar lenses and utilizes the solar energy from your panels for the purpose of assisting IAS in research and development."[347]

306. Shepard also made such a claim in 2014, when he told customers that LTB had rented their lenses to IAS for research and development since 2010.[348] Shepard claimed that, therefore, customers' "rental payments began to accrue" *in 2010*.[349] Shepard said that he was "99.5% sure [customers would] start receiving rental payments" in 2014 for IAS's purported past use of their lenses.[350] This never happened.[351]

307. Freeborn knew, since 2009, that he never received rental income from his lenses.[352]

308. Freeborn never asked any questions about LTB, either before or after he agreed to "lease out" his lenses to LTB in 2009.[353]

309. Freeborn never asked Johnson why LTB has never made a rental payment.[354]

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[346] LTB1 Dep. 92:7-93:22; Pl. Ex. 558; RaPower-3 Dep. 117:22-118:23; Pl. Ex. 473.

[347] Pl. Ex. 473; *see also* Pl. Ex. 547.

[348] Pl. Ex. 341.

[349] Pl. Ex. 341.

[350] Pl. Ex. 341.

[351] Shepard Dep. 258:5-261:16; Johnson Dep., vol. 1, 239:18-240:1; LTB1 Dep. 88:18-90:18.

[352] IAS Dep. 182:16-183:4; Pl. Ex. 533; Freeborn Dep. 39:23-40:24.

[353] LTB1 Dep. 75:15-77:14.

[354] LTB1 Dep. 75:15-77:14.

(continued...)

310. No customer has asked questions of LTB, either before or after signing an agreement to "lease out" their lenses to LTB. [355]

311. Defendants know that if the solar lenses are going to generate rental income for customers, a third party must be willing to purchase power that the lenses will purportedly create.[356]

312. This agreement is typically called a "power purchase agreement" ("PPA").[357]

313. They know, or have reason to know, that there never has been such an agreement in place. [358]

314. Shepard testified that, since 2010, he has "tried to put his own projects together" to get a third-party purchaser.[359] "But we just kept running into road blocks. . . . Never got that far. Every time I got close, they wanted to see a power project up and running. . . . And we didn't have that running yet."[360]

315. Any other information that Shepard has about progress toward selling energy to an outside purchaser comes from Johnson.[361]

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[355] LTB1 Dep. 75:15-77:14.

[356] Johnson Dep., vol. 1, 130:5-131:6; Shepard Dep. 34:18-35:24, 153:22-154:4; Freeborn Dep. 48:2-55:1; Pl. Ex. 496 & 497; Pl. Ex. 185 at 2 (Johnson told a customer, in early 2010, "[w]e do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service.") *but see contra* IAS Dep. 149:4-16 (Johnson testified that IAS has never entered a power purchase agreement.). *See also* Pl. Ex. 504 at 22 (as of June 2012, Defendants knew that power purchase agreements were an integral part of a solar energy project).

[357] Shepard Dep. 204:24-205:6; PacifiCorp Dep. 46:22-48:14.

[358] Shepard Dep. 34:18-35:24, 153:22-154:4; Johnson Dep., vol. 1, 131:7-134:6; Pl. Ex. 412 at Response to Interrogatory No. 8; PacifiCorp Dep. 46:22-48:14..

[359] Shepard Dep. 204:15-209:11; Pl. Ex. 292.

[360] Shepard Dep. 205:21-12; *see also* IAS Dep. 204:24-207:10.

[361] Shepard Dep. 46:2-57:5.

(continued...)

316. On March 28, 2018, just before trial, RaPower-3 announced that rental payments would be paid to all customers "who have fully paid [their] obligation to [RaPower-3]. . . ."[362] The payments were made in the form of additional lenses for which the owners would owe a total price of "$3,500 but your rental fees would pay the difference."[363] The announcement did not explain why rental payments were made by RaPower-3 while LTB had the obligation to make the payment or why payments were made though most Operation and Maintenance Agreements do not require payment until power is produced.

317. This "payment" with lenses illustrates the illusory nature of the agreements and the absolute discretion Johnson exercises in relation to customers. The "payment" was unsolicited by customers and imposed a tax gain on them.[364] RaPower-3 advised that this tax gain could be mitigated by tax credits related to the lenses.[365] Thus, even at the eve of trial, Defendants were undeterred in their promotions and tax advice.

b. No customer has been paid a bonus.

318. The bonus contracts Johnson offered in the past are keyed to IAS's gross sales revenue.

319. Shepard and Freeborn know that no customer has been paid a bonus.[366]

320. Shepard does not know whether IAS has received sales revenue.[367]

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[362] Pl. Ex 796.

[363] *Id.*

[364] Pl. Ex. 796 at 2.

[365] Pl. Ex. 796 at 2.

[366] Shepard Dep. 34:18-35:24, 76:23-82:18, 93:17-94:13; Pl. Ex. 465.

[367] Shepard Dep. 77:6-78:18.

(continued...)

321. Shepard does not know what sales would generate such revenue.[368]

322. Shepard admitted that, even if IAS had generated sales revenue, he would not necessarily know about it.[369]

323. According to Johnson, IAS has never received any sales revenue.[370]

324. No customer has been paid a bonus.[371]

3. Defendants knew, or had reason to know, that their customers are not required to pay the full down payment, much less the full purchase price for a lens.

325. Shepard testified that Johnson "doesn't seem to be too forceful in trying to collect delinquent payments,"[372] and does not seem to even track which customers might be delinquent in paying their full down payment.[373]

326. Shepard does not believe that Johnson "does anything with people when they don't pay."

327. For example, one customer who purportedly purchased 500 lenses in January 2012 has not yet paid the "full down payment" of $1,050 on all 500.[374]

328. This customer has not done so yet because he has not yet received the benefit of using all 500 to reduce his tax liability.[375]

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[368] Shepard Dep. 77:6-78:18.

[369] Shepard Dep. 77:6-78:18.

[370] Johnson Dep., vol. 1, 230:4-11.

[371] Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246.

[372] Shepard Dep. 112:9-113:7.

[373] Shepard Dep. 110:9-113:7; Pl. Ex. 468.

[374] Aulds Dep. 140:15-146:5.

[375] Aulds Dep. 140:15-146:5.

(continued...)

329. RaPower-3 has not taken action to collect the remaining down payment.[376]

330. If a solar lens customer no longer desires to "own" lenses, Johnson will refund the person's money and let them out of the contract.[377]

331. Johnson "has always" offered this out.[378]

332. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits Defendants promote.[379]

333. Johnson, via Shepard, reiterated this offer in January 2015 to customers who were being audited for having claimed the tax benefits that Defendants promote:

> We . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction. You can most likely get the IRS to drop the penalties. But, if you decide on the refund, then you would give up all bonuses and rental fees associated with those solar lenses.[380]

334. Customers know that they are not liable to make any payments on the debt they purportedly owe to RaPower-3 for the difference between their down payment and the remainder of the purchase price, at least until their lenses begin producing revenue.[381]

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[376] Aulds Dep. 140:15-146:5; *see also* Pl. Ex. 448, Deposition Designations for Mike Penn ("Penn Dep.") 11:21-15:23, 38:10-40:22 (Mar. 13, 2017), Pl. Ex. 391.

[377] Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

[378] Shepard Dep. 304:4-305:10.

[379] Johnson Dep., vol. 1, 237:16-239:13; Pl. Ex. 383; Shepard Dep. 304:4-305:10; Pl. Ex. 282 at 1.

[380] Pl. Ex. 282.

[381] Shepard Dep. 153:2-16; Gregg Dep. 53:20-55:9;

4. Defendants knew, or had reason to know, that Johnson, and not their customers, controlled the customers' purported "solar lens leasing businesses."

335. Johnson, Shepard, and Freeborn knew that RaPower-3 customers do not exercise any control over their purported lens leasing business.[382]

336. No customer has ever decided, for example, to buy a lens and then lease it to an entity other than LTB.[383]

337. Customers never take direct physical possession of their lenses.[384]

338. Because Defendants do not track which lens belongs to which customer, there is no way for a customer to know which specific lens he owns.[385] No customer testified that the owned lenses could be identified.

339. Johnson's entities retain the lenses and control what happens to them (if anything).[386]

340. Defendants emphasize how *little* any customer would have to do with respect to "leasing out" their lenses: "[s]ince LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."[387]

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[382] *E.g.*, Freeborn Dep. 28:19-40:16 (noting that he did not know where his lenses were or are, or what, exactly, they were being used for, or by whom).

[383] *See* LTB1 Dep. 87:10-88:6; RaPower-3 Dep. 62:21-64:5.

[384] LTB1 Dep. 87:10-88:6.

[385] *See* Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; Pl. Ex. 669 at 1 ("RaPower[-]3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17; *see also Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014) ("Gregg acknowledged on cross-examination that he was not certain whether the lenses were placed on the 'array' (*i.e.*, whether the lenses were or are in use) in Utah or stored someplace in boxes in a warehouse."); *e.g.*, Lunn Dep. 119:6-120:3; Zeleznik Dep. 35:21-38:13; Aulds Dep. 107:18-21, 130:21-131:11.

[386] LTB1 Dep. 32:8-34:15.

[387] Pl. Ex. 19.

(continued...)

341. As early as March 2011, Shepard was put on notice by the tax return preparer for RaPower-3 customer Kevin Gregg that she was "coming up empty handed with doing the business credit when there actually is no business."[388] Shepard told her that "Kevin has chosen not to work very hard at his business, but the IRS does not require hard work or even smart work. Kevin is still entitled to depreciate his systems."[389]

342. Over the years, other tax professionals have questioned the validity of different aspects of the solar energy scheme.[390]

343. Shepard keeps customers updated about what Johnson's entities are doing with their lenses (if anything). Shepard described this very process when he wrote to customers in June 2014[391]:

From: Greg Shepard <greg@rapower3.com>
Sent: Friday, June 20, 2014 8:32 PM
To: undisclosed-recipients
Subject: Ra3 Construction Update
Attach: 016.JPG; 017.JPG

TO ALL: A big RaPower3 Welcome to all our new members.

PHOTOS #16 & 17 Installation: These two canvas buildings will add 20,000 square feet of construction space at the Delta, Utah project site. Twenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014.

QUESTIONS AND ANSWERS:

. . .

Q: Also, how do I as an owner know what my product is doing?
A: Through my e-mails and rapower3.com website. Your lenses are being used right now by virtue of your Bonus Contract. It is our goal to have your lenses operating in a tower before summer is over.

[388] Pl. Ex. 346 at 1; *see also Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *3-5 (Or. T.C. Nov. 30, 2017).

[389] Pl. Ex. 346 at 1.

[390] *E.g.*, Pl. Ex. 150; T. 1124:24-1127:7; Pl. Ex. 477; Shepard Dep. 235:20-239:14.

[391] Pl. Ex. 420.

(continued...)

344. Johnson knows that solar lens customers do not contact LTB for any reason.[392]

345. They do not inquire into LTB's experience operating and maintaining solar energy equipment, either before or after they sign the O&M to "lease out" their lenses to LTB.[393]

346. For example, in early 2014, one long-time RaPower-3 customer wrote to Shepard asking whether LTB has "a website, e-mail, contact #, or all of the above . . . ? I was unable to find anything online."[394]

347. This customer, who was being audited by the IRS for having claimed the tax benefits Defendants promote, noted that none of this information is in his O&M, and "[w]hen you google the company name and address there is zero information about the company."[395]

348. This customer told Shepard "I just want to be able to provide contact information for LTB if asked about it. . . . I fear it would be a big red flag if I cannot provide any contact information about the company who is supposed to be paying my rental fees." [396]

5. Defendants knew, or had reason to know, that their customers do not have special expertise or prior experience in the solar lens leasing business.

349. Johnson wanted to allow "everyday people" to "take advantage of all the generous tax benefits" of "not just receiving solar tax credits, but also getting the depreciation benefit" from buying solar lenses through RaPower-3.[397]

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[392] LTB1 Dep. 75:15-77:14.

[393] LTB1 Dep. 75:15-77:14; *e.g.*, Lunn Dep. 103:16-104:6; T. 1072:21-1074:4, 999:18-1000:24; Zeleznik Dep. 93:18-96:3.

[394] Pl. Ex. 77 at 1.

[395] Pl. Ex. 77 at 1-2.

[396] Pl. Ex. 77 at 1-2; Shepard Dep. 250:13-251:3; Pl. Ex. 72; *see also* Halverson Dep. 61:13-65:14; Pl. Ex. 189 at 1-3 (In 2011, a customer's accountant wrote to Shepard asking what, if anything, was happening with the customer's 2009 lens "purchase.")

[397] Pl. Ex. 8A at 7.

(continued...)

350. Defendants knew that they sold solar lenses to individuals who generally work full-time jobs, like teachers, school administrators, coaches, and others.[398]

351. They knew, or had reason to know, that their customers do not have special expertise in the solar energy industry.[399]

6. Defendants knew, or had reason to know, that advice from independent professionals did not support their claims about tax benefits.

352. In August 2009, Shepard consulted Ken Oveson, a CPA at Mantyla McReynolds.[400] He told Oveson that IAS had a system that could generate solar power.[401]

353. Shepard gave Oveson a basic overview of the transaction structure: that IAS and he wanted to promote a program where they would sell lenses to people for $3,500 total, with a partial down payment and the remaining payments financed with a note.[402] The purchasers would then make money off of the sale of electricity that was generated using their lenses, according to Shepard.[403]

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[398] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12 (showing purported tax benefits of solar lens purchase for a "typical teaching couple."); Pl. Ex. 674 (touting "TAX TIME SUCCESS STORIES" from RaPower-3 customers with school-based jobs). Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1 (noting that RaPower-3 program allows "'Average Joes' like you and I" to qualify for solar energy tax credits; using as an example RaPower-3 customer a husband and wife who are a teacher and a nurse, respectively); Pl. Ex. 216 (noting a "teacher from the Midwest" who is a customer); Pl. Ex. 109 at 1 ("Sadly, right now most of the $6 Million is going to businesses rather than to teachers and coaches . . . ."); Pl. Ex. 214 ("The average dual income household, that pays taxes, forks over $5,000 each year to the IRS. Enrolling into RaPower[-] could reduce your federal income tax burden to ZERO!"); Pl. Ex. 544; Johnson Dep., vol. 1, 96:19-97:13; Zeleznik Dep. 9:10-13:5, 14:13-22, 24:9-28:21, 29:4-30:12; Gregg Dep. 22:10-33:24; T. 1066:4-1069:22, 978:2-979:24.

[399] *See* Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12; Pl. Ex. 674 (touting "TAX TIME SUCCESS STORIES" from RaPower-3 customers with school-based jobs). *See* Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1; Zeleznik Dep. 9:10-13:5, 14:13-22, 24:9-28:21, 29:4-30:12; Gregg Dep. 22:10-33:24; T. 1066:4-1069:22, 978:2-979:24.

[400] T. 328:24-330:9; Pl. Exs. 372-374.

[401] T. 336:7-11.

[402] T. 337:5-340:19.

[403] T. 339:9-340:19.

(continued...)

354. Shepard wanted an opinion from Oveson on whether a customer could claim a depreciation deduction and solar energy tax credit.[404] Among the specific topics Shepard wanted to know were whether solar lenses could be considered "placed in service" and how customers could meet "material participation" standards.[405] It was Oveson's understanding that Shepard was going to use the Mantyla McReynolds' tax opinion letter to market the solar energy program.[406]

355. In 2009, Shepard told Oveson that the company was producing solar energy, that they would be selling the solar lenses to investors, and that these investors were counting on receiving the energy credit, and that they would also be taking depreciation deductions since they own the equipment.[407]

356. Shepard told Oveson that '[h]aving our solar property 'placed in service' with absolutely no gray areas is fundamental to our selling units for our solar project west of Delta."[408] Shepard also told Oveson that IAS "has sent every client a letter stating the units have been placed in service. The IRS guidelines on that are easy to meet. The [IAS] units have done that."[409]

357. In researching and preparing the letter that Shepard wanted, Oveson became concerned about the developmental stage of the company. Oveson testified he told Shepard that, in order for customers to take both depreciation and the energy credit, the lenses had to be placed

[404] T. 330:17-331:16.

[405] Pl. Exs. 372 at 1, 373 at 1-2, 374 at 2; T. 344:7-346:19, 358:9-361:3 .

[406] T. 331:11-23.

[407] T. 334:3-15, 336:7-20.

[408] Pl. Ex. 373 at 1.

[409] Pl. Ex. 372 at 1.

(continued...)

in service. Since the company was a developmental company and it was not operating, the lenses could not be placed in service yet.[410]

358. Oveson's "biggest concern was that the placed in service issue, that we didn't feel that the equipment was placed in service" because the lenses did not have the ability to perform or function to create electricity. "[A]nd therefore [the lenses] wouldn't qualify for the credit or the depreciation."[411]

359. Oveson told Shepard his opinions: that the lenses were not placed in service and therefore would not qualify for a depreciation deduction or the solar energy tax credit for purchasers.[412]

360. Oveson's colleagues at Mantyla McReynolds, led by Cody Buck, were auditing IAS's financial statements around the same time.[413] The audit revealed the lenses were not placed in service for financial auditing purposes because they were not connected within a system that was generating electricity and therefore revenue.[414] Therefore, customers' lens down payments could not be booked as current income for IAS and had to be deferred until the lenses were placed in service.[415] The down payments were liabilities for IAS because customers could demand refunds of their down payments if the lenses did not produce revenue.[416] According to Buck, the financial statements he received from IAS from its prior CPA showed deferred

[410] T. 343:1-344:10.

[411] T. 343:21-344:10.

[412] T. 350:22-354:7; Pl. Ex. 372.

[413] T. 242:14-243:1.

[414] T. 268:3-270:12.

[415] T. 255:3-256:2, 257:7-258:1.

[416] T. 259:14-261:9.

