Nos. 18-4119, 18-4150

IN THE 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 P. JOHNSON,

Defendants-Appellants

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE JUDGMENT AND ORDERS OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF UTAH
No. 2:15-cv-00828-DN-EJF
JUDGE DAVID NUFFER

BRIEF FOR THE APPELLEE

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

JOAN I. OPPENHEIMER (202) 514-2954
CLINT A. CARPENTER (202) 514-4346
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:
JOHN W. HUBER
United States Attorney

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases (continued): **Page(s)**

Cases (continued): **Page(s)**

Statutes: **Page(s)**

Other Authorities:

Other Authorities (continued): **Page(s)**

GLOSSARY

Abbreviation	Definition
FTC	Federal Trade Commission
IAS	International Automated Systems, Inc.
I.R.C.	Internal Revenue Code (26 U.S.C.)
Restatement	Restatement (Third) of Restitution and Unjust Enrichment
SEC	Securities and Exchange Commission
Treas. Reg.	Treasury Regulation (26 C.F.R.)

STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), counsel for the United States state that they are unaware of any prior or related appeals.

JURISDICTIONAL STATEMENT

This is an action under sections 7402 and 7408 of the Internal Revenue Code of 1986, 26 U.S.C. (I.R.C.), to enjoin the promotion of an abusive tax scheme and obtain equitable disgorgement of ill-gotten gains. The United States of America commenced this action on November 23, 2015. (A.8 (Dkt.2).)[1] The district court had jurisdiction under I.R.C. § 7402 and 28 U.S.C. §§ 1331, 1340, and 1345.

On August 22, 2018, the district court entered an interlocutory order (A.137) freezing defendants' assets and holding that that the appointment of a receiver was necessary and appropriate. Defendants filed a notice of appeal (A.59 (Dkt.445)) from that interlocutory order on August 27, 2018. That notice was immediately effective as to the asset freeze injunction, 28 U.S.C. § 1292(a)(1), but it did not become effective to appeal the receivership until the district court actually appointed a receiver and defined his powers in a subsequent order (A.63 (Dkt.490))

---

[1] "A." references are to defendants' appendix. "S.A." references are to the supplemental appendix accompanying this brief. "PLEX749" references are to the Excel spreadsheet that defendants submitted in native format as part of their appendix. "Dkt." references are to the numbered entries on the district court docket.

entered on October 31, 2018. *See* 28 U.S.C. § 1292(a)(2); Fed. R. App. P. 4(a)(2).

On October 4, 2018, the district court entered judgment for the Government, disposing of all claims as to all parties. (A.312.) Defendants filed a notice of appeal from the judgment on October 10, 2018. (A.61 (Dkt.472).) That notice was premature because defendants filed a timely motion to amend the judgment (A.62 (Dkt.474)). *See* Fed. R. App. P. 4(a)(4)(A)(iv), (B)(i). As a result, their notice of appeal from the judgment did not become effective until November 13, 2018, when the district court granted their post-judgment motion and entered an amended judgment (A.313). *See* Fed. R. App. P. 4(a)(4)(B)(i).

Defendants' appeals were consolidated on December 11, 2018. This Court has jurisdiction under 28 U.S.C. §§ 1291 and 1292(a).

STATEMENT OF THE ISSUES

1. Whether the district court correctly determined that defendants engaged in an abusive tax scheme in violation of I.R.C. § 6700.

2. Whether the district court abused its discretion in determining the amount of disgorgement.

3. Whether the district court abused its discretion in denying defendants' belated motion for a jury trial on the issue of disgorgement.

4. Whether the district court abused its discretion in freezing assets of nonparty entities controlled by defendant Neldon Johnson.

STATEMENT OF THE CASE

This case arises from defendants' promotion of an abusive tax scheme centered on purported solar energy technology. For more than a decade, defendants sold "solar lenses" to the public with false assurances that purchasers were entitled to claim solar energy tax credits and depreciation deductions far exceeding the purchase price. Through those sales, defendants received more than $50 million at the expense of the United States Treasury.

The United States brought this action to enjoin defendants' unlawful promotion of their scheme and to obtain disgorgement of their ill-gotten gains. After a 12-day trial, the district court ruled from the bench that defendants had engaged in a "massive fraud," "a hoax funded by the American taxpayer through defendants' deceptive advocacy of abuse of the tax laws." (S.A.176:5-6, 177:2-4.) Supplementing that ruling with 144 pages of written findings and

conclusions, the district court entered a judgment for the Government that permanently enjoined defendants from promoting their abusive tax scheme and ordered them to disgorge more than $50 million in ill-gotten gains.

A. Neldon Johnson's purported solar energy technology

Defendant Neldon Johnson is the mastermind of defendants' scheme. He is the sole decision-maker for, and a direct or indirect owner of, each of the three entity defendants: RaPower-3, LLC, International Automated Systems, Inc. ("IAS"), and LTB1, LLC. He also created, owns, and controls various non-party entities that have been involved in the scheme, including Solco I, LLC and XSun Energy, LLC. (A.174, 180.) Defendant R. Gregory Shepard's role in the scheme was in marketing, sales, and disseminating false information regarding the availability of tax benefits to customers. (A.179.)

Although Johnson does not have a college degree in any subject, he claims to have invented the purported solar energy technology on which the scheme was based. (A.174, 177.) The "solar lenses" that defendants sold to customers are triangular pieces of plastic that do nothing by themselves. But if 32 of those "lenses" are arrayed in a

certain pattern, they form a large "Fresnel" lens that can focus and concentrate sunlight, similar to a magnifying glass, if properly aligned with the sun. (A.174-175; S.A.229.)

Johnson's idea was that each lens array would be mounted to a tower that could track the sun as it moves across the sky, focusing sunlight onto a receiver that would be suspended underneath the array. (A.174.) The beam of concentrated light would heat a "transfer fluid" in the receiver, which would then be pumped to a heat exchanger. (A.175.) The heat exchanger would use the heat to boil water, and the resulting steam would turn a turbine. And the resulting product would be electricity that could be transferred to the electrical grid and sold commercially. (A.176.)

In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on "the R&D Site" near Delta, Utah. Johnson also directed that IAS install solar lenses in those towers. Assuming 19 towers and four lens arrays per tower, approximately 2,500 lenses have been installed. These are the only towers that have ever been built, and the only lenses that have ever been installed. (A.175, 178, 226.)

Since the towers were erected more than a decade ago, the R&D site has fallen into a state of neglect and disrepair, with no sign of turbines, receivers, or any other components that would be required to generate electricity. (S.A.248-249.) Lenses installed at the site have been used a handful of times to demonstrate their ability to produce heat by burning things like wood or, in one instance, a rabbit. (A.221.) But while Johnson claims to have generated electricity using lenses at the R&D site, no one else has ever seen it happen. (A.215.) And Johnson has no records of electricity production or of any other application of heat or other energy to a useful purpose. (A.216, 223-224.)

He also has no data, research, or third-party validation to support his ideas of how his system *would* work. (A.216, 223.) His purported solar energy technology consists of separate component parts, including some of his own invention (A.216; S.A.181:11-14), and there is no evidence that that they have, or ever will, fit together in a system that will operate effectively or efficiently. (A.220-221.) Moreover, Johnson has no ability or concrete plan to connect his purported technology to

the electrical grid so that a third party could purchase electricity generated. (A.218-219.)

B. Defendants' sales of lenses and promotion of purported tax benefits

Despite the foregoing, defendants sold to the public at least 49,415 solar lenses between 2006 and 2018 on the premise that defendants would use the purchased lenses in a bona fide solar energy project and thereby enable purchasers to claim solar energy tax credits and depreciation deductions.[2] (A.178, 186, 298; S.A.271.) According to a proprietary sales database maintained by defendants, the total sale price of orders placed by their customers was more than $50 million. (A.185.)

Johnson enlisted Shepard and others as salespeople. (A.179.) Until Johnson formed RaPower-3 in 2010, lenses were sold through IAS. Solco I and XSun Energy have also sold lenses. RaPower-3's only

---

[2] Because only about 2,500 lenses have ever been installed on towers, the vast majority of the lenses sold remain as uncut plastic sheets in undifferentiated stacks of pallets in a warehouse. Neither defendants nor their customers know which lenses belong to which customers. (A.227-228, 236, 272.)

business activity is selling solar lenses through a multi-level marketing approach to increase sales. (A.180.)

From the start, defendants told their customers that they could "zero out" their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and a solar energy tax credit for the lenses. (A.207.) Through 2009, defendants told customers that the total price for a lens was $30,000, but the customer was required to pay only a "down payment" of $9,000. IAS financed the remaining $21,000, interest free, which would be paid by the customer in $700 annual payments over 30 years if and when IAS installed and began operating the customer's lens at a specific "Installation Site." (A.196.)

But even though that might not, and in fact did not, ever occur, defendants told customers that their lenses were "placed in service" in the year of purchase, and that, based on the arbitrary total price of $30,000 (which customers did not actually pay), they could claim a solar energy tax credit of $9,000 per lens in the year of purchase, plus depreciation deductions in that same year and for several subsequent years. (A.199, 208, 525-528.) Customers were thus advised, in essence,

that the federal government would pay them to buy defendants' lenses. (A.208-209.)