(continued...)

revenue for customer deposits, and therefore an understanding that the lenses were not yet placed in service.[417]

361. Because "[t]here must be consistency between the books of [IAS] and the taxpayer," if IAS's books did not recognize the lenses as placed in service, Oveson told Shepard that the taxpayers could not either.[418]

362. Shepard had told customers that Oveson would be available to explain the purported tax benefits of buying lenses on a conference call.[419] Shepard misrepresented the information generally, and his personal relationship with Oveson to lens customers.[420] Via email Shepard stated "I met with my CPA today…I have retained him and his firm…"[421] Oveson testified that he was not Shepard's personal CPA.[422]

363. When Oveson reported his conclusion that the lenses were not placed in service (which is a "key factor in taking deductions for depreciation and credits"[423]), Shepard said that they would find another CPA to give him the opinion he was looking for.[424]

364. Within a week of first meeting with Shepard, Oveson had withdrawn the engagement.[425]

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[417] T. 255:25-262:9.

[418] Pl. Ex. 372 at 1.

[419] Pl. Ex. 136 at 2-3; T. 366:1-18.

[420] *See* Pl. Ex. 136 at 2-3; T. 363:4-364:5.

[421] Pl. Ex. 163.

[422] T. 363:4-364:5.

[423] Pl. Ex. 372 at 1.

[424] T. 358:9-359:21; Pl. Ex. 373 at 1.

[425] T. 364:19-365:8.

(continued...)

365. As of October 2010, Shepard wrote to Johnson with his concern that certain aspects of the solar energy scheme were "problematic" under the internal revenue laws, including the fact that lenses "are purchased and then rented back."[426] Shepard stated that an opinion from Johnson's attorney on "the seven criteria for determining active participation would be essential."[427]

366. Around the same time, Johnson approached Todd Anderson, of the Anderson Law Center, with some questions about principles of tax law.[428] Todd Anderson referred the questions to his wife and partner in the Anderson Law Center, Jessica Anderson.[429]

367. Johnson gave Jessica Anderson only limited information about the factual context for the questions he had about tax law.[430] She relied on the information Johnson provided.[431]

368. Jessica Anderson researched the law applicable to general tax principles and summarized it.[432] She delivered a letter to Johnson in or about October 2010 with her summary of the three general principles of tax law he had asked about, including "material participation," which goes to whether a customer's activity in a trade or business is substantial enough such that business deductions may be claimed against other active income or must be claimed against passive income and the requirements to claim depreciation.[433]

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[426] Pl. Ex. 574.

[427] Pl. Ex. 574.

[428] T. 490:24-491:6; Pl. Ex. 570; T. 573:10-14.

[429] T. 500:17-501:3.

[430] T. 573:2-25.

[431] T. 573:15-576:5.

[432] *E.g.*, T. 498:14-23; 580:1-10;; Pl. Ex. 570; Pl. Ex. 23.

[433] Pl. Ex. 570; T. 578:4-22; 580:21-581:5; 589:2-598:12.

(continued...)

369. Citing 26 U.S.C. § 469(c)(2) & (4), the October 2010 letter stated that "losses generated from equipment leasing are considered to be passive," and that "material participation" standards do not apply to equipment leasing.[434] The letter noted exceptions to these rules, but expressly did not opine that any exception would apply to the limited facts stated in the letter.[435]

370. Further, the letter stated that, even if material participation standards did apply, "[i]nvestor-type activities do not count [toward material participation] unless the taxpayer is directly involved in day-to-day management or operations."[436] The "investor-type activities" that do not count include[437]:

- Studying or reviewing financial statements or reports.
- Preparing or compiling summaries of analyses for the individual's own use.
- Monitoring finances or operations in a non-managerial capacity.
- (This list is not all inclusive. Other activities could include organizing records, preparing taxes, and paying bills.)

371. Jessica Anderson also noted it is unlikely that a taxpayer will have "materially participated" in an activity if (among other things)[438]:

[434] Pl. Ex. 570 at 2.

[435] Pl. Ex. 570 at 2-4.

[436] Pl. Ex. 570 at 5 (citing 26 C.F.R. § 1.469-5T(f)(2)(ii)(B)).

[437] Pl. Ex. 570 at 5.

[438] Pl. Ex. 570 at 6.

- The taxpayer was not compensated for services. Most individuals do not work significant hours without expecting wages or commissions.
- The taxpayer's residence is hundreds of miles from the activity.
- The taxpayer has a W-2 job requiring 40+ hours a week for which he or she receives significant compensation.
- The taxpayer has numerous other investments, rentals, business activities, or hobbies that absorb significant amounts of time.
- There is a paid on-site management/foreman/supervisor and/or employees who provide day-to-day oversight and care of the operations.
- The taxpayer is elderly or has health issues
- The majority of the hours claimed are for work that does not materially impact operations.
- Business operations would continue uninterrupted if the taxpayer did not perform the services claimed.

372. Johnson was unhappy with the October 2010 letter.[439] He thought the letter was too technical and wanted something more akin to marketing materials.[440] He also wanted energy credits to be included.[441]

373. Jessica Anderson and Todd Anderson revised the October 2010 letter in an attempt to address Johnson's concerns.[442] In November 2010, they gave Johnson their revisions in a working draft.[443] Jessica Anderson and Johnson were going to review it together.[444]

374. The October 2010 letter and the November 2010 draft provide a general summary of what the law is.[445] They do not include specific facts about the transactions, purported energy

[439] T. 599:10-600:19.

[440] T. 601:2-14.

[441] T. 601:21-602:3.

[442] T. 602:11-603:7.

[443] Pl. Ex. 23A; T. 611:3-611:21; Pl. Ex. 23; T.603:19-604:10, 511:8-514:19.

[444] T. 604:4-10.

[445] Pl. Exs. 570 & 23.

(continued...)

property, or people or entities at issue in the solar energy scheme.[446] Neither the October 2010 letter nor the November 2010 draft state that purchasers of solar lenses are in a "trade or business" with respect to the solar lenses or are holding the lenses to generate income, or that any person who purchases solar lenses through RaPower-3 may lawfully claim the tax benefits Defendants promote.[447]

375. Only *after* Johnson received the November 2010 draft did he give the Andersons specific facts of the transactions he proposed for RaPower-3 customers.[448] Johnson wanted an opinion letter saying that, on the facts he provided, RaPower-3 customers could claim a depreciation deduction and solar energy tax credit on the energy equipment.[449] He wanted the opinion letter to say that the lenses were placed in serviced immediately upon purchasing as opposed to when a lens started actually producing energy.[450]

376. Johnson was trying to find a way to generate tax benefits (a depreciation deduction and a solar energy tax credit) for lens purchasers before his purported solar energy equipment ever produced energy.[451] Johnson admitted that customers would not be running a solar energy power plant and would not be involved in the day-to-day operations of running the energy equipment.[452]

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[446] Pl. Exs. 570 & 23.

[447] *See generally* Pl. Ex. 570 at 6-7 (To be depreciable, property "must be used in your business or income-producing activity."); Pl. Ex. 23 at 2 ("To be depreciable, the property must meet all of the following requirements: . . . it must be used in your business or income-producing activity . . . .").

[448] T. 608:22-609:12, 612:11-625:25.

[449] T. 612:11-613:1.

[450] T. 620:11-17.

[451] T. 613:12-614:6, 617:8-620:17, 621:7-625:11 .

[452] T. 583:14-584:2, 618:22-619:25.

(continued...)

377. When Jessica Anderson questioned Johnson about how customers would materially participate in their business, none of Johnson's answers led her to conclude that there would be active participation by any customer. Johnson believed that RaPower-3 customers would actively participate in an energy production business, and thus be entitled to tax benefits, by being a member of the multi-level marketing structure, and their participation would be in selling more equipment to others.[453]

378. After taking the information Johnson provided and performed research, Jessica Anderson could not find any information that would indicate that the tax benefits would be applicable to RaPower-3 customers immediately upon purchase of the equipment.[454]

379. Johnson came into Anderson Law Center, and Jessica Anderson expressed her concerns about the energy credits, specifically (1) customers couldn't take energy credit for equipment that was not producing energy, (2) just by taking energy equipment and using it as a billboard wasn't placing it in service, and (3) selling energy equipment didn't qualify as active participation in an energy producing business.[455]

380. When Jessica Anderson told Johnson she was not sure that the energy equipment would qualify for the energy credit, Johnson brushed it off and they didn't talk about it again.[456]

[453] T. 618:10-619:25.

[454] T. 621:25-622:18.

[455] T. 622:19-623:20.

[456] T. 623:21-624:1.

(continued...)

381. Jessica Anderson believed that equipment leasing under the IRS laws qualified as passive and told Johnson that she did not believe sales activity qualified as active participation in running an energy production business.[457]

382. Johnson remained confident that his ideas were going to fit within the parameters of the tax code and asked Jessica Anderson to go back and look at it again.[458]

383. Jessica Anderson and Todd Anderson discussed the issue and decided that their opinion remained the same, that "these principles" did not immediately apply to a RaPower-3 customer.[459]

384. Over the next several weeks, Johnson returned to the Anderson Law Center to propose different hypotheticals to change Jessica Anderson's opinion that the tax principles would apply to RaPower-3 customers.[460]

385. Jessica Anderson communicated to Johnson that these new hypotheticals did not change her opinion and a purchaser of energy equipment from RaPower-3 would not meet the active participation requirement.[461]

386. Jessica Anderson ultimately decided that she could not reach the conclusions that Johnson wanted her to reach regarding the tax principles as it applied to RaPower-3 customers.[462]

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[457] T. 624:14-625:4.

[458] T. 625:5-11.

[459] T. 626:3-9.

[460] T. 626:10-627:6.

[461] T. 627:7-21.

[462] T. 627:7-628:3.

(continued...)

387. In January 2011, Jessica Anderson told Johnson that she could not reach the conclusions she wanted him to and he would need to find another attorney.[463]

388. Via email, Jessica Anderson wrote Johnson and reiterated that she did not believe customers who purchased solar equipment and then turned over the operation of the equipment to generate power to a third party would be considered active participants in a business. Also, in this email Jessica Anderson informed Johnson that he would need to find a new attorney.[464]

389. In fall 2012, Johnson retained Kirton McConkie, through its partner Kenneth Birrell, on behalf of his entity or entities XSun Energy, SOLCO I, and/or International Automated Systems, Inc.[465]

390. Birrell provided SOLCO I and Johnson with a memorandum containing a general overview of the tax benefits associated with the solar business that was described.[466] It summarizes "certain tax consequences for the buyers . . . of solar lenses from SOLCO I, LLC . . . based on factual circumstances that are substantially similar in all material respects" to the facts set forth in the memorandum.[467]

391. Among the facts stated or assumed in the memorandum is that the solar lens buyer is an entity taxed as a C corporation.[468] The memorandum does not address a solar lens buyer

[463] T. 629:12-630:23.

[464] T. 629:12-632:15; Pl. Ex. 582.

[465] T. 406:8-18, 407:14-18, 408:5-22, 412:8-23; Pl. Ex. 364 at 2; Pl. Exs. 355, 358, 370.

[466] Pl. Ex. 363 at 33-45; T. 412:10-23, 423:4-22.

[467] Pl. Ex. 363 at 33 ("Introduction").

[468] Pl. Ex. 363 at 33 ("Factual Background"); T. 422:25-424:7; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1 ("Please note that this analysis is limited to C corporations – there would be different issues for an individual, partnership or S corporation purchaser.").

(continued...)

that is an individual or a pass-through entity like a partnership or an S corporation.[469] The memorandum does not address whether an individual (or owner of a pass-through entity) could be considered to be in a "trade or business" or holding the lenses to generate income.[470]

392. The memorandum also assumes that the purported solar energy technology actually works as a system to generate electricity from solar radiation.[471] Birrell relied on the representation that the technology had been approved for a § 1603 grant.[472] If Birrell had known that there was no system that would work using the lenses to convert solar radiation to any sort of energy, he would not have written the memorandum because the lenses would not be eligible for the solar energy tax credit.[473]

393. Another assumption in the memorandum is that any lens purchase and lease arrangement would be executed using the transaction documents that Birrell prepared.[474]

394. Johnson knew these features of the memorandum. Birrell reminded him that the memorandum applies only to C corporations.[475]

395. RaPower-3 put the Kirton McConkie memo on its website and has used the memo to market solar lenses, not just to C corporations, but to individuals as well.[476]

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[469] Pl. Ex. 363 at 33, 45; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1; T. 422:25-424:7.

[470] *See generally* Pl. Ex. 363 at 33-45; Pl. Ex. 370 at 1-2; T. 422:25-424:7.

[471] Pl. Ex. 363 at 33-34, 37; T. 429:12-25, 440:6-18, 713:16-715:2.

[472] T. 420:24-25.

[473] T. 429:12-25, 440:6-18, 713:16-715:2.

[474] Pl. Ex. 363 at 33-34.

[475] Pl. Ex. 364.

[476] T. 454:6-8.

(continued...)

396. Shepard received both the Anderson November 2010 draft and the Kirton McConkie memorandum from Johnson.[477]

397. In or around July 2013, the Andersons learned that Johnson was using their November 2010 draft to encourage people to buy solar lenses, and take a depreciation deduction and solar energy tax credit on their tax returns.[478] The Andersons retained an attorney to send a cease-and-desist letter to Johnson and RaPower-3, stating that the November 2010 draft was "only in the 'rough draft' stage and was intended to solicit additional information" and was not a final product.[479]

398. Similarly, Birrell learned that the Kirton McConkie memorandum was on the RaPower-3 website.[480] On or about January 10, 2014, Birrell sent a cease-and-desist letter to Johnson.[481] Birrell told Johnson that: 1) the memorandum is a general summary of tax principles regarding an energy tax credit and is not an opinion letter; 2) the memorandum is written with the assumption that the taxpayer claiming the credit is "taxed as a subchapter C corporation[] for federal income tax purposes," and is not an individual or subchapter S corporation; and 3) the analysis in the memorandum is only valid if the solar lens transactions are completed on the terms and conditions of the transaction documents Birrell drafted and attached to the memorandum.[482]

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[477] Shepard Dep. 280:24-281:18; RaPower-3 Dep. 172:24-173:5.

[478] T. 5336-9 ; *see also* Aulds Dep. 157:1-8; Pl. Ex. 399.

[479] Pl. Ex. 480 at 1; T. 533:6-536:21 .

[480] T. 454:4-457:15.

[481] Pl. Ex. 370; T. 460:4-10; Pl. Ex. 579, Johnson Dep., vol. 1, 277:18-279:3.

[482] Pl. Ex. 370 at 1-2; *accord* Pl. Ex. 363 at 34-45 (general principles described), 33 (purchaser taxed as C corporation), 33-34 and 2-32 (transactions completed per transaction documents supplied).

(continued...)

399. Shepard learned, soon after the Kirton McConkie memorandum was issued, that Birrell said that the memorandum could not be used to support the solar energy scheme.[483] Yet Shepard expressly told customers that Shepard "believe[d] that the vast majority, if not all, of the references and information contained therein also applies to sole proprietor."[484]

400. Shepard continuously misled and made false statements to RaPower customers about these writings. Plaintiff's Exhibit 231 is an example of how Shepard disseminated false information to customers regarding tax benefits. Shepard attempted to summarize the Kirton McConkie memorandum and in doing so altered a major fact. Although the analysis in the memorandum applies only to C corporations, Shepard's summary asserts that the memorandum also applies to LLCs and sole proprietors:

> **Shepard's Note:** The Kirton-McConkie Memorandum was written specifically for corporations or limited liability companies. While some RaPower3 Team Members have purchased their Solar Lenses as an LLC, most have purchased as a sole proprietor. However, Shepard believes that the vast majority, if not all, of the references and information contained therein also applies to sole proprietors

401. Shepard also summarizes the memorandum and titles his summary "Kirton-McConkie Memorandum Comments." Birrell did not write these comments nor did he review Shepard's comments. This is confusing to RaPower-3 customers.[485]

402. Shepard told RaPower-3 customers that he wrote Birrell "a detailed letter about the situation and asked [him] to write a letter of clarification." Birrell testified that he did not

[483] Shepard Dep. 276:8-22; Pl. Ex. 231.

[484] Pl. Ex. 479 at 3; *see also generally id.* at 1-4; Shepard Dep. 270:7-271:4, 279:10-280:21.

[485] Pl. Ex. 231.

(continued...)

receive any letter from Shepard; he never wrote a clarification letter; and he never talked to Shepard after his one visit to Kirton McConkie.[486]

403. Shepard also falsely told RaPower-3 customers that Kirton McConkie could not rescind the memorandum.

404. The Andersons' November 2010 draft and the Kirton McConkie memorandum remained on RaPower-3's website until this Court ordered them to remove it – even after Defendants heard the Andersons and Birrell testify to the reasons the writings could not be used as Defendants were using them.[487]

405. Defendants had reason to know, and did in fact know that RaPower-3 customers were not entitled to the tax benefits they promoted based on their serial solicitations and rejections from multiple attorneys, and the misrepresentations to RaPower-3 customers regarding who they met with and the attorneys' work product. Therefore, Defendants knew that their statements made to RaPower-3 customers were false or fraudulent.

406. Furthermore, based on the testimony presented, Johnson did not meet with any engineers regarding the scheme. But he consulted with tax professionals and attorneys regarding the tax issues. This shows that this is not a bona fide energy activity, but a tax scheme.

7. Defendants knew, or had reason to know, that the IRS disallowed their customers' depreciation deductions and solar energy tax credits.

407. The IRS began investigating Defendants' conduct in June 2012.[488]

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[486] Pl. Ex. 231; T. 468:7-469:25.

[487] Pl. Ex. 903 at 2 ("Tax Opinion (Anderson)" and "Tax Letter (K&M)"); *see also* RaPower-3 Dep. 125:2-129:6; T. 537:8-540:8; Pl. Ex. 548; T. 454:4-457:25; Pl. Exs. 27, 351.

[488] *See* Pl. Ex. 10 at 2; Shepard Dep. 311:2-313:2.