With the transition to RaPower-3 in 2010, Johnson made several changes. He lowered the total price of a lens to $3,500 and the "down payment" (*i.e.*, the price customers were actually required to pay) to $1,050. (A.197, 200.) He also gave customers the option to pay only $105 up front, with the remaining $945 due by June 30 of the following year, *i.e.*, after the customer received his or her tax refund. (A.200.)

Finally, he had customers sign an Operation and Maintenance Agreement ("O&M") with defendant LTB1, which purported to lease the customer's lenses to LTB1 so that LTB1 could use them to produce revenue. (A.199, 201, 229.) But LTB1 exists only on paper; it has never actually done anything and has never even had a bank account. (A.229.) Nevertheless, defendants told customers that the O&M Agreement meant that, for tax purposes, the customer was in a "trade or business" of leasing solar lenses. (A.194; S.A.198.)

The tax benefits that defendants promoted remained the same, except that the amounts were adjusted to account for the new pricing. So since 2010, both the total down payment and the promoted credit

were $1,050, while from 2006 through 2009, the down payment and the promoted credit were $9,000. And in all years, the difference between the down payment and the "full" purchase price of a lens was almost exactly the same as the amount that defendants claimed could be deducted as depreciation. Thus, a customer never had to spend "his own money" to buy a lens; according to defendants, the United States Treasury would pay for it. (A.276; *see also* A.209.)

C. Proceedings in the district court

The United States sued defendants under I.R.C. §§ 7402(a) and 7408, seeking an injunction against further promotion of their scheme and disgorgement, as ill-gotten gains, of defendants' gross receipts from lens sales. As the principal basis for this relief, the Government alleged that defendants were promoting an abusive tax scheme in violation of I.R.C. § 6700 by making statements to customers about the purported tax benefits of buying lenses that defendants knew or had reason to know were false or fraudulent, I.R.C. § 6700(a)(2)(A), and also by making "gross valuation overstatements" about the value of the lenses, I.R.C. § 6700(a)(2)(B).

Defendants timely demanded a jury, but the Government moved to strike that demand because injunctions and disgorgement of ill-gotten gains are equitable remedies for which there is no right to a jury. The magistrate judge agreed (A.70), and defendants filed no objections to the magistrate judge's order striking their jury demand.

Over a year later, and less than two months before trial, defendants moved for a jury trial on the issue of disgorgement based on the Supreme Court's decision more than eight months earlier in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). The district court denied the motion as untimely (A.96) and also held that *Kokesh* did not undermine longstanding precedent characterizing disgorgement as an equitable remedy (A.99).

The case was tried to the court over 12 days in April and June 2018. The court received over 650 exhibits, and the Government presented testimony from 25 witnesses. (A.168.) Defendants' counsel thoroughly cross-examined the Government's witnesses and averred that they intended to call at least seven witnesses in their case-in-chief (S.A.156:1-7), including Neldon Johnson's wife, Glenda Johnson, who was present during the trial and had reportedly (S.A.92:5-6, 149:13-

150:2) made most of the entries in the sales database (PLEX749) that the Government contended was evidence of defendants' gross receipts. But defendants then changed their minds and rested their case without calling a single witness. (A.168; S.A.164:21-172:4.)

D. The district court's findings and conclusions

At the conclusion of trial, the court issued its initial findings and conclusions from the bench (S.A.175:16-187:4), stating in part:

> 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.
>
> . . . [T]he numbers tell us that this is a massive fraud on the defendants' customers . . . . But it's also a fraud on the American people who have effectively paid to operate defendants' enterprise.
>
> . . . Mr. Johnson has patents for many components which may function separately or two at a time. But the project to create a useful product from solar energy has no sound scientific basis as a whole; has no demonstration of economic viability, not even the barest evidence; and does not qualify lens buyers for federal tax credit or depreciation deductions.

> Mr. Johnson and other defendants have created an aura of success . . . but this enterprise is destined to fail by the lack of sound scientific, engineering, utility and management expertise. This is an amateur integration of tax law, engineering and multilevel marketing enabled by the defendants' universal rejection of all conventional authoritative expertise and process. It's a hoax funded by the American taxpayer through defendants' deceptive advocacy of abuse of the tax laws.

(S.A.175:16-177:4.)

The court supported its initial ruling with 144 pages of comprehensive findings and conclusions. (A.168-311.) Among those were findings that the testimony of defendants Johnson and Shepard "did not lend any credibility to their case" and that Johnson's testimony, in particular, was not credible in multiple respects. (A.168, 223-225.)