(continued...)

408. Defendants knew, at least as of June 2013, that the IRS was auditing their customers and disallowing the tax benefits Defendants promoted.[489]

409. Defendants knew, as of November 2014, that IRS investigators had contacted tax return preparers who had prepared returns for Defendants' customers and claimed the tax benefits Defendants promoted.[490]

8. Defendants knew, or had reason to know, that the Oregon Tax Court rejected their customers' depreciation deductions and solar energy tax credits.

410. Defendants knew, as early as 2013, that the State of Oregon disallowed tax benefits their customers claimed on their state tax returns.[491]

411. To date, there have been three decisions issued by the Oregon Tax Court, Magistrate Division, which disallowed the tax benefits Defendants promote. The first decision came out in October 2014.[492]

412. These three decisions follow federal law in evaluating the allowability of the customers' claimed depreciation deduction and solar energy tax credit because Oregon state tax law is intended to be "identical in effect to the [internal revenue code] for the purpose of determining [Oregon state] taxable income of individuals."[493]

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[489] *E.g.*, Pl. Ex. 328; Gregg Dep. 141:20-142:7; Pl. Exs. 71 & 73; Zeleznik Dep. 165:13-166:10, 167:3-21; Pl. Ex. 602; Howell Dep. 216:16-217:15.

[490] Pl. Ex. 606; Howell Dep. 226:11-227:23; *see also* Pl. Ex. 642;.

[491] T. 1275:2-18; ; Pl. Ex. 279; Gregg Dep. 147:5-148:10, 149:1-7, Pl. Exs. 330-33.

[492] *Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *10 (Or. T.C. Nov. 30, 2017); *Orth v. Dep't of Revenue*, No. TC-MD 160075R, 2017 WL 5904611, at *10 (Or. T.C. Nov. 30, 2017); *Peter Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014). Former counsel for Defendants, Justin Heideman, represented the taxpayers in the two most recent cases. *K. Gregg*, 2017 WL 5900999, at *1; *Orth*, 2017 WL 5904611, at *1.

[493] *K. Gregg*, 2017 WL 5900999, at *2 (citing ORS § 316.007); *P. Gregg*, 2014 WL 5112762, at *4 (same).

(continued...)

413. All three cases concluded, based on the customers' conduct and a comprehensive analysis of the relevant provisions of the internal revenue code, that the customers did not have a trade or business involving the solar lenses.[494]

414. All three cases disallowed all tax benefits related to the solar lenses.[495]

D. In connection with organizing or selling any interest in a plan or arrangement, Defendants made or furnished (or caused another person to make or furnish) gross valuation overstatements as to the value of the solar lenses.

415. Defendants currently sell a single solar lens for a total purported price of $3,500.

416. But the record evidence showed that Plaskolite charged IAS between $52 and $70 dollars for a rectangular sheet of plastic.[496]

417. Assuming each rectangle could be cut into a single triangular "lens," the raw cost of that "lens" is very low.

418. There is no other credible evidence about other possible costs of a "lens."

419. The correct valuation of any "lens" is close to its raw cost, and does not exceed $100.

E. The harm caused by Defendants' conduct is extensive.

420. Defendants' customers followed the solar energy scheme and claimed depreciation deductions and solar energy credits on their tax returns.

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[494] *K. Gregg*, 2017 WL 5900999, at *5; *Orth*, 2017 WL 5904611, at *5; *P. Gregg*, 2014 WL 5112762, at *4.

[495] *K. Gregg*, 2017 WL 5900999, at *10; *Orth*, 2017 WL 5904611, at *10; *P. Gregg*, 2014 WL 5112762, at *6.

[496] Pl. Ex. 518, 519, 520.

(continued...)

421. The United States was able to identify and collect information about certain of Defendants' customers' tax returns for tax years 2013-2016. [497] Over 1,600 tax returns from 9 preparers were examined.[498]

422. A reasonable approximation of the harm to the Treasury, from depreciation and tax credits claimed, from this sample is at least $14,207,517.[499]

423. Critically, these numbers do not include the still-unknown harm to the Treasury from Defendants' misconduct.

424. It does not include tax returns for tax years 2008 through 2012, when customers bought lenses and claimed unwarranted tax benefits as a result.

425. It does not include tax returns for tax year 2017, although Defendants sold lenses in 2017 and it is reasonable to conclude that the people who "bought" lenses in 2017 claimed the tax benefits Defendants' promoted for tax year 2017.

426. The United States' numbers also do not include, for example, customers' tax returns that claimed the tax benefits Defendants promoted throughout the solar energy scheme, but which the IRS has not yet identified.[500]

427. Defendants' conduct wrongfully deprived the U.S. Treasury of the taxes Defendants' customers lawfully owed.

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[497] Pl. Ex. 752; T. 825:1-826:3;; *see also*, *e.g.*, Howell Dep. 186:3-190:23, 193:22-194:10, 194:19-200:20; Pl. Exs. 598-99; T. 1221:17-25; Pl. Exs. 128-32, 316-17, 636; T. 1137:5-18; Zeleznik Dep. 152:10-15, 152:22-159:5; Pl. Exs. 63-68; Gregg Dep. 102:7-103:25, 104:24-105:4, 105:15-106:2, 112:7-124:9; Pl. Exs. 308, 314-17

[498] Pl. Ex. 752at 1, T. 825:13-15; 829:8-830:17.

[499] Pl. Ex. 752 at 3; T. 833:22-833:25.

[500] Penn Dep. 38:10-43:21; Pl. Ex. 391 at 33; Aulds Dep. 154:22-155:16 & 158:17-; *compare* Pl. Exs. 397, 400, 401 (which have no connection to RaPower-3 on the face of the return) *with* Pl. Ex. 402 at 19 (with connection to RaPower-3 on the face of the return); Howell Dep. 199:7-200:10; *see* T. 1228:18-1229:14, 1247:17-1248:4.

III. Conclusions of Law

One of the statutes under which the United States seeks an injunction is 26 U.S.C. § 7408. Section 7408(a) authorizes a district court to enjoin any person from engaging in conduct subject to penalty under 26 U.S.C. § 6700 if injunctive relief is appropriate to prevent recurrence of that conduct or any other activity subject to penalty under the Internal Revenue Code.[501] Section 6700 is meant to attack abusive tax shelters "at their source: the organizer and salesman."[502] It creates a penalty for a person who 1) organizes or sells any plan or arrangement involving taxes and 2) makes or furnishes, or causes another to make or furnish, a statement connecting the allowability of a tax benefit with participating in the plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter.[503]

A. Defendants organized, or assisted in organizing, the solar energy scheme, and sold solar lenses pursuant to the scheme.

"[A]ny 'plan or arrangement' having some connection to taxes" is a "plan" under § 6700.[504] The solar energy scheme is a "plan" under § 6700 because the key component of the scheme was its promoted connection to the federal tax benefits of a depreciation deduction and a solar energy tax credit.

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[501] 26 U.S.C. § 7408(b).

[502] S. Rep. No. 97-494,Vol. 1 at 266 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1014.

[503] 26 U.S.C. § 6700(a)(2)(A).

[504] *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, 1107-08 (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. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

(continued...)

All Defendants organized, or assisted in organizing the scheme, and sold the scheme to customers either directly or through other people.[505] Johnson created the solar energy scheme and organized other people, including Shepard and Freeborn, to sell lenses pursuant to the scheme. Johnson directed IAS, and now, RaPower-3, to market the lenses in ways that would maximize sales. Johnson also established the contracts and infrastructure through which customers buy lenses. In an effort to increase sales, Johnson has spoken to countless customers and prospective customers about his purported solar energy technology and the tax benefits he promotes, including on radio broadcasts twice per month since March 2017. Johnson directed both IAS and RaPower-3 to pay commissions to people who sell solar lenses. He also gave Shepard and Freeborn information about the purported technology, the transactions underlying the solar energy scheme, and the purported tax benefits to publicize and, thereby, increase sales of solar lenses. Johnson is paying for customers' representation in Tax Court, and Shepard's and Freeborn's representation in this case.

Shepard takes all Johnson's information about the solar energy scheme, adds his own observations, and then spreads the scheme as widely as he can, especially through the internet and social media. Shepard has created and managed a website, newsletter, and email distribution list solely devoted to selling solar lenses through RaPower-3; supported and encouraged RaPower-3 "distributors" to increase their downline sales; convened and hosted events like the 2012 RaPower-3 National Convention and other tours of Defendants' facilities. When distributors or other customers have questions, they look to Shepard (as "Chief Director of Operations for RaPower-3") to answer them, or to get the answer from Johnson. Shepard also

[505] *See* § 6700(a); *Stover*, 650 F.3d at 1107-08; *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1104 (9th Cir. 2000); *United Energy Corp.*, 187 WL 4787, at *8-9.

provides arguments and materials for customers to submit to the IRS that mirror Defendants' promotional materials.

Freeborn was a prolific salesman for RaPower-3. As the self-titled "National Director for RaPower-3," he took information from Johnson and Shepard about the purported technology, the transactions, and the purportedly related tax benefits, and presented it to people in-person or by phone or email. His work resulted in more than $300,000 in commissions; it follows from IAS's and RaPower-3's commission structure, that either Freeborn or those in his downline have generated well over $3 million in actual revenue to IAS or RaPower-3.

B. While promoting the solar energy scheme, Defendants made or furnished (or caused others to make or furnish) statements about the allowability of a depreciation deduction and a solar energy tax credit as a result of buying solar lenses, which statements Defendants knew or had reason to know were false or fraudulent.

Defendants told customers they could claim a tax deduction for depreciation on the lens and the solar energy tax credit on their individual income tax returns if they purchased a lens. Defendants constantly made statements to customers, over years and years, in support of these assertions while promoting the solar energy scheme. Defendants' statements were false or fraudulent as to material matters, and Defendants knew or had reason to know it.

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."[506] "Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor

[506] *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, at *9.

(continued...)

and include matters relevant to the availability of a tax benefit."[507] "There is no matter more material to the sale of a tax avoidance package than whether the package effectively allows customers to avoid taxes."[508]

A statement about a material matter is false in the tax law context if "untrue and known to be untrue when made."[509] A statement about a material matter can also be false because of what a plan promoter fails to say.[510] Promoters are charged with knowledge of the law governing the tax benefits they promote.[511] A promoter who does not tell customers all of the requirements

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[507] *Campbell*, 897 F.2d at 1320; *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985).

[508] *Benson*, 561 F.3d at 724; see *Stover*, 650 F.3d at 1111 (affirming district court's finding that a promoter's promises of numerous tax advantages induced customers to purchase his tax arrangements).

[509] *Stover*, 650 F.3d at 1108.

[510] 26 U.S.C. § 7408(c) (conduct subject to injunction is "any action, *or failure to take action*" which is subject to certain penalty provisions or the regulations governing practice before the IRS (emphasis added)); *Stover*, 650 F.3d at 1109 (8th Cir. 2011) ("Stover's statements regarding all three schemes were also false because of what he failed to convey: that deductions taken under 26 U.S.C. § 162(a) must be 'ordinary and necessary' for the deducting business. The district court found that Stover 'advised his clients to set up these entities in order to save taxes without also advising them of the potential pitfalls and the actions necessary to guard against the obvious conclusion that the transaction was a sham and bore no relation to reality.' . . . [C]ourts have repeatedly held that a tax promoter's failure to advise his clients of the requirements for a proper deduction qualifies as a false statement."); *United States v. Gleason*, 432 F.3d 678, 682-683 (6th Cir. 2005) (affirming district court's finding that a defendant "made false statements about the purported home-based business deductions" that the defendant claimed could be derived from using his abusive tax scheme because the defendant "did not properly qualify his assertions about the deductibility of weddings, college, travel, meals, golf, cars, and everyday household expenses by stating that business expenses must be 'ordinary and necessary' to the business, and that personal consumption expenditures must be 'inextricably linked to the production of income[.]'" (internal citations omitted)); *United States v. Elsass*, 978 F. Supp. 2d 901, 935 (S.D. Ohio 2013) (listing "examples of false statements made by [the defendants], keeping in mind that statements can be false based on what they fail to convey").

[511] *See, e.g.*, *United States v. Campbell*, 704 F. Supp. 715, 725 (N.D. Tex. 1988) ("The Coral program was based on the deduction for research and experimental expenditures allowed by [I.R.C. § 174]. That section permits an electing taxpayer to currently deduct from gross income (rather than to amortize) the amount of expenditures 'paid or incurred' for research and experimental activities. Acquiring a project completed before the date of acquisition would not constitute an expenditure for research and experimentation under Section 174." (citation omitted)); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985) ("Under Section 46(c) of the Code, property must be placed in service in the year for which an investment tax credit is claimed. Music Masters represented to investors that these masters were purchased in 1982 and that the investors could deduct the investment tax credits for that year. These were material false statements, since the availability of credits for the 1982 year would have a substantial impact on a reasonably prudent investor in the investment program." (citations omitted)).

(continued...)

to lawfully claim a deduction or credit has made a false statement.[512] A promoter who does not tell customers all of the facts relevant to whether the customers may lawfully claim a deduction or credit has made a false statement.[513]

A court may conclude that a promoter had *reason to know* his statements are false or fraudulent based on "what a reasonable person in the defendant's subjective position would have discovered."[514] The trier of fact may impute knowledge to a promoter, "so long as it is commensurate with the level of comprehension required by [his] role in the transaction."[515] A person selling a plan "would ordinarily be deemed to have knowledge of the facts revealed in the sales materials furnished to him by the promoter."[516] A person who holds himself out as an authority on a tax topic has reason to know whether his statements about that topic are true or false.[517] "The test for injunctive relief under § 7408 is satisfied if the defendant had reason to know his statements were false or fraudulent, regardless of what he actually knew or believed."[518]

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[512] *E.g.*, *Stover*, 650 F.3d at 1109 ("When Stover's client Donald Clark questioned whether it was a 'legal and standard practice' to create sham management companies solely for tax savings purposes, Stover replied that it was. Stover's statements were false because they untruthfully conveyed that his clients' tax arrangements did not need to have economic substance.").

[513] *United Energy Corp.*, 1987 WL 4787, at *9 (among the false statements that the defendants made were "representations that [solar energy equipment] modules would be installed by the end of the year of purchase and that the solar farms were operational, letters stating that modules were installed and available for service, and statements reflecting payments for power that was never produced. The income projections also constituted false statements, as did, in some instances, the statement that a module existed at all.").

[514] *Campbell*, 897 F.2d at 1321-22 (quotation and alteration omitted); *accord United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

[515] *Campbell*, 897 F.2d at 1322; *Estate Pres. Servs.*, 202 F.3d at 1103; *United States v. Davison*, No. 08-0120-CV-W-GAF, 2010 WL 286419, at *1 (W.D. Mo. Jan. 19, 2010).

[516] *United States v. Harkins*, 355 F. Supp. 2d 1175, 1180 (D. Or. 2004) (quotation omitted).

[517] *United States v. Poseley*, No. CV 06–2335–PHX–EHC, 2008 WL 4811174, at *2 (D. Ariz. Nov. 4, 2008) ("Although the Defendants attempted to disclaim liability as tax or legal experts in their marketing materials, Defendants held themselves out as tax experts to their customers and at promotional seminars. Defendants knew or had reason to know that their tax evasion schemes, including the creation of Pure Trusts, were unlawful and fraudulent." (fact citations omitted)).

[518] *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

Here, Defendants' statements about "material matters" go to the law and facts applicable to 1) whether their customers were in a "trade or business" related to leasing out solar lenses, or were holding the lenses "for the production of income," such that their customers were allowed a depreciation deduction related to the solar lenses and the solar energy credit in § 48; 2) whether, even if their customers were in a "trade or business" or other "activity" with respect to the solar lenses, customers were allowed to deduct expenses against active income and use the solar energy credit to offset tax on active income; and 3) whether Defendants' customers were "at risk" for the full purchase price of each lens.

1. Defendants knew, or had reason to know, that their customers were not allowed a depreciation deduction or the solar energy credit because customers were not in a "trade or business" related to the solar lenses and did not hold the lenses for the production of income.

Under the proper circumstances, the Internal Revenue Code allows a taxpayer engaged in a trade or business certain tax deductions for expenses the taxpayer incurs while generating income, and certain credits against tax liability. At issue here are the business deduction for depreciation and the solar energy credit.

a. Defendants knew, or had reason to know, that their customers were not in a "trade or business" related to the solar lenses and did not buy lenses for the production of income.

The typical first step in the analysis of whether a taxpayer is in a "trade or business" (such that depreciation and/or the solar energy credit may be allowed) is to determine whether the taxpayer has undertaken activity for that purported "trade or business" in good faith, with the primary purpose of the activity to make a profit – or, instead, has bought into an abusive tax scheme designed to create tax losses.[519] Here, the focus is on *Defendants' statements* to their

[519] 26 U.S.C. §§ 162(a), 183, 7701(o)(1)(A) (for a transaction to be recognized for tax purposes, the transaction must "change[] in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position"); *Nickeson*

(continued...)

customers that their customers were in the trade or business of holding out solar lenses for lease, and what Defendants knew or had reason to know about whether those statements were false or fraudulent.

At minimum, Defendants had "reason to know" that their solar energy scheme is an abusive tax scheme rather than a bona fide trade or business for their customers, and that their statements about tax benefits were false or fraudulent. Common red flags that courts have identified as showing an abusive tax scheme include: 1) continued failure of a purported "business" to earn income; 2) control of the purported business remaining with the promoter, rather than the customer; 3) illusory contract documents with little cash outlay by the customer and substantial debt or obligation that the customer is unlikely to pay; and 4) a promoter's heavy emphasis on greatly reducing or eliminating a customer's tax liability by buying in to the plan.[520] Courts have rejected abusive tax schemes with these features.[521] All of these red flags are present here and, for the reasons that follow, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens purchaser was in a "trade or business" with respect to any solar lens.