The court determined that defendants' promotion of the purported tax benefits of their scheme was proscribed by I.R.C. § 6700 because they knew or had reason to know that their customers were not entitled to solar energy credits and depreciation deductions. In particular, defendants knew or had reason to know that they were making false or fraudulent statements when they told customers that, for tax purposes, (1) they became engaged in a "trade or business" by purchasing lenses and executing the transaction documents, (2) their lenses were "placed

in service" in the year of purchase, (3) their lenses were used "to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat," (4) they were "at risk" with respect to the full purchase price that they never actually paid, and (5) their leasing of solar lenses was not a "passive" activity. (A.215-255, 262-288.) The district court also determined that defendants' statements that the full purchase price of a lens was $30,000 or $3,500 constituted "gross valuation overstatements" in violation of § 6700. (A.291-293.)

The district court held that this misconduct warranted both an injunction and disgorgement of defendants' ill-gotten gains. (A.293-297.) As to the amount of disgorgement, the court noted that defendants had "obstructed discovery about their gross receipts and other topics involving their finances" and "did not produce relevant documents and information to the United States on these issues." (A.298; *see* S.A.1-15.) But the court determined that the Government's evidence was nevertheless sufficient to establish that $50,025,480—the lesser of two totals of the sales prices of lens orders recorded in defendants' proprietary sales database—is a reasonable approximation

of their gross receipts from lens sales. (A.297-299.) And the court also held that defendants were not entitled to a credit for expenses of their enterprise because any such expenses were incurred in defrauding the United States. (A.301.)

Accordingly, the district court entered a judgment for the United States enjoining defendants from continuing their scheme and ordering disgorgement of $50,025,480. (A.302-311, 313-314.) On the Government's motion, the court also froze assets of defendants and certain nonparties controlled by Neldon Johnson, including Solco I and XSun Energy, and appointed a receiver to collect and distribute the disgorgement award. (S.A.35.)

SUMMARY OF ARGUMENT

Defendants promoted an abusive tax scheme based on false assurances that purchasers of "solar lenses" were entitled to claim tax credits and depreciation deductions. The "solar lenses," however, remained as uncut plastic sheets in a warehouse, rather than being used as part of an electricity-generating system, and this system never became operational.

The district court held that an injunction and disgorgement of sale proceeds are warranted and supported its judgment with 144 pages of comprehensive findings and conclusions that defendants make no serious attempt to challenge. Indeed, with few exceptions, their brief completely ignores the district court's extensive findings and conclusions. But defendants cannot establish that the district court abused its discretion or that its underlying findings were clearly erroneous without rebutting those findings and the court's stated reasons for exercising its discretion. Defendants' failure to do so is reason alone to affirm.

In any event, the district court properly exercised its discretion in all respects.

1. Defendants argue that their statements about the purported tax benefits of their scheme were not false or fraudulent because those statements were sometimes accompanied by disclaimers advising customers to seek their own tax advice. But that does not make their statements true. Indeed, defendants do not dispute that their statements were false or fraudulent as to three of the five prerequisites for claiming solar energy credits or depreciation deductions that the

district court determined their customers could not satisfy. And their argument that their solar energy system now "works" because they allegedly generated a small amount of electricity *months after trial* is both too little and too late.

Defendants argue in the alternative that they had no reason to know that their statements were false or fraudulent, claiming they relied on the advice of counsel. But the attorney-written letters and memorandum they refer to do not support the tax benefits that defendants promoted to customers, and the attorneys who authored those writings told them so.

Defendants also argue that they did not grossly overstate the value of their solar lenses. But even if there were credible evidence that they incurred $14 million in development costs, as they claim, that amount would not increase the value of a lens by nearly enough to avoid crossing the statutory threshold into a "gross valuation overstatement."

2. With respect to the amount of disgorgement, defendants' argument that the Government's evidence was not sufficient to allow a "reasonable approximation" of their improper gains is belied by the district court's cogent analysis. If defendants had better evidence of

their receipts from lens sales, the burden was on them to produce it. They cannot be heard to complain that their own sales database and other business records were insufficiently clear or precise when they declined the opportunity to explain those records or to otherwise put on any evidence that the Government's evidence overstated the amount of their gross receipts. Moreover, defendants were not entitled to a credit for alleged expenses of their scheme to defraud the Treasury, nor did they need the Government to tell them in pretrial disclosures how much money they made from their own scheme.

3. The decision whether to order a jury trial on motion is committed to the district court's sound discretion, and defendants' argument that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), established a new right to a jury trial on disgorgement claims fails to show that the district court here abused that discretion. Defendants' motion for a jury trial was untimely, having been filed more than eight months after the Supreme Court decided *Kokesh*, nearly three months after the motions deadline, and less than two months before the start of the scheduled bench trial. The denial of the motion can be affirmed simply on the basis of its untimeliness.