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v. Comm'r, 962 F.2d 973, 976-77 (10th Cir. 1992). Often, this question is before a court when an individual taxpayer claims to have a "trade or business" and therefore seeks business-related tax deductions and/or credits. *E.g.*, *Sala v. United States*, 613 F.3d 1249 (10th Cir. 2010), *as amended on reh'g in part* (Nov. 19, 2010); *Nickeson*, 962 F.2d at 976-77; *Keeler v. Comm'r*, 243 F.3d 1212, 1218-20 (10th Cir. 2001); *Jackson v. Comm'r*, 966 F.2d 598, 601 (10th Cir. 1992).

[520] *E.g.*, *Nickeson*, 962 F.2d at 976-77; *Music Masters, Ltd.*, 621 F. Supp. at 1049-50.

[521] *See Rose v. Comm'r*, 88 T.C. 386, 413 (1987) (collecting cases), *aff'd* 868 F.2d 851 (6th Cir. 1989), *not followed on other grounds as stated in Bank of New York Mellon Corp. v. Comm'r*, 106 T.C.M. (CCH) 367 (T.C. 2013); *United States v. Philatelic Leasing*, 794 F.2d 781, 782-85 (2d Cir. 1986); *United States v. Petrelli*, 704 F. Supp. 122, 124 (N.D. Ohio 1986) (concluding that defendants violated § 6700 when they "entered into lease agreements with investors who leased master photographs and plates from the defendants. Defendants advised the lessees of the master photographs and plates to claim investment tax credits and deductions for the leased art work and plates allegedly made therefrom, some of which never existed.").

i. **Defendants knew, or had reason to know, that no customer earned or would earn income from buying solar lenses.**

When the activity underlying a tax plan fails to perform as promised, the plan's promoters know, or have reason to know, that the plan is an abusive tax shelter and not a trade or business.[522] For example, in *United States v. United Energy Corporation*, from 1982 through 1984, four defendants "sold 'solar power modules' which, according to advertising literature, would simultaneously produce electricity and thermal energy (hot water) from the sun's rays."[523] None of the modules actually worked as promised, however, and no module purchaser was ever paid by a third party for energy produced by a module.[524] For this and other reasons, the district court concluded that the defendants made false or fraudulent statements in their "representations designed to mislead purchasers into believing that the solar farms were operational, that uses for hot water existed . . . and that their modules could and would be fully installed."[525] These false statements were contributing factors to the defendants' "income projections based upon

[522] *Blum v. Comm'r*, 737 F.3d 1303, 1312 (10th Cir. 2013) ("The probability of earning a profit must be reasonable, not a mere possibility."); *see Sala*, 613 F.3d at 1254 ("The existence of some potential profit is 'insufficient to impute substance into an otherwise sham transaction' where a 'common-sense examination of the evidence as a whole' indicates the transaction lacked economic substance."); *Keeler*, 243 F.3d at 1218 ("While it is true that investors routinely make decisions with an eye to decreasing tax liability, the deliberate incurrence of first-year losses may be an indication that a transaction lacks economic substance."); *Jackson v. Comm'r*, 864 F.2d 1521, 1526 (10th Cir. 1989) ("Although the failure to make sales in a given period does not per se prevent a taxpayer from carrying on a business, the tax court's finding that taxpayers 'made [no] legitimate efforts to locate potential buyers for the [player/recorders]' during 1978 is fatal to taxpayers' case. Merely possessing the legal capability to sell player/recorders by obtaining a license from the inventor, without actual efforts to sell the products, is insufficient to constitute carrying on a trade or business for purposes of section 162." (citations and footnote omitted)); *see generally Apperson v. Comm'r*, 908 F.2d 975, 1990 WL 100774 at *1-2 (7th Cir. 1990) (unpublished); *Music Masters, Ltd.*, 621 F. Supp. at 1056. *See also Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *4 (Or. T.C. Oct. 13, 2014) (concluding that Defendants' customer Peter Gregg did not have a trade or business related to his solar lens purchase).

[523] 1987 WL 4787, at *1.

[524] *United Energy Corp.*, 1987 WL 4787, *2-5.

[525] *United Energy Corp.*, 1987 WL 4787, *5.

(continued...)

completely unsupportable energy production estimates."[526] Such false statements were "material to the issue of whether [that solar energy] enterprise is entered into with a profit-making motive."[527]

It is no excuse for making such false or fraudulent statements that a promoter-defendant "had intended to accomplish" things like installing and starting up solar energy equipment, "but had been thwarted."[528] "[A] statement that something non-existent currently exists is false irrespective of the most reasonable, good faith intentions that it will exist in the future. Even a statement that something will exist in the future, such as an income projection, can be false if there is no reasonable basis for the prediction." [529]

(a) Defendants knew, or had reason to know, that customers would not earn income from "leasing out" his lenses to LTB.

Johnson and Shepard have been promoting the solar energy scheme for more than *ten years*, and Freeborn promoted the scheme for at least four years. During that time, all repeatedly made statements to customers creating the expectation that customers would earn income from "leasing out" their lenses to LTB according to Johnson's 2006 vision[530]:

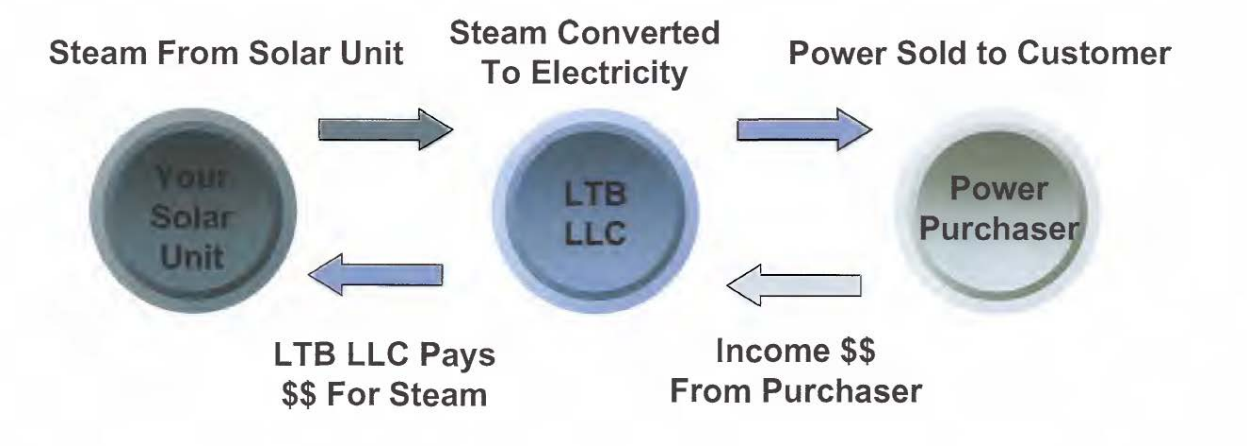
[526] *United Energy Corp.*, 1987 WL 4787, *4.

[527] *United Energy Corp.*, 1987 WL 4787, *9.

[528] *United Energy Corp.*, 1987 WL 4787, *9.

[529] *United Energy Corp.*, 1987 WL 4787, at *9.

[530] IAS Dep. 162:1-163:22; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531 at 1-3.



But as of April 2018, no third-party power purchaser has ever paid LTB (or any other entity) for energy. LTB has never paid a customer for use of his lens.

Defendants have known that no customer was paid rental income generated by payments from a third-party purchaser throughout the entire time they have been promoting the solar energy scheme. Johnson, as the manager and director of all entities at issue in this case knew that no money was coming in from a third-party power purchaser. Shepard knew as early as 2006, and Freeborn knew as early as 2009 (and continuously through the years thereafter), that IAS had missed its target installation dates in their own contracts and their own lenses were not producing rental income. They knew that other customers were not being paid either. Tellingly, Shepard has never even bothered to ask Johnson why. Payments were irrelevant because the principal benefit was tax advantages.

Not only have Defendants known that no customer has ever been paid rental income generated by payments from a third-party purchaser, they knew or had reason to know that such rental income would not be paid. Defendants knew, or had reason to know, that Johnson's purported solar energy technology had not resulted, and would not result, in sales of energy to a third-party purchaser. Johnson knew that neither he, nor anyone affiliated with him, had ever installed, operated or maintained a solar energy production plant before. Running a solar energy

power plant is not an endeavor for the inexperienced. Johnson also knew, all along, that LTB existed only on paper. He also knew that neither Shepard nor Freeborn ever asked any questions about LTB or its experience in operating or maintaining solar energy equipment: not when they first signed an agreement purportedly to lease their lenses to LTB, and not in the intervening years.

Defendants' solar energy scheme is clearly a complete sham. Defendants knew it was not generating income for customers for more than *ten years*. Yet, despite their clear knowledge that the system did not produce energy or income to customers, they continued to sell lenses, encourage customers to take purportedly related tax deductions and credits, and deplete the United States Treasury. Defendants have given self-serving and conflicting reasons for the lengthy delay in bringing Johnson's ideas to fruition, all of which show that they knew or had reason to know that their customers were not earning income from leasing their lenses, and would not be earning such income in the near future. Johnson claims to have been able to put electricity on the grid since 2005. He has just made the "business decision" not to do it. But Johnson has also claimed, as have Shepard and Freeborn, that his process toward generating energy has taken more than ten years because his work is so cutting-edge. Every time he thinks he is finished and ready to connect to a third-party purchaser, he finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system. For example, Shepard testified that he told a customer in November 2012 that there were "150 towers ready to install" because (at that time) he thought that it "wouldn't take too long to put up 150 towers."[531] But because Defendants were using "brand new technology," various components of the

[531] Shepard Dep. 172:9-173:15; Pl. Ex. 141 at 1.

(continued...)

purported technology did not work.[532] So the towers were not erected at that time. [533] Now, more than five years later, all those new towers with lens arrays are *still* not up.

Even if such towers had been constructed, they would not work as Defendants claim they will. The United States' expert witness on concentrating solar power, Dr. Thomas Mancini, credibly testified that Defendants' purported technology comprises separate component parts that do not work together in an operational solar energy system to produce electricity or other useable energy from the sun. Dr. Mancini also credibly testified that Defendants' purported technology is not now, and will never be, a commercial-grade dish solar system converting sunlight into electrical power or other useful energy. Defendants do not have the expertise, the experience, the research, or the data to build a system that converts solar radiation into electrical power or other useful energy.

But one need not have Dr. Mancini's extensive expertise to see that Defendants' purported technology is a sham. As Freeborn (a high school teacher and coach who did not have any special expertise in solar energy technology) testified, getting the "individual parts" of Johnson's purported technology to "work in concert . . . seems to be the hurdle."[534] Yet Defendants have continued to sell the scheme.

For these reasons, Defendants knew or had reason to know that any "construction updates" they gave customers, suggesting that rental income was soon to arrive, were false or fraudulent. Shepard and Freeborn knew that each time they visited Millard County, Utah, because the only towers they ever saw were the 19 that went up in 2006. To date, those towers are *still* the only towers built with lens arrays installed. Defendants knew, or had reason to know,

[532] Shepard Dep. 172:9-179:17.

[533] Shepard Dep. 172:9-179:17.

[534] Freeborn Dep. 95:3-13.

that the bulk of customers' "lenses" are shrouded in plastic wrap on pallets in a warehouse, uncut, unframed, and not installed on any tower such that they could even have the possibility of providing heat to generate electricity. The Court gives no credence to Defendants' claims that they have made "progress" on any site, either in manufacturing or construction. Assembling components for a system that has not been shown to work is not progress. Rather, it is a convenient façade for Defendants' ongoing fraud. They are savvy enough to inject just enough purported reality into the solar energy scheme to convince willing believers.

Further, the requirements for interconnecting to the electrical grid are extensive, expensive, and time-consuming. Defendants have no expertise or experience in this technical and specialized process, or in obtaining a power purchase agreement to sell electricity to a commercial third-party purchaser. Defendants knew, or had reason to know, that there has never been an interconnection agreement. Johnson and Shepard know, or have reason to know, that there is no current, concrete plan to obtain either an interconnection agreement, yet their statements to customers suggested that they would have one soon. But PacifiCorp, the entity responsible for maintaining the electrical grid near Defendants' property, and through which Defendants would interconnect to the grid if they could, has not received an interconnection application, nor has it ever heard of Defendants.

Defendants also knew, or had reason to know, that there has never been a contract for any third party to buy power generated through any system using the solar lenses. Johnson and Shepard know, or have reason to know, that there is no current, concrete plan to obtain a power purchase agreement. As Shepard said, when discussing his efforts to enter a power purchase agreement *since 2010*: "Every time I got close, they wanted to see a power project up and

running. . . . And we didn't have that running yet."[535] Yet they told their customers that such an agreement was imminent.

In short, Defendants knew, or had reason to know, that their statements to customers that they would earn rental income from leasing out their solar lenses to LTB for the production of electricity were false or fraudulent.[536]

(b) Defendants knew, or had reason to know, that no customer would earn a bonus payment.

Defendants told customers that, if they bought lenses and signed a "bonus contract," they would earn a payout based on certain gross sales benchmarks for IAS. The bonus payouts (of either $6,000 or $2,000 per lens) were keyed to IAS's first and second billion dollars in gross sales revenue. On their face, those sales numbers are astronomical to reach, based on what Shepard and Freeborn knew about the state of the purported solar lens technology. Shepard and Freeborn knew that since 2010, RaPower-3, *not IAS*, had been selling lenses – both Shepard and Freeborn were part of the transition from IAS to RaPower-3. Because IAS was not selling, both had reason to question why a customer should expect any payout on a bonus contract, much less "soon" as they both told customers. Shepard admitted that he would not know how to begin evaluating whether IAS was anywhere near its first (or second) billion dollars. Either Shepard or Freeborn could have asked Johnson about this at any time to learn exactly how far away customers (including Shepard and Freeborn themselves) are from receiving a bonus payment. Instead, Shepard was willfully ignorant.

[535] Shepard Dep. 205:21-206:12.

[536] *See United Energy Corp.*, 1987 WL 4787, at *9.

In fact, Johnson testified that to date IAS has produced *no* sales revenue. Nonetheless, Defendants told customers about how important the bonus contract was for obtaining tax benefits (when Johnson was offering bonus contracts) and why they should expect revenue from it.

But like the other transaction documents in the solar energy scheme, the promises in the "bonus contracts" are illusory. Johnson used the bonus contracts to increase lens sales, knowing that RaPower-3 was the entity that generated sales and not IAS. His promise to pay will never come due as long as he directs that entities other than IAS make sales (which is what he has done so far). The "bonus contract" is just one more façade for Defendants' ongoing fraud.

Defendants knew, or had reason to know, that no customer was paid a bonus, or would be paid a bonus.

ii. Defendants knew, or had reason to know, that customers had no control over their purported "lens leasing" businesses.

When a promoter sells a plan in which the promoter, and not the customer, retains control over the customer's purported trade or business, the promoter knows or has reason to know that he is selling an abusive tax scheme.[537] Defendants know, or have reason to know, that Johnson

[537] *Blum*, 737 F.3d at 1314-15 (indicia of tax-avoidance motive are when a taxpayer fails to investigate a deal before signing up and does not understand the details of the plan); *Nickeson*, 962 F.2d at 977 ("failure of taxpayers to inquire into the potential profitability of the program" and "taxpayers' lack of control over activities" are hallmarks of an abusive tax shelter); *Rose v. Comm'r*, 868 F.2d 851, 854 (6th Cir. 1989); *United Energy Corp.*, 1987 WL 4787,. at *1-3; *Music Masters, Ltd.*, 621 F. Supp. at 1056 ("The investors were each told they were to be in the business of manufacturing and distributing records based on the partial interest(s) they leased in the masters, and that they would not have to pay more than the start-up distribution expenses, which could be as little as $200." But in fact "[t]he evidence [was] clear that *Defendants* [and not their customers] carried on the business of manufacturing and distributing the masters. The Defendants' representations to the contrary are false and/or fraudulent." (emphasis added)); *see also Van Scoten v. Comm'r*, 439 F.3d 1243, 1253 (10th Cir. 2006) (a taxpayer did not reasonably rely on a promoter's assurances about purported tax benefits from entering a cattle partnership, in part because the taxpayer had no experience in the cattle industry); *see also Arevalo v. Comm'r.*, 469 F.3d 436, 439 (5th Cir. 2006) ("where the transferor continues to retain significant control over the property transferred, the transfer of formal legal title will not operate to shift the incidence of taxation attributable to ownership of the property" (quoting Upham v. Comm'r, 923 F.2d 1328, 1334 (8th Cir.1991)).

(continued...)

controls the entire process, from start to finish, of their customers' purported foray into the "solar lens leasing business." Johnson controls all terms of the transaction. He decides whether and when to install a customer's lens in a tower, which (according to Defendants' transaction documents) is a prerequisite to the lens generating any income. Defendants tell customers how little effort they will be required to expend in their "solar lens leasing business."

Customers do not negotiate terms, including price. Defendants know, or have reason to know that customers have no reason to negotiate price because customers pay a mere $105 per lens to claim tax benefits calculated on the $3,500 "purchase price" of a lens.[538] Customers simply write a check to RaPower-3. Customers have not asked about LTB's experience operating and maintaining solar energy equipment before signing the O&M. Customers do not take possession of their lenses. No customer has ever chosen to buy a lens, then lease it to an entity other than LTB.[539] Defendants do not even have a way to track which lens belongs to which customer. It follows that there is no way for a customer to identify which lenses (whether among the many stacks of uncut plastic inside a warehouse or framed on one of the towers erected in 2006) belong to him. Defendants know, or have reason to know, that their customers are typically wage-earners in other full-time professions who lack the time and experience to meaningfully engage in a solar lens leasing business, and are not experienced in "leasing out" solar lenses.[540]

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[538] *See* *Keeler*, 243 F.3d at 1219 ("The Tax Court also found that the prices of the items traded were not set by market forces, but by [the promoter]. Contrary to taxpayer's assertion, any alleged negotiation between [the promoter] and its customers as to the prices of the legs falls short of demonstrating economic substance, because the importance of the instruments' prices was dwarfed by their tax advantages.").

[539] *See* *Jackson*, 864 F.2d at 1526.

[540] *See Apperson*, 1990 WL 100774, at *1-2.

(continued...)

iii. Defendants knew, or had reason to know, that the transaction documents were meaningless.

When transactions feature substantial deferred debt, backed by non-recourse promissory notes, which will purportedly be paid out of proceeds from the plan itself, a promoter knows or has reason to know that he is selling an abusive tax scheme.[541] The form of Defendants' lens sale-lease transactions that Defendants use in the solar energy scheme have similar features.

Defendants tell their customers the "full purchase price" of each lens that the customer purportedly buys, but allow them to make a much smaller "down payment." From 2006 through 2009, the full purchase price was $30,000 but the down payment was only $9,000. Currently, the full purchase price is $3,500 and the down payment is $1,050.[542] From the beginning, Johnson conditioned the customer's obligation to pay the difference between the initial "down payment" and the "full purchase price" of a lens on that very lens being installed and producing revenue. No lenses are installed and producing revenue. And Johnson's transaction terms mean that no customer actually owes the difference between the down payment and the full purchase price until five years *after* his lenses are "installed and producing revenue." Payments continue for 30 years thereafter. These facts show that any purported obligation to pay is substantial – and perhaps indefinitely – deferred debt.

Johnson does not charge interest on these "financed amounts." Customers borrow for free. According to the plain terms of the contracts, the only security for the customers' promise to pay these outstanding amounts is the lens itself. Customers are not required to fill out any type

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[541] *See Nickeson*, 962 F.2d at 977 (one hallmark of an abusive tax scheme is nonrecourse indebtedness); *Philatelic Leasing*, 794 F.2d at 786; *United States v. Stover*, 731 F. Supp. 2d 887, 911-12 (W.D. Mo. 2010); *see Music Masters, Ltd..*, 621 F. Supp. at 1054.

[542] As explained in the facts, this is a simplified statement of Defendants' "down payment" structure. Typically, customers do not even pay $1,050 in the tax year for which they claim depreciation and a credit for any lens; they pay $105 in that tax year and then pay the remaining $945 per lens once they receive the tax benefits Defendants promote.

of credit application, pledge any collateral or otherwise demonstrate their ability to pay the outstanding obligation on the "full purchase price" of the lens.

As described above, all Defendants know, or have reason to know, that that promise to pay is illusory (or at least is within Johnson' entire control). If Johnson has never installed a customer's lenses on towers that Johnson has, to date, failed to build, the customer will never be required to pay IAS or RaPower-3 the full purchase price of any lens. All Defendants know this, or have reason to know it, based on the plain terms of the contracts they signed or sold and their knowledge of the conditions at Defendants' facility in Delta, Utah.

Further, Defendants also know, or have reason to know, that Johnson does not actually enforce the full down payment amount of $1,050. Johnson will refund a customer's money if they simply no longer wish to own lenses, or if the IRS has disallowed the customer's depreciation or solar energy tax credit. Refunding money paid to "buy" lenses on the basis of a change in tax treatment shows that customers never had a bona fide "lens leasing" business or income producing activity. As a result, Defendants knew, or had reason to know, that the contracts contain illusory promises from all parties. They are designed to create the appearance of substance where there is none. And Defendants knew, or had reason to know, that their statements to customers, relying on the form of these documents to assert that a customer was in a substantive trade or business were false or fraudulent.[543]

[543] *See* *Twenty Mile Joint Venture, PND, Ltd. v. Comm'r*, 200 F.3d 1268, 1277 (10th Cir. 1999) ("the form chosen by the parties will be respected only if it comports with the reality of the transaction").

iv. Defendants knew that they promoted the solar energy scheme based on the tax benefits it would provide.

When a promoter sells a plan by focusing on the plan's ability to greatly reduce or eliminate a customer's income tax liability, the promoter knows or has reason to know that he is selling an abusive tax scheme, and the customer is not in a trade or business.[544] As they sold the solar energy scheme to customers, Defendants made it very clear that the goal of buying solar lenses was to eliminate a customer's tax liability. They told people to calculate the number of lenses to buy based on their anticipated tax liability. According to Shepard's sample Form 1040, a customer should end up buying enough lenses so that the amount of their depreciation deduction would "get [their adjusted gross income] low enough for zero taxes."[545] If that was not enough, Shepard told customers to claim solar energy tax credits "if needed" to reach the goal of "zero" taxable income.[546] Freeborn explicitly coached his downline to sell lenses by waiting for people to complain about paying taxes and then telling them that, with RaPower-3, they could stop paying taxes.

The system by which customers made payments (which all Defendants knew about) also shows that the purpose of the solar energy scheme was to reduce or eliminate a customer's tax

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[544] *Blum*, 737 F.3d at 1311 ("Evidence that a transaction was designed to 'produce a massive tax loss' indicates the transaction lacks economic substance."); *Stover*, 650 F.3d at 1110 (that money would "forever escape taxation" was a "key selling point" and an indicator of an abusive tax scheme). *See also* *Hartshorn*, 751 F.3d at 1204 ("Paying income taxes is a statutory duty; some also consider it a civic duty. Few gladly pay, but most faithfully do. Faithful compliance is tested, sometimes beyond elastic limits, by the siren's song of the unscrupulous — pay 10% of your income to the 'church' and completely avoid the much higher extractions demanded by the taxman AND do so without changing your life circumstances in any significant manner. Sounds great! To the unprincipled or the naïve, it is precisely what the doctor ordered. It is also illegal.") (O'Brien, J., concurring); *Nickeson*, 962 F.2d at 977 (one hallmark of an abusive tax scheme is "marketing on the basis of projected tax benefits"); *Keeler*, 243 F.3d at 1220 ("the fact that taxpayer's losses offset almost all of his income--100% and 97%, respectively, in 1981 and 1982--indicates his primary motivation was tax avoidance and not profit potential").

[545] Pl. Ex. 40 at 13; Pl. Ex. 490 at 9-10.

[546] Pl. Ex. 40 at 13; Shepard Dep. 240:4-11. *See also* Pl. Ex. 158 at 15; Shepard Dep. 243:3-9; Pl. Ex. 490 at 9-10.

(continued...)

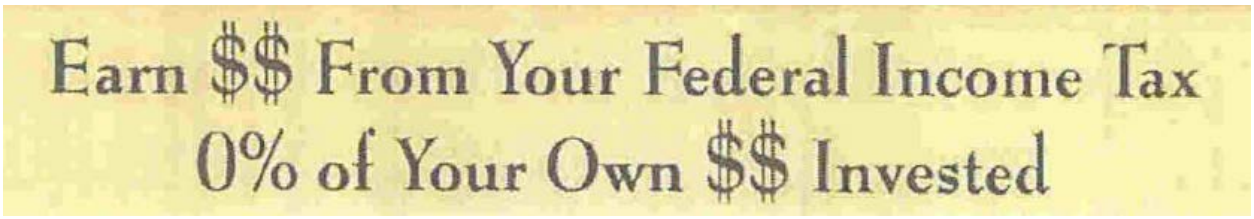
liability, while enriching Defendants with funds rightfully owed the Treasury.[547] Johnson's system since 2010 allowed customers to pay RaPower-3 only $105 of the $3,500 purchase price per lens in the year they wish to "buy" the lenses and claim the associated tax benefits. Johnson allows customers to pay RaPower-3 the remaining down payment amount of $945 in the *following year*, only *after* a customer has claimed depreciation and the solar energy tax credit for the year of purchase. The customer has the cash-in-hand to pay RaPower-3 because he "zero[ed] out" his taxes.[548] Instead of paying the United States Treasury his rightful tax liability, the customer pays RaPower-3 for "buying lenses."

Defendants knew, or had reason to know, that the full purchase price stated for each lens (whether $9,000, $3,000, or $3,500) nearly equals the amount of tax benefits Defendants tell customers they are allowed. The amount of the down payment Johnson states is identical to the amount Defendants tell customers they may claim as a solar energy tax credit. From 2006 through 2009, both the down payment and the promoted credit were $9,000. Since 2010, the total down payment and the promoted credit were $1,050. The difference between the down payment and the "full" purchase price of a lens is almost exactly the same amount that Defendants claim customers may deduct in depreciation. In this way, a customer never has to spend "his own money" to buy a lens. The United States Treasury pays for it, just as Johnson promised in 2006[549]:

[547] *See* Pl. Exs. 496-97, 777.

[548] Pl. Ex. 48.

[549] Pl. Ex. 532 at 12.



Because of the way Defendants marketed the solar energy scheme, it is clear: Defendants knew, or had reason to know, that the "solar lens sales" were not bona fide transactions. Defendants knew, or had reason to know, that the solar lenses were a smokescreen for their unlawful "sales" of tax deductions and credits to customers.

b. Defendants knew, or had reason to know, that their customers were not allowed a depreciation deduction.

One "business" deduction is for depreciation, the "wear and tear" on property either used in the taxpayer's "trade or business" or held by the taxpayer "for the production of income."[550] If a taxpayer is *not* in a trade or business, or is *not* holding property for the production of income, then the taxpayer is *not* eligible for a deduction for depreciation on that property.[551] "Depreciation . . . [is] not allowed on assets acquired for a business that has not begun operations."[552] The period for depreciation in an ongoing business begins when property is "placed in service."[553] "Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function."[554]

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[550] 26 U.S.C. § 167(a). Depreciation is not the only business expense deduction Defendants promoted to their customers, but it is the one with the greatest impact on the Treasury.

[551] § 167(a).

[552] *Piggly Wiggly S., Inc. v. Comm'r of Internal Revenue*, 84 T.C. 739, 745 (1985); *United Energy Corp.*, 1987 WL 4787, at *11 ("[T]he term 'placed in service' refers to an asset that is 'available for service' but not yet actually in use only if the taxpayer is engaged in an ongoing trade or business and the asset is not yet in service for reasons beyond the taxpayers control."); *see also id.* at *10.

[553] 26 C.F.R. § 1.167(a)-10(b).

[554] 26 C.F.R. § 1.167(a)-(11)(e)(1)(i) (26 C.F.R. § 1.46-3(d)(1)(ii) and (d)(2) "shall apply for the purpose of determining the date on which property is placed in service").

(continued...)

In furtherance of the solar energy scheme, Defendants told customers that their lenses were "placed in service" in the tax year in which the customer bought the lens.[555] Defendants asserted that customers' solar lenses are placed in service once they are "available for ANY income producing activity, including leasing [them] out."[556] To Defendants, the fact that customers signed a contract to "lease" their lenses to LTB was sufficient to show that their lenses were in a "state of readiness" to be leased, and therefore were placed in service. These assertions are false. For all of the reasons described above, Defendants knew or had reason to know that their customers' "lens leasing" businesses were not bona fide and ongoing businesses. Defendants knew, or had reason to know, that LTB existed only on paper. Defendants knew, or had reason to know, that their customers' purported "leasing businesses" existed only on paper and would never produce income. Defendants knew, or had reason to know, that their customers were not engaged in any business activity with a true profit motive.[557]

Defendants have also argued that customers' solar lenses are "placed in service" because as soon as the plastic rectangles "[come] off the production line" at the manufacturer, the

[555] Pl. Ex. 25 at 1.

[556] Pl. Ex. 1 at 3; Pl. Ex. 10 at 3; Pl. Ex. 29; Pl. Ex. 231 at 4; Pl. Ex. 547. Defendants have claimed, at times, that customers "leased out" their lenses to advertise for IAS and/or RaPower-3 in some fashion. The analysis that follows applies regardless of the purported purpose for which the lenses were "leased out."

[557] The facts of this case, which Defendants knew or had reason to know, distinguish it from cases Defendants have cited to support their idea that a tangible piece of property is "placed in service" as soon as someone "holds it out for lease." In those cases, the Tax Court first found that the taxpayers entered into leasing activities with a bona fide profit objective – meaning that the taxpayers actually had a business, unlike Defendants' customers here. *Cooper v. Comm'r*, 88 T.C. 84, 109 (1987) ("we believe that petitioners entered into their leasing activities with a bona fide objective to make a profit"); *Waddell v. Comm'r*, 86 T.C. 848, 849 (1986) ("Ps' computerized ECG terminal franchise venture was an activity engaged in for profit."). Because of the lack of substance to the purported leasing transactions (including the critical fact that the entity to which customers purportedly lease their lenses does not exist except on paper, this case is closer akin to the cases concluding that property that does not exist cannot be depreciated. *Hudson v. Comm'r*, 71 F.3d 877, 1995 WL 725812, at *5 (5th Cir. 1995). *See also Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *5-6 (Or. T.C. Nov. 30, 2017); *United Energy Corp.*, 1987 WL 4787, at *2-4, 11.

(continued...)

"lenses" are "in a state of readiness" to "provide[] solar process heat."[558] While the solar lenses may be able to concentrate solar radiation sufficient to set wood or shoes smoldering, blacken a rabbit, or burn an IRS agent,[559] that alone is not sufficient to generate "solar process heat." "Solar process heat" is taking heat from the sun and using it to accomplish function or application, like heating potash to speed the process of turning it into fertilizer.[560] There is no evidence that Defendants' solar lenses have ever, by themselves, used heat from the sun to accomplish any kind of useful function or application.

There is also no evidence that Defendants' solar lenses have ever been used as an individual component within a system to concentrate solar radiation to accomplish any kind of useful function or application – or to generate electricity. "[A]n individual component, incapable of contributing to the system in isolation, is not regarded as placed in service until the entire system reaches a condition of readiness and availability for its specifically assigned function."[561] Defendants' purported system as a whole has not been placed in service. For facilities that are intended to generate power, factors that go to whether the system as a whole is placed in service (such that any individual component could be placed in service) are: "1) whether the necessary permits and licenses for operation have been obtained; 2) whether critical preoperational testing has been completed; 3) whether the taxpayer has control of the facility; 4) whether the unit has been synchronized with the transmission grid; and 5) whether daily or regular operation has

[558] Pl. Ex. 9 at 1-2; *see also* Pl. Ex. 32 at ¶ 2; Pl. Ex. 73 at 1; Pl. Ex. 185 at 1-2; Pl. Ex. 472 at 1.

[559] T. 1666:14-24; T. 1737:2-9.

[560] T. 105:13-106:6.

[561] *Sealy Power, Ltd. v. Comm'r*, 46 F.3d 382, 390 (5th Cir. 1995).

(continued...)

begun."[562] The evidence here shows that Defendants' purported solar energy technology does not work, nor will it ever. Accordingly, there is no "daily or regular operation" of the system; it has not been "synchronized with the transmission grid"; "critical preoperational testing" has not yet been completed, and there is no evidence that it has even begun.[563] Defendants themselves continually assert the need for additional research and development before they will be "operational." Because the system in which the solar lenses would purportedly be used is not placed in service, the lenses themselves – component parts of that system, even lenses that have been installed on towers – are not placed in service.

Further, the bulk of customers' "lenses" are not installed on towers. They currently exist as rectangular sheets of plastic, shrouded in plastic wrap on pallets in a warehouse, uncut, unframed. According to Defendants, a lens must be installed in a tower before it even has a chance of producing revenue from the production of electricity. Even if Defendants' purported technology did work and was in operation, the rectangular plastic sheets would still have to be modified (cut into triangles and framed) before they can be installed. Thus, in their rectangular state, the sheets of plastic are not ready and available for any income-producing activity.

Ken Oveson, a CPA, told Shepard in August 2009 that customers' lenses were not "placed in service" such that customers could lawfully claim a depreciation deduction or solar

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[562] *Sealy Power, Ltd.*, 46 F.3d at 395. "The most important of the . . . factor appears to be . . . that the unit has gone into ordinary daily operation." *In re Mitchell*, 109 B.R. 434, 438 (Bankr. W.D. Wash. 1989), *aff'd*, No. C90-484M, 1990 WL 142016 (W.D. Wash. Aug. 31, 1990), *judgment rev'd on other grounds*, 977 F.2d 1318 (9th Cir. 1992).

[563] This is not a situation that has presented in other cases, when a nearly operational power plant was seeking "placed in service" status for certain property in a particular tax year. *E.g.*, *Sealy Power, Ltd.* 46 F.3d at 395; *Consumers Power Co. v. Comm'r*, 89 T.C. 710, 725-26 (1987). Further, "[m]aterials and parts acquired to be used in the construction of an item of equipment shall not be considered in a condition or state of readiness and availability for a specifically assigned function." 26 C.F.R. § 1.46-3(d)(2)(iv).

(continued...)

energy tax credit. For all of these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens was "placed in service."

c. Defendants knew, or had reason to know, that their customers were not allowed the solar energy credit.

Under § 48, a taxpayer may be allowed an "energy credit" that reduces his income tax liability in a given year[564] for certain "energy property" he "placed in service" during the tax year for which the taxpayer claims the credit.[565] "[E]nergy property" means equipment with respect to which depreciation is allowed, and "which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat."[566]

Defendants told their customers that they were allowed to claim an energy credit under § 48 for their lenses. But as described *supra*, their customers are not allowed a depreciation deduction for their solar lenses because they were not in a trade or business or holding the lenses for the production of income and their lenses were not "placed in service." These two factors disqualify their customers from the solar energy credit, and Defendants knew or had reason to know it based on the plain text of § 48.

Further, Defendants knew or had reason to know that customers' solar lenses did not "use[] solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat"[567] in the years in which the taxpayers bought the lenses and claimed credits. The preponderance of the credible evidence already described shows that customers' lenses have never been used in a system that generates electricity, that heats or

[564] §§ 48(a), 46(2), 38(a) & (b)(1).

[565] § 48(a)(1); 26 C.F.R. § 1.46-3(d)(1) & (2).

[566] § 48(a)(3)(A)(i) & (C); see also 26 C.F.R. § 1.48-9(d)(1).