In any event, defendants' reliance on *Kokesh* is misplaced. The Supreme Court emphasized repeatedly in *Kokesh* that it was deciding only the narrow issue whether disgorgement, as imposed in SEC enforcement proceedings, is a "penalty" within the meaning of the applicable statute of limitations. To accept defendants' argument that *Kokesh* created a new right to a jury trial on the issue of disgorgement would be to hold that that the Supreme Court overruled *sub silentio* the many authorities, including its own precedents and those of this Court, that have long characterized disgorgement as an equitable remedy. The federal courts have consistently and correctly rejected such expansive interpretations and declined to extend *Kokesh* beyond the specific context of SEC disgorgement as it relates to the statute of limitations.

4. Finally, defendants fail to show that the district court abused its discretion by freezing assets held by nonparties Solco I and XSun Energy. If defendants have standing to represent the interests of those entities, then those entities have received all the notice and opportunity to be heard that is required.

ARGUMENT

I

The record amply supports the district court's determination that defendants promoted an abusive tax scheme for which they could be enjoined and ordered to disgorge their gross receipts

Standard of review

A judgment granting a permanent injunction and order of disgorgement is reviewed for abuse of discretion. *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 699 (10th Cir. 2013); *SEC v. Curshen*, 372 F. App'x 872, 877 (10th Cir. 2010). In an appeal from a bench trial, the district court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. *Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001).

A. Introduction

The central predicate of the judgment below is the determination (A.257-293) that defendants promoted an abusive tax scheme in violation of I.R.C. § 6700. That determination enabled the district court to enjoin defendants under § 7408 from continuing to promote their tax scheme. *See* I.R.C. § 7408(b)-(c)(1) (authorizing courts to enjoin persons from engaging in conduct proscribed by § 6700 if the court finds "that

the person has engaged in [such] conduct, and . . . that injunctive relief is appropriate to prevent recurrence"). And it was also the district court's primary basis for awarding injunctive relief and disgorgement under § 7402(a). (*See* A.296 ("All of Defendants' conduct that warrants an injunction under § 7408 also warrants an injunction and disgorgement under § 7402(a).").)[3]

A violation of § 6700 occurs whenever a person directly or indirectly:

> (1) organizes, or sells any interest in, a plan or arrangement involving taxes; and

---

[3] Section 7402(a) gives federal district courts broad discretion to "issue . . . orders of injunction, . . . orders appointing receivers, and such other orders . . . as may be necessary or appropriate for the enforcement of the internal revenue laws." *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."). Courts have consistently held, and defendants do not dispute, that the nonexclusive remedies authorized by § 7402(a) include disgorgement of ill-gotten gains. *See, e.g.*, *United States v. Stinson*, 729 F. App'x 891, 898-99 (11th Cir. 2018); *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1118-19 (M.D. Fla. 2016).

(2) makes a material statement in connection with such organization or sale that either

(a) connects the allowability of a tax benefit with participation in the plan or arrangement, if the person knows or has reason to know that the statement is false or fraudulent; or

(b) constitutes a "gross valuation overstatement" within the meaning of § 6700(b)(1).

I.R.C. § 6700(a); *see also United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

Here, the Government proved at trial that defendants' conduct in promoting their solar energy scheme satisfied all these elements, and the district court so held in 120 pages of findings and conclusions addressed specifically to that issue. (A.173-255, 257-293; *see also* S.A.175:16-187:4.) More than half of those pages (A.215-255, 259-291) are dedicated to the court's determination, based on the evidence cited therein, that defendants knew or had reason to know that their statements to customers about the purported tax benefits of purchasing solar lenses were false or fraudulent in multiple respects. And the court

determined (A.255, 291-293) that defendants also made "gross valuation overstatements" by overstating the value of the solar lenses by more than 200 percent.

On appeal, defendants challenge the district court's judgment by attacking its determination that they engaged in conduct proscribed by I.R.C. § 6700. (Br. 10-21, 54-55.) But in doing so, they make no serious attempt to grapple with the district court's extensive findings and conclusions. Defendants cannot demonstrate that the relief granted in the judgment was an abuse of the district court's discretion or that its underlying findings were clearly erroneous without even acknowledging, much less rebutting, the court's reasons. And as discussed below, defendants' arguments lack merit in any event.