[567] *See* § 48(a)(3)(A)(i) & (C); see also 26 C.F.R. § 1.48-9(d)(1).

cools a structure or provides hot water for use in a structure. Nearly all customer "lenses" are actually rectangular sheets of plastic sitting in a warehouse, uncut, unframed, and not yet installed on towers. Further, the preponderance of credible evidence shows that even the lenses installed on towers do not "provide solar process heat."

For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens qualified for a solar energy credit under 26 U.S.C. § 48.

2. Defendants knew, or had reason to know, that their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income.

As just described, Defendants knew or had reason to know that their customers did not operate a trade or business as a result of purportedly buying the solar lenses, or hold the lenses to produce income. Their customers were not allowed the business expense deduction for depreciation or the solar energy credit. But even assuming that they were allowed the depreciation deduction and the solar energy tax credit, the next question to ask is whether (as Defendants have repeatedly asserted) their customers could use these tax benefits to offset their wages, or other "active" income.

Under 26 U.S.C. § 469, deductions and credits accrued in a passive activity, for individuals,[568] are only allowable to offset passive activity income.[569] They are *not* allowed to

[568] The overwhelming majority of Defendants' customers purchased the solar lenses in their individual capacity, but some purchased the solar lenses under the guise of a limited liability company ("LLC"). For tax purposes, these types of LLCs are "disregarded," and the tax consequences are treated as being incurred directly by the individual and reported directly on that individual's federal income tax return *See*, *generally*, 26 C.F.R. §§ 301.7701-1 through 301.7701-3.

[569] § 469(a), (d).

(continued...)

offset non-passive activity income like wages earned from an employer.[570] "Section 469 was intended to limit the financial incentive to structure traditional tax shelters. Prior to this enactment, taxpayers could use passive activity losses to offset non-passive activity income, thereby sheltering active income from taxation. Now, however, § 469 generally prohibits the deduction of passive activity losses, except insofar as the losses are used to offset passive activity income."[571]

Activity that involves the rental of tangible property is *per se* a passive activity.[572] Jessica Anderson expressly told Johnson this in October 2010.[573] Defendants knew or had reason to know the black letter law that any business involving leasing out tangible property like a "solar lens" was a *per se* passive activity, and that deductions and credits from purportedly leasing out solar lenses are not allowed to offset active income or tax on active income.

Yet Defendants repeatedly told customers they could lawfully claim deductions and credits from their "solar lens leasing business" to offset their active income and tax accruing from active income. They did so by telling customers that the customers "materially participated" in their "solar lens leasing business."[574] This is a false or fraudulent statement, about which Defendants knew or had reason to know, because the plain text of § 469 states that a rental activity is a passive activity "without regard to whether or not the taxpayer materially

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[570] § 469(a), (d); *Senra v. Comm'r*, 97 T.C.M. (CCH) 1386, 2009 WL 1010855 at *4 (T.C. 2009).

[571] *Van Scoten*, 439 F.3d at 1249 n.4 .

[572] 26 U.S.C. § 469(c)(2), (c)(4), (c)(7), & (j)(8); *Williams v. Comm'r*, 108 T.C.M. (CCH) 128, 2014 WL 3843838, at *8 (T.C. 2014) ("Rental activities are generally considered to be passive regardless of material participation."); *Senra*, 97 T.C.M. (CCH) 1386, 2009 WL 1010855 at *3 ("Any activity where payments are principally for the use of tangible property is a rental activity.").

[573] Pl. Ex. 570 at 2.

[574] *E.g.*, Pl. Ex. 25 at 1.

(continued...)

participates in the activity."[575] Jessica Anderson expressly told Johnson this in October 2010.[576] There are very limited exceptions to this rule, all of which apply to bona fide businesses and not the bogus transactions Defendants sold.[577]

Because Defendants made statements about "material participation," the Court will analyze those statements even though the standard does not apply here. If a taxpayer "materially participates" in an activity, losses and credits from that activity may be allowed to offset active income and tax on active income.[578] A taxpayer "materially participates" in an activity only if the taxpayer's involvement in the activity is regular, continuous, and substantial.[579] A Temporary Treasury Regulation identifies a number of fact-specific tests to determine whether a taxpayer has "materially participated" in any trade or business.[580] They include the number of hours the taxpayer has participated in the activity during the tax year and the kinds of activities the taxpayer performed for the business.[581] Defendants point to these tests to argue that their customers meet the standard for having "materially participated" in their lens leasing businesses.

But once again, Defendants ignore a critical provision of the regulation – which Jessica Anderson expressly told Johnson in 2010. Work done by a taxpayer as an *investor* in an activity (such as "[m]onitoring the finances or operations of the activity in a non-managerial capacity" or "[s]tudying and reviewing financial statements or reports on operations of the activity") is not

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[575] 26 U.S.C. § 469(c)(2), (c)(4).

[576] Pl. Ex. 570 at 2.

[577] 26 C.F.R. § 1.469-1T(e)(1)(ii), (e)(3); *see also* Pl. Ex. 570 at 2-4.

[578] 26 U.S.C. § 469(a), (c)(1), (c)(2), (j)(8).

[579] 26 U.S.C. § 469(h).

[580] *See generally* 26 C.F.R. § 1.469-5T.

[581] *See* 26 C.F.R. § 1.469-5T(a), (b), (f).

(continued...)

"participation" in the activity, "unless the individual is directly involved in the day-to-day management or operations of the activity."[582] These are exactly the kinds of activities Defendants claim their customers do with respect to their "lens leasing businesses." But performing these activities does not mean that a person has "materially participated" in a business.

Therefore (even assuming that the material participation standard applied here, which it does not), Defendants knew or had reason to know that their customers were not engaged in day-to-day management of a lens leasing business. Defendants promoted the solar energy scheme to wage-earning taxpayers with other investments, activities, hobbies, and personal commitments that absorbed their time, leaving no time that the customers could devote to materially participating in a purported "solar lens leasing business." One of Defendants' key selling points was telling customers how *little* they would have to do with respect to the lenses: "Since LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."[583] Under the solar energy scheme as Defendants operated it, customers did not materially participate in any activity related to the solar lenses.

For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens purchaser could lawfully claim deductions and credits related to solar lenses to offset the purchaser's active income and tax accruing from active income.

[582] 26 C.F.R. § 1.469-5T(f)(2)(ii)(A) & (B).

[583] Pl. Ex. 19 at 1.

3. Defendants knew, or had reason to know, that that the full "purchase" price of the lenses was not at risk in the year a customer signed transaction documents.

As is clear from the above, Defendants' customers were not in a trade or business, and were not allowed deductions like depreciation. And even if they were allowed such tax treatment (which they are not), they would be allowed to use those deductions and credits only to offset passive income. Assuming that Defendants' customers would be allowed some passive deductions, the next step in the analysis is to determine what amount they could be allowed.

The allowable amount of any deduction with respect to any activity is limited to the amount that the taxpayer has "at risk" in the activity.[584] "Section 465 was enacted because of the proliferation of tax shelters in the 1970's. Before the enactment of section 465, investors could take advantage of quick depreciation rules plus the deductibility of interest on nonrecourse debt to generate large "losses" in order to offset personal income. Section 465 attacks these practices directly."[585] A taxpayer is considered "at risk" with respect to money and property that the taxpayer contributed to the activity (so, amounts that the taxpayer pays to the activity out-of-pocket) and certain limited amounts that the taxpayer borrows.[586]

There are numerous caveats and exceptions to the general idea that a taxpayer is at risk for amounts that the taxpayer borrows to participate in the activity.[587] A taxpayer is *not* "at risk" to the extent the taxpayer is not personally liable to repay the borrowed funds or has secured repayment of the debt with property used in the activity at issue.[588] A taxpayer is not "at risk

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[584] § 465(a).

[585] *Nicholson v. Comm'r*, 60 F.3d 1020, 1026 (3d Cir. 1995) (footnote omitted) (Alito, J.).

[586] § 465(b)(1).

[587] *E.g.*, § 465(b)(2), (3), (4),

[588] § 465(b)(2).

(continued...)

with respect to amounts protected against loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements."[589] "We look to the economic reality of the situation to determine whether there was a realistic chance that [the taxpayer] might lose the money [he borrowed], or, rather, whether the funds were protected from loss by the arrangement of the transactions."[590]

Here, Defendants tell their customers that they may claim federal tax deductions based on the "full purchase price" (currently $3,500, but $9,000 or $3,000 in prior years) of each lens that the customer purportedly buys. But Defendants' customers are not "at risk" with respect to the full $3,500 in the year they purportedly purchase their lenses and claim the purportedly related tax benefits. Instead, the customers typically make a down payment of $1,050 (at most) of the $3,500 purchase price. The contract documents state that the customer does not incur an obligation to pay the remaining $2,450 of the $3,500 purchase price until the customer's lens is installed and producing revenue. Defendants knew, or had reason to know, that no customer's lens was installed and producing revenue at any time, so they knew or had reason to know that no customer had any obligation to pay the remaining $2,450 for any lens. Therefore, no customer was "at risk" for that amount in the tax year the customer purportedly purchased a lens.

And even if a customer were ever to incur the obligation to pay the $2,450, that amount is "financed" by RaPower-3 at zero percent interest.[591] The customer is not personally liable to pay

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[589] § 465(b)(4).

[590] *Oren v. Comm'r*, 357 F.3d 854, 860 (8th Cir. 2004); *Brifman v. Comm'r*, 64 T.C.M. (CCH) 3 (T.C. 1992) ("The 'economic reality' of the situation is the key factor in determining who is ultimately liable for a debt.").

[591] Defendants' customers never executed any notes or entered into any borrowing transaction. However, to the extent that the transaction could be viewed as the customers borrowing funds – they are borrowing the funds from RaPower-3 by deferring payment and/or from LTB, who will take its payment from revenue generated from the lens. Under 26 U.S.C. § 465(d)(3), a taxpayer is not considered "at risk" for funds borrowed from any person who has an interest in such activity or from a person who is related to a person (other than the taxpayer) having such an interest in the activity. Here, both LTB and RaPower-3 have an interest in the "activity" and therefore Defendants' customers are not at risk for the remaining purchase price if that amount is considered borrowed.

any of the "financed" amount; all payments will come from LTB from revenue the lens generates and the only collateral for the "financed" amount is the lens itself. There is no provision for payment in the event the lens does not generate revenue. There is no remedy in case a customer defaults, other than "repossession" of the lens by RaPower-3. These features make any potential obligation to pay the $2,450 a nonrecourse debt, for which no customer would be "at risk."

Further, customers' down-payments (currently $1,050 per lens) also do not appear to have been "at risk." IAS and RaPower-3 contracts contained an explicit statement that a customer could get a refund of all amounts paid in, without penalty, if either IAS or RaPower-3 did not perform on the contract. Johnson has offered refunds of all funds used to purportedly buy solar lenses to anyone being audited by the IRS.

The facts show that Defendants' customers funds are not "at risk" with respect to *any* amount they have paid in to the solar energy scheme or purportedly borrowed to participate. Defendants, who structured and sold these transactions, knew or had reason to know that their customers were not at risk for the full purchase price of any lens and therefore were not allowed to claim a depreciation deduction for the full purchase price or any related amount. For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that the full purchase price of a lens (whether $9,000, $3,000, or $3,500) was "at risk" for federal income tax purposes.

4. Defendants knew, or had reason to know, that all of their statements were false or fraudulent in spite of the legal advice upon which they claim reliance.

Defendants claim that they relied on the Andersons' writings and the Kirton McConkie memorandum while they were promoting the solar energy scheme, to support their assertions that customers could lawfully claim a depreciation deduction and a solar energy tax credit from

buying solar lenses and signing the transaction documents that Defendants provided. But these writings, and the facts and circumstances surrounding them, cannot support the heavy weight of Defendants' purported reliance on advice of counsel – especially because Defendants knew facts about the solar energy scheme that the attorneys did not know.[592]

When an advisor's opinion depends on facts that do not match the reality of a transaction, a promoter's claimed reliance is not in good faith.[593] The Anderson writings offer no genuine basis for Defendants' purported reliance because they are general summaries of the law, unconnected to the specific facts and circumstances of the transactions Defendants promoted. The October 2010 letter and the November 2010 draft say as much: they withhold any decisive opinion on the lawfulness of any tax treatment because they do not have specific facts and circumstances about the transactions. They each state that the availability of the tax benefits summarized will depend on facts and circumstances that do not appear in either document.

The Kirton McConkie memorandum is factually inapposite to RaPower-3 customers. On its face, the memorandum applies only to lens buyers that are C corporations (among other factual assumptions and preconditions stated in the memorandum). Birrell was careful to repeat this because of the differences in tax treatment for C corporations versus individuals and pass-through entities. Johnson and Shepard knew that RaPower-3 sold solar lenses to individuals or pass-through entities, not to C corporations. The memorandum assumes that Defendants' purported solar energy technology works and that the sale and lease transactions are completed using forms Birrell prepared. Neither of these assumptions match the facts of the solar energy

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[592] *United Energy Corp.*, 1987 WL 4787, at *11 ("The important point here, however, is not what defendants or their tax attorney believed the law to be. The point is that the module purchasers were entitled to truthful information on which to base their own decisions, regardless of defendants' interpretation of the law. Thus, even if defendants, knowing all the facts, reasonably believed their legal interpretation was correct, still their misstatements of the underlying material facts to purchasers are actionable.").

[593] *United States v. Zanfei*, No. 04 C 2703, 2006 WL 2861051, at *3, 13 (N.D. Ill. Sept. 29, 2006).

scheme as Defendants know them. The memorandum provides them no basis for their purported reliance.

Shepard's purported reliance on these writings was also unreasonable because he did not personally consult with or receive advice from the Anderson Law Center or Kirton McConkie. He got the November 2010 Anderson draft and the Kirton McConkie memorandum from Johnson. Shepard knows that Johnson is the originator of the solar energy scheme and Johnson's entity collects all the money from the solar energy scheme. It is not reasonable for a person to rely on opinion letters delivered to him by a financially conflicted promoter.[594] Shepard was also on notice from discussions with Ken Oveson about the true limitations on tax treatment of lenses.

While the text of the attorneys' materials shows their limitations, the attorneys also made clear that the use of the materials by Defendants was improper. A promoter's claimed reliance on advice of counsel is "disingenuous" when the promoter ignores warnings from independent attorneys that his interpretation of the internal revenue code is wrong.[595] Here, Jessica Anderson told Neldon Johnson, no later than January 2011, that he was wrong about the tax benefits solar lens purchasers could claim. Both the Andersons and Birrell sent Johnson cease-and-desist letters, which told him in no uncertain terms exactly why their writings did not support his solar energy scheme. Shepard knew, too, that Birrell said that the memorandum could not be used as RaPower-3 was using it. Shepard's visit to Kirton McConkie to complain about this did nothing to change Birrell's mind.

In short, the Anderson and Kirton McConkie writings do not negate Defendants' reason to know that they made false or fraudulent statements to customers. If anything, the

[594] *Van Scoten*, 439 F.3d at 1253 ; *Anderson v. IRS*, 442 F. Supp. 2d 365, 372 (E.D. Tex. 2006).

[595] *Campbell*, 704 F. Supp. at 730-31; *see also Estate Pres. Servs.*, 202 F.3d at 1103 .

circumstances surrounding the writings, and the attorneys' outraged response to learning that Defendants were using their writings to promote the solar energy scheme, bolster Defendants' reason to know that their statements were false or fraudulent.

C. While promoting the solar energy scheme, Defendants made or furnished (or caused others to make or furnish) gross valuation overstatements as to the value of the solar lenses.

A defendant may also be enjoined under § 7408 for making or furnishing, or causing another to make or furnish, "gross valuation overstatement[s]" as to a material matter while organizing or selling a plan related to taxes.[596] A gross valuation overstatement is "any statement as to the value of any property or services" if the value of the property or services is directly related to the amount of any tax deduction or credit and the stated value is more than 200 percent of the correct value of the property or services.[597] A defendant "who stated [a] price to any person as part of an effort to induce them to invest . . . [has] furnished a 'gross valuation

[596] 26 U.S.C. § 6700(a)(2)(B), § 7408; *United States v. Alexander*, 2010 WL 1643425, at *5 (D.S.C. 2010) ("Regardless of whether he created the statements or merely re-circulated others' work, the Defendant cannot dispute that he furnished materials to his customers through the Aware Group and the Freedom Trust Group."); *Mattingly v. United States*, 722 F. Supp. 586, 571(E.D. Mo. 1989) ("Clearly whether property exists or whether a valuation can actually be rendered at the time the representation is made is inconsequential. The fact that the statement was made and that it exceeds the correct value by 200 percent is all that is relevant under § 6700(b)(1)(A).").

[597] 26 U.S.C. § 6700(b)(1).

(continued...)

overstatement' within the meaning of § 6700(a)(2)(B)."[598] There is no scienter element in proving penalty conduct under this provision of § 6700; it is a strict liability standard.[599]

Defendants sell a single solar lens for a total purported price of $3,500. But the evidence shows that that number far exceeds 200 percent of the correct price for a "lens." The record evidence showed that Plaskolite charged IAS between $52 and $70 dollars for a rectangular sheet of plastic. Each rectangle could be cut into two triangular "lenses," making the raw cost of each "lens" very low. Defendants' technology does not work, and is not likely to work to produce commercially viable electricity or solar process heat. Therefore, each "lens" is just one component of an inoperable system. It is not a piece of sophisticated technology such that premium pricing is appropriate for it.