B. Defendants' statements promoting the purported tax benefits of their scheme were false or fraudulent

As the district court explained in great detail (A.262-288), defendants' customers were not entitled to solar energy tax credits and depreciation deductions because purchasing lenses and executing the transaction documents in accordance with defendants' scheme fails to satisfy at least *five* statutory or regulatory prerequisites for those tax benefits. Specifically:

1. Customers were not in a "trade or business" involving their lenses (A.215-255, 262-277, 281), I.R.C. §§ 48(a)(3)(C), 162(a), 167(a);
2. Customers' lenses were not "placed in service" (A.277-281), I.R.C. § 48(a)(1), (3)(C); Treas. Reg. §§ 1.167(a)-10(b), 1.167(a)-11(e)(1)(i), 1.46-3(d)(1)(ii), (2);
3. Customers' 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" (A.220-221, 279, 281-282), I.R.C. § 48(a)(3)(A)(i);
4. Customers were not "at risk" with respect to any amounts they paid for the lenses, much less the full purchase price (A.287-288), I.R.C. § 465(b); and
5. Customers' purported leasing of their lenses was, at most, a "passive" activity (A.282-285), I.R.C. § 469(a), (c), (d).

Accordingly, defendants' contrary statements advising customers and prospective customers that participation in the scheme satisfied these five prerequisites (*e.g.*, S.A.190-192, 195-197) were, at a minimum, false. And as a result, so were their more general

statements that participation entitled customers to claim solar energy credits and depreciation deductions and to use those tax benefits to offset wages and other "active" income.

Citing no authority, defendants' primary response seems to be (Br. 10, 12-14, 16, 26) that their use of boilerplate disclaimers advising customers to seek their own tax advice absolves them of responsibility. But the mere fact that such disclaimers sometimes accompanied their false or fraudulent statements about tax benefits does not make those statements true. Furthermore, the text of I.R.C. § 6700 contains no "disclaimer" exception, and "[c]ourts have long rejected such disclaimers when the [defendants' own promotional] materials claim to be based on legal content and directly cite legal authority." *United States v. Alexander*, 2010 WL 1643425, at *6 (D.S.C. April 22, 2010) (citing *United States v. Schultz*, 529 F. Supp. 2d 341, 351 (N.D.N.Y. 2007); *see also 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.").

Moreover, defendants' disclaimers that customers should seek their own tax advice ring hollow, since they funneled customers to their hand-picked tax return preparers, who they knew would endorse their tax-benefit claims. (A.188-191, 338, 641; S.A.199-204, 207-208.) And in any event, the district court found that "[t]he disclaimers buried in defendants' websites have no real effect by virtue of their language and by virtue of the overwhelming predominance of false information about tax law on the websites." (S.A.179:11-14.) Defendants cite no evidence to the contrary.

Equally meritless are defendants' assertions (Br. 10, 12-14, 16-19) that their statements about the allowability of depreciation deductions and solar energy credits were true. Defendants do not dispute that their customers were neither "at risk" as to any amounts paid nor engaged in any non-"passive" activity. And while they seem to imply (Br. 16) that there was some use of lenses "to provide solar process heat," I.R.C. § 48(a)(3)(A)(i), they provide no explanation and cite no evidence that contradicts the district court's finding that "[t]here is no evidence that Defendants' solar lenses have ever . . . used heat from the sun to accomplish any kind of useful function or application" (A.279, *see*

also A.221). Thus, defendants have not challenged three of the five unsatisfied statutory requirements on which the district court relied, each of which is sufficient to preclude the tax benefits they promoted.

That alone is reason enough to uphold the district court's determination that defendants made false or fraudulent statements about the purported tax benefits of their scheme. And consequently, this Court need not even consider defendants' arguments as to the "placed in service" and "trade or business" requirements that the district court held their customers also could not satisfy.

Those arguments do not withstand scrutiny, in any event. As defendants admit (Br. 12), they told their customers that lenses were "placed in service" for tax purposes in the year of purchase. Property is generally considered to be "placed in service" when it is "placed in a condition or state of readiness and availability for a specifically assigned function."[4] Treas. Reg. § 1.46-3(d)(1)(ii). Defendants imply (Br. 18-19) that the district court required them to show "regular

[4] This definition of "placed in service," along with the examples set forth in Treas. Reg. § 1.46-3(d)(2), is made applicable to the depreciation deduction by Treas. Reg. § 1.167(a)-11(e)(1)(i), which is made applicable to the solar energy credit by I.R.C. § 48(a)(3)(C).

achievement of anticipated [electricity] production levels," which is the interpretation of "placed in service" that the Fifth Circuit rejected in *Sealy Power, Ltd. v. Commissioner*, 46 F.3d 382, 393 (5th Cir. 1995), as inconsistent with both Congressional intent and the applicable regulations.

But the district court required no such thing. Rather, it expressly followed (A.279-280) the standard *adopted* in *Sealy Power*, which is that "an 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." *Id.* at 390; *see also* Treas. Reg. § 1.46-3(d)(2) ("[M]aterials and parts acquired to be used in the construction of an item of equipment shall not be considered [placed in service]."). In doing so, the district court found "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.279.) Accordingly, the district court correctly held (A.279-280) that the lenses sold to

customers could not have been placed in service because the system as a whole was never placed in service.

Furthermore, even if the system had worked and been in operation, it would not be enough merely that the lenses sold to customers "exist." (Br. 12.) As the district court found, and defendants tacitly acknowledge (*id.*), the vast majority of customers' lenses "exist," if at all, only "as rectangular sheets of plastic, shrouded in plastic wrap on pallets in a warehouse, uncut [and] unframed" (A.280, *see also* A.226-228). To turn those rectangular sheets into so-called "solar lenses," they would have to be cut into triangles. (A.228, 280.) And to then install those triangular lenses on towers, they would have to be framed. (*Id.*) Thus, the district court correctly found that "in their rectangular state, the sheets of plastic are not ready and available for any income-producing activity." (A.280.)

Moreover, even if all of the relatively few lenses that have actually been cut could be said to have been placed in service, no customer could claim any tax benefits as a result because it is impossible to know which customers own those lenses. As the district court explained, defendants "do not even have a way to track which lens belongs to which customer."

Thus, "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." (A.272; *see also* A.228, 236.)

Defendants' challenge to the court's determination that their customers could not satisfy the "trade or business" prerequisite to the claimed tax benefits is also meritless. Defendants told their customers that, by purchasing lenses and signing the transaction documents, their customers were in the "trade or business" of "leasing" solar lenses.[5] (A.194; S.A.198.) The district court disagreed, finding that their customers' purported "leasing businesses" were "not bona fide and ongoing businesses," "existed only on paper," "would never produce income," and "lacked a true profit motive." (A.278.) The court cited many reasons (A.215-239, 262-274, 278), including its findings that defendants' solar energy technology did not and never would work to

---

[5] Defendants also assert (Br. 16-18) that "research and development" can be a trade or business, but they make no attempt to show that their customers were engaged in such a trade or business. Moreover, that is not the business that customers were told they were engaging in.

generate commercially viable electricity or other energy and that no one even knows which lenses a customer owns.

Defendants respond (Br. 54-55) that their solar energy system now "works" because, several months after trial, they allegedly used the "lenses mounted in one of the RaPower-3 solar collector arrays" to generate "independently measured electricity" in a *different* system (*see* S.A.23-24, 30) involving a commercially available "Stirling engine." They support that assertion with an unverified and unsworn report of several purported experts that is in the record only because defendants attached it to a reply they filed (A.61 (Dkt.470)) in support of their post-trial Rule 59(e) motion. According to that report, defendants produced approximately 500 watts of electricity over a total period of approximately 1 hour and 20 minutes. (A.720, 726-846; S.A.30.)

But defendants make no attempt to show that the district court abused its discretion in refusing (A.315-316) to consider this post-trial "evidence." As the court observed, it "was within their control to produce before and at trial," and "[i]f they thought it was relevant, then they should have come forward with it." (A.315-316.) Moreover, after more than a decade of promoting their solar energy system to the

detriment of the U.S. Treasury, defendants' alleged one-time generation of "a very small amount of electricity" (S.A.32) by using their lenses in a different system does not undermine the district court's finding that their solar energy technology will never generate commercially viable electricity. (*See* S.A.30-34 (sworn declaration of Government's expert, who testified at trial, in response to defendants' belated post-trial report).) And in any event, that finding was just one of many on which the district court based its determination that defendants' customers were not engaged in a "trade or business."

C. Defendants knew or had reason to know that their statements were false or fraudulent

Defendants assert repeatedly (Br. 11-16) that they neither knew nor had reason to know that their statements about the allowability of solar energy credits and depreciation deductions to their customers were false or fraudulent. But this Court has explained that "[t]he test for injunctive relief under § 7408 [based on violations of § 6700] is satisfied if the defendant had reason to know his statements were false or fraudulent, regardless of what he actually knew or believed." *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014); *accord* I.R.C. § 6700(a)(2)(A).

And on that question, defendants' only argument (Br. 12-13) is that they relied on the advice of counsel, apparently referring an October 2010 letter[6] (A.564-572) and November 2010 draft letter (A.334-337) from attorney Jessica Anderson of the Anderson Law Center and an October 2012 memorandum from attorney Kenneth Birrell of Kirton McConkie (A.380-395) that defendants used in promoting their tax scheme to customers.