Defendants have attempted to argue that "research and development" costs should be attributed to the costs of the lens, but there is no credible evidence about the amount of those costs. The concept of the Fresnel lens itself is not new. If Defendants have incurred "research and development" costs associated with their purported technology, such costs are in their yet-unsuccessful attempts to get the entire system working. The Court does not credit any such costs

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[598] *United States v. Turner*, 601 F. Supp. 757,767 (E.D. Wis. 1985); accord *Gates v. United States*, 874 F.2d 584, 586 (8th Cir. 1989) ("[The defendant] admitted that in responding to questions about the valuation, he would refer individuals to the valuation statements contained in the promotional offering materials. This conduct is sufficient to satisfy the requirements of section 6700."); *Reno v. United States*, 717 F. Supp. 1198, 1202 (S.D. Miss. 1989); *Mattingly*, 722 F. Supp. at 572 (distributing brochures listing inflated purchase prices in connection with the sale of an abusive tax shelter constituted making or furnishing a gross valuation overstatement); *Campbell*, 704 F. Supp. at 726 ("Statements of the . . . contract price were statements of value. To offer an object or service at a specified price is to implicitly represent that the object is worth the price."), *aff'd* *Campbell*, 897 F.2d at 1322-23 (rejecting the defendant's argument that a quoted price for a purported investment was not a representation of value directly related to a tax deduction).

[599] *Autrey v. United States*, 889 F.2d 973, 981 (11th Cir. 1989); *United States v. Hand-Bostick*, 816 F. Supp. 2d 343, 352 (N.D. Tex. 2011); *Campbell*, 704 F. Supp. at 726 ("Scienter need not be shown to hold a person liable for gross valuation overstatements . . . . This 200 percent overvaluation is to be a bright line test."); *Turner*, 601 F. Supp. at 767 ("scienter is not required" to establish a violation of § 6700(a)(2)(B)); see also *Gates*, 874 F.2d at 586 (rejecting a defendant's attempt to avoid liability for making or furnishing a gross valuation overstatement because he did not know that the valuations were overstatements).

(continued...)

to the price of the lens alone. Based on the available and credible evidence, the Court concludes that the correct valuation of any "lens" is close to its raw cost, and does not exceed $100.[600] The most expensive parts of the purported solar energy production system are other components, such as collectors, towers, frames, distribution pipes and fluids, turbines, and generators. And those components consume the most testing and development resources.

It follows that Defendants engaged in conduct subject to penalty under § 6700(a)(2)(B) and made or furnished a gross valuation overstatement each time they told someone the price of a lens (whether $9,000, $3,000, or $3,500). They caused others to make or furnish gross valuation overstatements when those people told *others* the price of a lens – for example, when a RaPower-3 team member told someone the price of a lens while attempting to recruit that person into his downline.

D. An injunction and other equitable relief are necessary and appropriate to enforce the internal revenue laws of the United States.

Because § 7408 sets forth specific criteria for injunctive relief, namely that injunctive relief is appropriate to prevent recurrence of penalty conduct, the United States need only show that that criteria is met; it need not show that the traditional equitable factors are satisfied before an injunction may issue.[601] The foregoing facts show that an injunction is appropriate here. But

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[600] *C.f.* *United Energy Corp.*, 1987 WL 4787, at *5 ("A buyer with reasonable knowledge of the relevant facts would not have purchased a UEC module at any price. Such a buyer would have realized that UEC's modules had no chance of producing any significant income and that tax credits would never become available because the modules would never be placed in service and because defendants' operation was a sham. The people who actually purchased modules did not have a reasonable knowledge of the relevant facts because of the false statements made in UEC's advertising literature.")

[601] *Buttorff*, 761 F.2d at 1063; *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983) ("The legislative process has already taken these [equitable] factors into consideration in its decision to address the promotion of abusive tax shelters . . . ."); *accord* *Stover*, 650 F.3d at 1106 (traditional equitable factors need not be discussed when an injunction is authorized by statute like § 7408 and the statutory elements have been satisfied); *Estate Pres. Servs.*, 202 F.3d at 1098; *see also* *Hartshorn*, 751 F.3d at 1198.

(continued...)

the Court will also address other factors that courts have weighed to issue an injunction under § 7408(b), which are: (1) the extent of each Defendant's participation; (2) the isolated or recurrent nature of each Defendant's abusive conduct; (3) the Defendants' degree of scienter; (4) the Defendants' recognition (or non-recognition) of culpability; and (5) the likelihood that any Defendant's occupation would put him "in a position where future violations could be anticipated;" and (6) the gravity of the harm caused by Defendants' abusive conduct.[602]

Injunctive relief is appropriate to prevent recurrence of penalty conduct because of the multi-level marketing used by RaPower-3. The high economic incentives for network participation are illustrated by the testimony of Robert Aulds. In his downline a total of 2,468 lenses have been purchased.[603] His sales pitch was simple. Aulds answered the question as to whether RaPower-3 worked by telling potential buyers that he got a check from the federal government.[604]

The incentive for evangelizing the misleading scheme is high. Under the RaPower-3 commission structure, 10% of the purchase price paid by people directly sponsored by a purchaser was paid to the sponsor, and 1% of the purchase price paid by people sponsored by a purchaser in up to five lower levels was paid to the sponsor.[605] Multi-level marketing is pernicious due to the propagation of misinformation. For example, Aulds testified that his understanding was that "according to the definition of 'placed in service' that the government uses, they didn't actually have to be on a lens to be placed in service. They had to be on site

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[602] *Gleason*, 432 F.3d at 683 (quoting *Estate Pres. Servs.*, 202 F.3d at 1105).

[603] Aulds Dep. 69:15-24, Pl. Ex. 394 at 2.

[604] Aulds Dep. 59:17-60:11.

[605] Aulds Dep. 79:7-16.

(continued...)

available to be on the lens, and so we met that qualification from the moment they were purchased."[606] He also said that he and "99.9%" of the RaPower-3 purchasers "didn't understand tax law and all that stuff," but that they had to help other purchases "understand this is not a scam. We're actually taking tax law and applying it . . . ."[607] The toxic combination of multi-level marketing and misleading information creates an urgent need an injunction.

The facts and legal analysis already recited show that Defendants Neldon Johnson, IAS, RaPower-3, LTB1, and R. Gregory Shepard ("Defendants" hereafter, in light of Roger Freeborn's death and dismissal from this case) fully, actively, and consistently, for more than ten years, participated in promoting and selling the solar energy scheme. They each knew, or had reason to know, that their statements about the tax benefits purportedly related to buying solar lenses were false or fraudulent. Johnson, IAS, RaPower-3, and Shepard made or furnished gross valuation overstatements while promoting the scheme. Defendants show no remorse, recognition of culpability, or likelihood of stopping this abusive conduct without a Court order.

Johnson, Johnson's entities, and Shepard have made the solar energy scheme a primary focus of their time, energy, and efforts for the past ten years. They did not stop promoting the scheme after investigation by the IRS, multitudes of customer audits by the IRS, and adverse rulings in the Oregon Tax Court, Magistrate Division. According to Shepard, the only change in his behavior since the United States filed this case is that he "bowed [his] back and [is] fighting harder."[608] This shows that, without an injunction, Defendants' occupations put them in a position where future violations of the internal revenue laws are likely. Defendants' efforts to

[606] Aulds Dep. 107:13-17.

[607] Aulds Dep. 119:16-23.

[608] Shepard Dep. 314:1-5.

promote the depreciation deduction and the solar energy tax credit have been so robust, that although Defendants stopped promoting depreciation as a benefit in 2016, their customers continued to claim it.

Further, the harm caused by Defendants' abusive conduct is extensive. The United States showed that its direct financial harm due to the deductions and credits claimed on a subset of Defendants' customers' tax returns for tax years 2013-2016 is at least $14,207,517.[609] Critically, these numbers do not include the still-unknown harm to the Treasury from Defendants' misconduct. It does not include tax returns for tax years 2008 (or prior) through 2012, although Defendants' customers bought lenses and claimed purportedly related tax benefits during those years. This snapshot does not include tax returns for tax year 2017, although Defendants sold lenses in 2017 and it is reasonable to conclude that the people who "bought" lenses in 2017 claimed the tax benefits Defendants' promoted for tax year 2017. The United States' numbers also do not include, for example, customers' tax returns that claimed the tax benefits Defendants promoted, but which the IRS has not yet identified.

All of Defendants' conduct that warrants an injunction under § 7408 also warrants an injunction and disgorgement under § 7402(a). Under § 7402(a), "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions . . . orders of injunction, . . . 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." An injunction under § 7402 may be issued "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to

[609] Pl. Ex. 752 at 3.

(continued...)

enforce such laws."[610] "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" than the language in § 7402(a).[611]

There is no need show that a Defendant "has violated a particular Internal Revenue Code section in order for an injunction to issue" under § 7402(a).[612] All the United States must show is that an injunction (or other order, such as one for disgorgement and other equitable relief) "may be necessary or appropriate for the enforcement of the internal revenue laws."[613] An order for disgorgement, in this case, is "appropriate" for the enforcement of the internal revenue laws.[614]

To show entitlement to disgorgement, the United States has the burden of "producing evidence permitting at least a reasonable approximation of the amount of [Defendants'] wrongful gain."[615] Defendants bear the "risk of uncertainty in calculating net profit."[616] "'Reasonable approximation' will suffice to establish the disgorgement liability of a conscious wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk

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[610] 26 U.S.C. § 7402(a).

[611] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

[612] *E.g.*, *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984); *Elsass*, 978 F. Supp. 2d at 941 ("[E]ven if the Defendants' business structure somehow left them outside the legal definition of tax return preparers, broad relief would still be appropriate, as § 7402(a) is undoubtedly designed to prevent individuals from undermining the Nation's tax laws through exploiting loopholes in the [Internal Revenue Code]'s overall regulatory scheme.").

[613] 26 U.S.C. § 7402(a); *accord*, *e.g.*, *United States v. ITS Financial, LLC*, 592 F. App'x 387, 394 (6th Cir. 2014) ("The fact that no other court has ever granted the precise injunction granted in this case does not mean [§ 7402(a)] does not authorize it.").

[614] *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla. 2017) ("Because § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws, the Court has determined that disgorgement is an available remedy in this case." (quotation omitted)).

[615] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i.; *Stinson*, 239 F. Supp. 3d at 1329; *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1120-23 (M.D. Fla. 2016).

[616] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i. ; *Stinson*, 239 F. Supp. 3d at 1329; *Mesadieu*, 180 F. Supp. 3d at 1120-23.

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of uncertainty arising from the wrong. The allocation of risk of uncertainty to the wrongdoer yields the rule that 'when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.'"[617] In other words, if "the true measure of unjust enrichment is an indeterminable amount not less than 50 and not more than 100, liability in disgorgement will be fixed at 100."[618]

Defendants obstructed discovery about their gross receipts and other topics involving their finances. They did not produce relevant documents and information to the United States on these issues. Nonetheless, the United States showed that Defendants "sold" at least 49,415 lenses.[619] If all customers paid the $1,050 down payment required under the terms of Defendants' own transaction documents, Defendants' gross receipts were $51,885,750.[620] There was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought, but Defendants offered no credible evidence of the amount of any missing down payments. But this is the likely explanation for why Defendants' own customer database shows that (even if Defendants "sold" 82,365 lenses) customers actually paid in $50,025,480 as of February 28, 2018.[621] It is reasonable, based on the facts of this case and Defendants' extensive promotion of the solar energy scheme, to conclude that customers have

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[617] *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) *quoted in* Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

[618] Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

[619] Pl. Ex. 742B.

[620] Pl. Ex. 742B, Pl. Ex. 749.

[621] T. 758:10-777:10; Pl. Ex. 749. *See also supra* ¶ 79, noting likely ranges of revenue based on Pl. Exs. 742A and 742B. It appears that data from sales by IAS and RaPower-3, and perhaps also XSun Energy and SOLCO I, are in Defendants' customer database. The United States' bank deposit analysis, which contained data only through 2016, also supports this number.

(continued...)

used their "purchases" of all, or nearly all, of those lenses to claim a depreciation deduction and a solar energy credit. Because of the manner in which Defendants promoted the scheme, the Court concludes that $50,025,480 in gross receipts from the solar energy scheme came from money that rightfully belonged to the U.S. Treasury.[622] Defendants – who are the ones in possession of the best evidence of a reasonable approximation of their gross receipts – failed to rebut the United States' evidence of this reasonable approximation, and introduced no credible evidence of their own on the point.[623]

On the facts of this case, it is appropriate to hold Johnson liable for the gross receipts shown in the RaPower-3 database. An individual may be held liable for what is, on its face, an entity's debt, when 1) there was "such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct" and 2) "adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations." [624]

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[622] *E.g.* Freeborn Dep. 48:2-51:18; Pl. Ex. 496, Pl. Ex. 497; Pl. Ex. 777 at 1-2; Pl. Ex. 40 at 13.

[623] *See Esgar Corp. v. Comm'r.*, 744 F.3d 648, 656 (10th Cir. 2014) ("It is the function of the Tax Court to draw appropriate inferences, and choose between conflicting inferences in finding the facts of a case. The Tax Court may draw these inferences from the whole record, including the Commissioner's evidence on a given fact and the taxpayer's lack thereof." (quotations and alterations omitted)); *Wardrip v. Hart*, 949 F. Supp. 801, 804 (D. Kan. 1996).

[624] *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (identifying factors to determine whether to pierce the corporate veil, including "whether a corporation is operated as a separate entity"; "commingling of funds and other assets"; "the nature of the corporation's ownership and control"; "use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation"; "disregard of legal formalities and the failure to maintain an arms-length relationship among related entities"; and "diversion of the corporation's funds or assets to noncorporate uses."); *see also United States v. Badger*, 818 F.3d 563, 572 (10th Cir. 2016) ("One can attempt to improperly escape a payment responsibility using any manner of entity, regardless of the formal connection between the two alter egos.").

(continued...)

Here, the whole purpose of RaPower-3 was to perpetrate a fraud to enable funding of the unsubstantiated, irrational dream of Nelson Johnson.[625] The same is true for the other entities Johnson established and used including IAS, SOLCO I, XSun Energy, Cobblestone, and the LTB entities. He created the solar energy scheme and directed all of these entities' actions to sell it. Johnson owns RaPower-3, SOLCO I, and XSun Energy directly or indirectly and exercises exclusive control over their actions. Johnson commingled funds between his entities and frequently used the entities' bank accounts to pay his personal expenses and his family.[626] The funds were disbursed from the entities' bank accounts either with Johnson's knowledge or at his direction. Johnson was personally enriched from the gross receipts received by IAS ($5,438,089[627]), RaPower-3 ($25,874,066[628]), SOLCO I ($3,434,992[629]) and XSun Energy ($1,126,888[630]) even if he did not go through the process of formally moving money into his own personal account before spending it.

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[625] *Boilermaker-Blacksmith Nat. Pension Fund v. Gendron*, 96 F. Supp. 2d 1202, 1218 (D. Kan. 2000) ("[P]laintiffs must show that defendants acted with intent to avoid payment to plaintiffs, or that their disregard of corporate formalities caused the companies to be less able to pay plaintiffs or otherwise caused injustice.").

[626] *See S.E.C .v. World Capital Mkt., Inc.*, 864 F.3d 996, 1007 (9th Cir. 2017) ("ongoing possession of the funds is not required for disgorgement"); *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010) ("A person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained."); *S.E.C. v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) ("Given the close relationship between Monterosso and Vargas, and their collaboration in the fraudulent scheme, we find it was appropriate to hold them jointly and severally liable.").

[627] Pl. Ex. 738; T. 869:1-25; Pl. Ex. 852, at 59; T. 257:7-258:20, 271:9-272:12, 293:1-294:11, 312:5-15; Pl. Ex. 371; Pl. Ex. 507, at 20, 35; T. 1812:4-12.

[628] Pl. Ex. 735; T. 863:18-868:24; *see also* Pl. Exs. 742B, 749.

[629] Pl. Ex. 739; T. 863:18-866:18; 870:3-872:14; 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..

[630] Pl. Ex 740; T. 871:9-872:14; 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.

(continued...)

The United States has shown that a reasonable approximation for Shepard's gross receipts from the solar energy scheme was at least $702,001.[631] Any amounts that went through an entity that Shepard owns and operates are attributable to him, personally, for the same reasons that Johnson is personally liable for the gross receipts of his entities.

Disgorgement will be ordered, pursuant to § 7402(a), in these amounts. Defendants will not be allowed any credit of operating expenses to "carry[] on the business that is the source of the profit subject to disgorgement."[632] When a defendant defrauds the claimant, as the United States has shown Defendants have done, such credits are not consistent with principles of equitable disgorgement.[633]

In addition to this direct harm to the Treasury, Defendants' misconduct has caused the government to devote substantial resources to investigating the solar energy scheme, which Defendants promoted widely; investigating Defendants' conduct in particular; examining the tax returns of Defendants' customers; litigating nearly 200 petitions filed by Defendants' customers

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[631] Pl. Ex. 411 at 16-17; Pl. Ex. 445; T. 1296:14-1301:3, 1596:5-1598:21.

[632] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & cmt. h; *see also id.* at cmt. i. ("[T]he claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment. If the claimant has done this much, the defendant is then free (there is no need to speak of 'burden shifting') to introduce evidence tending to show that the true extent of unjust enrichment is something less."); *id.* at cmt. k. ("[T]he wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct.").

[633] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & cmt. h ("The defendant will not be allowed a credit for the direct expenses of an attempt to defraud the claimant, even if these expenses produce some benefit to the claimant."). *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place."); *SEC v. Veros Farm Holding LLC*, No. 1:15-cv-00659-JMS-MJD, 2018 WL 731955, at *4 (S.D. Ind. Feb. 6, 2018); *SEC v. Art Intellect, Inc.*, No. 2:11-CV-357, 2013 WL 840048 at *23 (D. Utah, Mar. 6, 2013) ("The amount of disgorgement should not include any offset for the operating expenses of [the defendant company, which was run as a Ponzi scheme].") (Campbell, J.); *SEC v. Smart*, No. 2:09cv00224, 2011 WL 2297659 at *21 (D. Utah June 8, 2011) (the purpose of "depriving a wrongdoer of unjust enrichment" would not be served if defendants "who defrauded investors" were allowed a credit against disgorgement of the "expenses associated with this fraud.") (quoting *JT Wallenbrock*, 440 F.3d at 1115)) (Kimball, J.).

(continued...)

in Tax Court; and litigating this case for nearly three years.[634] Further, the government has suffered irreparable harm from Defendants' misconduct, which "undermine[d] public confidence in the administration of the federal tax system and encourage[d] noncompliance with the internal revenue laws."[635]

For these reasons, the United States has shown that it is entitled to the following relief.

ORDER AND INJUNCTION

IT IS HEREBY ORDERED pursuant to 26 U.S.C. §§ 7402 and 7408 that Defendants and their officers, agents, servants and employees, and anyone acting in active concert or participation with them are **HEREBY PERMANENTLY ENJOINED** from directly or indirectly, by use of any means or instrumentalities:

1. **Solar Energy Business Limited without Disclosures.** Organizing (or assisting in the organization of), promoting, or selling any entity, plan, or arrangement or participating (directly or indirectly) in the sale of any interest in an entity, plan, or arrangement involving a solar lens and/or any solar energy system or component without the following affirmative disclosure printed on every document; included on every webpage and sub-page that comprises

[634] *See United States v. Anderson*, 3:10-510-JFA, 2010 WL 1988100, at *3 (D.S.C. May 5, 2010) ("The United States is also harmed because the IRS is forced to devote substantial resources to identifying whether the taxpayers for whom Anderson filed returns were actually owed refunds and recovering any erroneous refunds that are issued."); *United States v. Casternovia*, 08-426-CL, 2011 WL 4625638, at *7 (D. Or. August 23, 2011) ("Pendell's conduct has resulted in serious harm to the United States, not only in the form of understatements of liability but also the administrative burden on the IRS of auditing, investigating, and collecting taxes from SORCE and ERS customers."); *United States v. Grider*, 3:10-CV-0582-D, 2010 WL 4514623, at *4 (N.D. Tex. November 2, 2010) ("There is a broad public interest in maintaining a sound tax system and defendants' failure to pay employment and other taxes causes harm by divesting funding from other government objectives." (quotations and alteration omitted); *United States v. Ferrand*, 05-0069, 2006 WL 598212, at *5 (W.D. La. February 7, 2006) ("Not to be forgotten is the administrative cost the IRS and, in turn, the general public, will suffer from having to audit each return the Defendants prepared.").

[635] *Anderson*, 2010 WL 1988100, at *3; *accord HedgeLender*, 2011 WL 2686279, at *10 (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.

rapower3.com, iaus.com, rapower3.net, the IAUS & RaPower3 Forum, and any other website controlled by any Defendant and used in relation to marketing lenses; and included in any other written communication: "THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in *U.S. v. RaPower-3, LLC., et al.*, Case No., 2:15 cv 828, has determined that the solar energy technology of RaPower-3 in place from 2005 to 2018 is without scientific validation or substance and ineligible for tax credits or depreciation by individual purchasers of lenses.";

2. **False and Fraudulent Statements Prohibited in Solar Energy Business.** Making or furnishing, or causing another to make or furnish, in connection with organizing promoting, or selling any entity, plan, or arrangement involving a solar lens and/or any solar energy system or component any false and fraudulent statements including, without limitation, the following:

a. That a purchaser of a solar lens is in a "trade or business" of "leasing out" the solar lens, or is in any other "trade or business" with respect to a solar lens;

b. That a purchaser of a solar lens may lawfully claim on a federal tax return a depreciation deduction related to a solar lens;

c. That a purchaser of a solar lens may lawfully claim on a federal tax return any other business expense deduction related to a solar lens; or

d. That a purchaser of a solar lens may lawfully claim on a federal tax return a solar energy credit related to a solar lens.

3. **Limitation on Statements Regarding Tax Benefits**. Making or furnishing, or causing another to make or furnish, in connection with organizing or selling any plan or arrangement, a statement with respect to the allowability of any deduction or credit or the

securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which Defendants know or have reason to know is false or fraudulent as to any material matter;

4. **Gross Overvaluation Statements Prohibited – Solar Energy**. Making or furnishing, or causing another to make or furnish, a statement of the value of a solar lens and/or any solar energy system or component that exceeds 200 percent of the correct valuation of the lens, system, and/or component, when the value of the lens, system, and/or component is directly related to the amount of a federal tax deduction, credit, or other benefit;

5. **Gross Overvaluation Statements Prohibited – Property or Service**. Making or furnishing, or causing another to make or furnish, a statement of the value of any property or service that exceeds 200 percent of the correct valuation of the property or service, when the value of the property or service is directly related to the amount of a federal tax deduction, credit, or other benefit;

6. **Recommending Tax Advisors Prohibited.** Recommending a tax return preparer or other tax professional to any person with whom a Defendant has a financial or contractual relationship;

7. **Prohibition Against Tax Document Activities – Solar Energy.** Preparing or filing, or assisting or advising in the preparation or filing of, any federal tax return or amended return, or claim for refund, other related documents or forms (including but not limited to Internal Revenue Service ("IRS") Form 3800, IRS Form 4368, IRS Form 4562, and IRS Schedule C), or any other document filed with the IRS, that claims federal tax benefits as a result of using, purchasing, or otherwise acquiring a solar lens and/or any solar energy system or component;

8. **Prohibition Against Tax Document Activities for Others.** Preparing or filing, or assisting or advising in the preparation or filing of, any federal tax return or amended return, or claim for refund, other related document or form (including but not limited to IRS Form 3800, IRS Form 4368, IRS Form 4562, and IRS Schedule C), or any other document filed with the IRS, for any person or entity other than himself or an entity in which he owns an interest;

9. **Prohibition Against Advocacy to Federal Taxation Authorities.** Making arguments or submitting documents or other materials to the IRS or to the United States Tax Court that claim or support the claim that federal tax benefits are available to a taxpayer as a result of using, purchasing, or otherwise acquiring a solar lens and/or any solar energy system or component; and

COMPLIANCE VERIFICATIONS

IT IS FURTHER ORDERED THAT in aid of this order, the following compliance verifications must be made. Wherever possible, these materials must be delivered in native format (electronic, machine readable, searchable) with cover explanatory information disclosing any proprietary programs needed to read the data**:**

10. **Identification of Entities.** Each Defendant must deliver to counsel for the United States, no later than 28 days from the date this Injunction is entered, a list identifying any entity in which they own an interest, either directly or indirectly through another entity, or through which they sold a solar lens and/or any solar energy system or component. The list must include the name of any other person or entity who owns an interest in an identified entity (with the address, telephone number, taxpayer identification number, and email address of that person or entity); the identified entity's taxpayer or employer identification number; and the registered agent for the identified entity, including the registered agent's address and telephone number.

Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

11. **Identification of Purchasers.** Each Defendant must deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all persons or entities who, on or since January 1, 2005, have purchased any solar lens and/or any solar energy system or component, including each person's or entity's mailing address, e-mail address, telephone number, and taxpayer identification number. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

12. **Identification of Sellers, Marketers, MLM Participants.** Each Defendant must deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all persons or entities who have sold a solar lens and/or any solar energy system or component on behalf of a Defendant, including each person's or entity's mailing address, e-mail address, telephone number, taxpayer identification number, item sold, and quantity sold. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

13. **Identification of Tax Preparers.** Each Defendant must to deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all

persons or entities to whom they referred customers for the preparation of federal tax returns related to a solar lens and/or any solar energy system or component, including each tax preparer's or entity's mailing address, e-mail address, and telephone number. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

14. **Distribution of Complaint and Injunction.** Each Defendant must, no later than 56 days from the date this Injunction is entered and at their own expense, (a) contact by first-class mail (and also by e-mail, if an address is known) all persons or entities who have purchased any solar lens and/or any solar energy system or component, since 2005 stating that (1) a copy of the United States' complaint, and (2) a copy of this signed document is available for download at a specified web site; and (b) email a copy of those documents to every purchaser for whom an email address is available. There must not be any other document enclosed with the email. Each Defendant must file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph; a copy of the standard letter and email sent; a listing of the persons who received a letter and those who also received an email; that the mailing and emailing complied with this paragraph; and attaching any agreements between Defendants as permitted in this paragraph. A Defendant may, in a signed writing, agree with a Defendant who has entirely completed a timely and compliant distribution , that the distribution was made in behalf of the Defendant making the agreement provided that the letter and email so state, and provide email, phone and mail contact information for each Defendant on whose behalf the mailing and emailing was made. Such Defendants are jointly and severally responsible for deficiencies in the mailing and emailing.

15. **Warning; Removal of Tax Information from Websites.** Each Defendant, their officers, agents, employees, servants and persons acting in active concert or participation with them must, no later than 28 days from the date this Injunction is entered, remove all tax related content from www.rapower3.com and www.rapower3.net and www.iaus.com and the IAUS & RaPower3 Forum and any other site controlled by any Defendant. At the top of each page of each such web site the following notice must appear, which must include a link to this document which must be posted on that website:

> THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in *U.S. v. RaPower-3, LLC.*, et al., Case No., 2:15 cv 828, has determined that the solar energy technology of RaPower-3 in place from 2005 to 2018 is without scientific validation or substance and ineligible for tax credits or depreciation by individual purchasers of lenses. The tax information provided by Neldon Johnson, RaPower-3, International Automated Systems (IAUS), XSun Solar, SOLCO I LLC, Greg Shepard, and others associated with them is misleading. Tax information related to solar energy systems or components must not appear on this site until further order of the court.

This notice must appear at in text that is at least as large as the largest text on the rest of the page, and in a color that distinguishes it from any background color and other text color on the page. Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph.

16. **Removal of Other Tax Related Information.** Each Defendant must, no later than 28 days from the date this Injunction is entered, remove all tax related content regarding Defendants' purported solar energy technology system from any website and/or social media account he owns or maintains, or is owned or maintained on his behalf. Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph.

17. **Reporting Customer Information to IRS and Notice to Customers.** For the duration of the time between the date of this Injunction and ten years from the date of this

Injunction, no later than January 15 each year, Defendants must report to the IRS the following information about their customers for any solar lens or other product relating to solar energy technology: name; taxpayer identification number; address; phone number; product purchased; quantity of product purchased; date of purchase; total sales price; amount actually paid; date(s) of payment; and Defendants' account in which payment was deposited. Defendants must report this information to the IRS through its designee, Revenue Agent Kevin Matteson, at Internal Revenue Service, 178 S. Rio Grande, M/S 4218, Salt Lake City, UT, 84101. Defendants must notify customers, at the time this information is collected: "This information will be provided to the IRS. You may be subject to audit, interest on any unpaid taxes, and penalties if you claim tax benefits connected with your purchase."

18. **Notice of Future Entities**. For the duration of the time between the date of this Injunction and ten years from the date of this Injunction, each Defendant must advise the IRS through its designee, Revenue Agent Kevin Matteson, of any entity formed by him or it or at his or its direction after the entry of this Injunction, no later than 28 days from the date of the entity's formation. Notice to the IRS must be sent to Revenue Agent Matteson at Internal Revenue Service, 178 S. Rio Grande, M/S 4218, Salt Lake City, UT, 84101 (or any other designee the IRS appoints), and must include: 1) copies of the documents as filed with the appropriate authorities to form the entity (e.g., Articles of Incorporation); 2) the entity's taxpayer identification number and/or employer identification number; 3) the location and identifying number for all of the entity's bank accounts (whether domestic or foreign). Each Defendant must advise all principals of any such entity of these requirements.

19. **Misrepresentations Prohibited.** Each Defendant must not make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, that misrepresent any of the terms of this Injunction.

20. **Persons Bound.** Pursuant to Fed. R. Civ. P. 65(d)(2), this Injunction binds the following who receive actual notice of it by personal service or otherwise:

a. each Defendant, Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, LTB1, LLC, and R. Gregory Shepard;

b. each Defendant's officers, agents, servants, employees, and attorneys; and

c. other persons or entities who are in active concert or participation with anyone identified in paragraphs (a) or (b) above.

21. **Discovery Permitted.** The United States may propound post-judgment discovery to monitor compliance with this Injunction.

22. **Costs and Expenses.** The United States is awarded its costs and expenses incurred in this suit with respect to its claims against Defendants. The United States may file a Bill of Costs pursuant to 28 U.S.C. § 1920 and the Local Rules of the District of Utah, which shall be subject to objection as the statute and rules provide.

23. **Jurisdiction Retained.** This Court will retain jurisdiction over this action for purpose of implementing and enforcing this Injunction and issuing any additional orders necessary or appropriate for the enforcement of the internal revenue laws.

IT IS FURTHER ORDERED THAT:

24. **Equitable Disgorgement.** Judgment shall be entered in favor of the United States and against Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and R. Gregory Shepard, jointly and severally, in the amount of $50,025,480 as equitable monetary relief, up to and including the amount of gross receipts each received from the solar energy scheme as follows:

a. Neldon Johnson: $50,025,480 ;

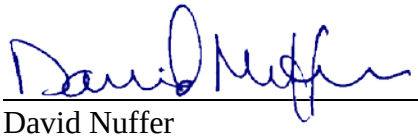
b. International Automated Systems, Inc.: $5,438,089;

c. RaPower-3, LLC: $25,874,066; and

d. R. Gregory Shepard: $702,001.

Signed October 4, 2018.

BY THE COURT:



David Nuffer
United States District Judge

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

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; and NELDON JOHNSON, Defendants.	**JUDGMENT IN A CIVIL CASE** Case No. 2:15-cv-00828-DN District Judge David Nuffer

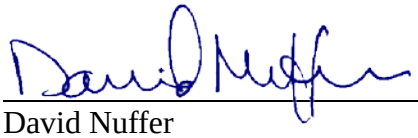
IT IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of Plaintiff United States of America and against Defendants RaPower-3 LLC, International Automated Systems Inc., R. Gregory Shepard, and Neldon Johnson, jointly and severally, in the amount of $50,025,480, with post-judgment interest at the legal rate.

The "Order and Injunction" and "Compliance Verifications" set forth in the Findings of Fact and Conclusions of Law[1] shall remain in effect and survive the closure of this action.

The clerk is directed to close this action.

Signed October 4, 2018.

BY THE COURT:



David Nuffer
United States District Judge

[1] Docket no. 467, at 130-138, filed October 4, 2018.

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

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; and NELDON JOHNSON, Defendants.	**AMENDED AND RESTATED JUDGMENT IN A CIVIL CASE** Case No. 2:15-cv-00828-DN District Judge David Nuffer

Based on the Motion to Amend Terms of Judgment ("Motion")[1] and the United States' response to it,[2] the Motion[1] is GRANTED and this Amended and Restated Judgment in a Civil Case is entered:

It IS HEREBY ORDERED AND ADJUDGED that final judgment is entered in favor of Plaintiff United States of America and against Defendants RaPower-3 LLC, International Automated Systems Inc., R. Gregory Shepard, and Neldon Johnson, jointly and severally, in the amount of $50,025,480 as equitable monetary relief, up to and including the amount of gross receipts each received from the solar energy scheme as follows, together with post-judgment interest at the legal rate:

1. Neldon Johnson: $50,025,480;
2. International Automated Systems Inc.: $5,438,089;

[1] Docket no. 474, filed October 16, 2018.

[2] United States' Response to Defendants' Motion to Amend Terms of Judgment, docket no. 488, filed October 26, 2018.

3. RaPower-3 LLC: $25,874,066; and

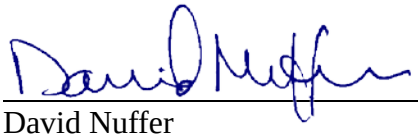
4. R. Gregory Shepard: $702,001.

The "Order and Injunction" and "Compliance Verifications" set forth in the Findings of Fact and Conclusions of Law[3] shall remain in effect and survive the closure of this action.

This action shall remain closed.

Signed November 13, 2018.

BY THE COURT:



David Nuffer
United States District Judge

[3] Docket no. 467, at 130-138, filed October 4, 2018.

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

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, et al., Defendants.	**ORDER DENYING RULE 59(e) AND RULE 52(b) MOTION** Case No. 2:15-cv-00828-DN District Judge David Nuffer

Defendants RaPower-3 LLC, International Automated Systems Inc., LTB1 LLC, R. Gregory Shepard, and Neldon Johnson (collectively, "Defendants") have filed a motion (the "Motion")[1] to amend the findings of fact, conclusions of law, judgment, and other orders under Fed. R. Civ. P. 52(b) and 59(e) based on "new evidence previously unavailable" and "the need to . . . prevent manifest injustice."[2] According to Defendants, the findings, conclusions, and judgment should be amended "[i]n light of the availability of . . . new evidence"—in the form of expert testimony—indicating that the "lenses at issue in this case have been successfully used to generate independently measurable electricity."[3]

Each party was given full opportunity at trial to present whatever evidence it thought was relevant. The expert testimony that Defendants now seek to introduce was within their control to produce before and at trial. If they thought it was relevant, then they should have come forward

[1] Defendants' Rule 59(e) and Rule 52(b) Motion, docket no. 451, filed September 14, 2018; *see* United States' Opposition to Defendants' Motion to Alter or Amend Findings, Orders, and Judgment, docket no. 460, filed September 28, 2018; Defendants' Reply in Support of Their Rule 59(e) and Rule 52(b) Motion, docket no. 470, filed October 9, 2018.

[2] Motion, *supra* note 1, at 2 (citation and internal quotation marks omitted).

[3] *Id.* at 2-3.

with it. Instead, they chose to rest without calling a single witness during their case-in-chief. "Blessed with the acuity of hindsight, [Defendants] may now realize that [they] did not make [their] initial case as compellingly as [they] might have, but [they] cannot charge the District Court with responsibility for that failure through this . . . motion."[4]

THEREFORE, IT IS HEREBY ORDERED that the Motion[5] is DENIED.

Signed December 4, 2018.

BY THE COURT:

David Nuffer
United States District Judge

[4] *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1220 (5th Cir. 1986).

[5] Docket no. 451, filed September 14, 2018.