The district court concluded, however, that "the Anderson and Kirton McConkie writings do not negate Defendants' reason to know that they made false or fraudulent statements to customers" (A.290) for many reasons (A.243-253, 283-284, 288-291; S.A.178:18-179:2), including the following findings:

- Anderson's October 2010 letter and November 2010 draft "are general summaries of the law" and expressly "withhold any decisive opinion on the lawfulness of any tax treatment

[6] The copy of the October 2010 letter that is contained in the record is misdated February 9, 2017, for reasons that were explained at trial. (S.A.87:22-88:22.)

because they do not have specific facts and circumstances about the transactions" that defendants promoted. (A.289.)

- After Neldon Johnson later gave Anderson the specific facts of those transactions, she refused his requests for an opinion letter justifying the claimed depreciation deductions and tax credits, and she terminated the engagement (A.246-249), telling Johnson, "no later than January 2011, that he was wrong about the tax benefits solar lens purchasers could claim" (A.290).
- The Birrell memorandum is expressly predicated on facts and assumptions that did not accurately reflect the transactions defendants promoted. (A.249-250, 289-290.)
- Upon learning that defendants were using their writings in promoting defendants' scheme to customers, Anderson 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."[7] (A.251, 290.)

[7] Anderson and Birrell are not the only tax professionals who refused to endorse defendants' scheme. (*See* A.239-242 (discussing Greg (continued…)

Thus, "[i]f anything, the 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." (A.290-291 (emphasis added)); *see Hartshorn*, 751 F.3d at 1202 (a defendant has reason to know if " 'a reasonable person in [his] subjective position would have discovered' the falsity of his representations"). Defendants do not even mention the findings above, much less attempt to show any clear error.

D. Defendants also made "gross valuation overstatements"

Even if defendants had not made false or fraudulent statements about the purported tax benefits of their scheme, the district court's determination that they violated § 6700 would still be correct because they also made or furnished (or caused others to make or furnish) "gross valuation overstatements" in violation of I.R.C. § 6700(a)(2)(B). (A.291-293.) Defendants told customers that they could claim depreciation

---

(…continued)
Shepard's unsuccessful efforts to obtain a favorable opinion letter from CPA Ken Overson).)

deductions and solar energy credits based on the arbitrary "full purchase price" of each lens, which was $30,000 from 2006 through 2009 and usually $3,500 in subsequent years (A.196-197, 200, 273), even though customers were only required to pay a much smaller "down payment." (A.208-213, 287.)

The district court held that these representations about the price of defendants' lenses were "gross valuation overstatements" based, in part, on its determination that even the lesser price of $3,500 far "exceeds 200 percent of . . . the correct valuation" of a lens, I.R.C. § 6700(b)(1)(A), which the court found "is close to its raw cost [of $26-$35], and does not exceed $100" (A.292-293). Defendants argue (Br. 21) that there is "no proof" that the correct valuation of a lens is $26-$35, but that is nonsense. The district court cited the evidence on which it relied (A.255 (citing S.A.205-206; A.514-522)) and fully explained its reasoning (A.292-293). Defendants' failure to acknowledge that evidence and reasoning does not establish a lack of proof.

Defendants cite (Br. 19-20) Neldon Johnson's vague and equivocal testimony (S.A.160:1-161:4) that he spent approximately $14 million to develop the solar lenses. But they once again fail to acknowledge the

district court's reasons for rejecting that argument, including its findings that Johnson "misrepresents the truth about his systems" (A.223), that his testimony in support of defendants' positions was not credible (A.168, 223-224), and that "there is no credible evidence about the amount of [alleged 'research and development'] costs" (A.292; *see also* A.255). Those credibility findings are entitled to great deference, *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985), especially given the dearth of corroborating evidence for even a dime of the purported $14 million.

Moreover, even if there were credible evidence of $14 million in development costs, that amount would increase the cost of the roughly 50,000 lenses that defendants sold from a maximum of $100 per lens (as determined by the district court) to a maximum of approximately $380 per lens. Thus, the $3,500 price that defendants represented to customers would still exceed the "correct valuation" of a lens by far more than 200 percent.

II

The district court properly exercised its discretion in ordering disgorgement of $50,025,480

Standard of review

The district court's calculation of the amount of disgorgement is reviewed for abuse of discretion, as are its evidentiary rulings. *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 427-28 (9th Cir. 2018); *United States v. Dowlin*, 408 F.3d 647, 659 (10th Cir. 2005); *see SEC v. Contorinis*, 743 F.3d 296, 301 (2d Cir. 2014); *SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006).

A. Introduction

It is well settled that "[t]he district court has broad discretion not only in determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *Contorinis*, 743 F.3d at 301 (internal quotation marks omitted); *Maxxon*, 465 F.3d at 1179 (same). Exercising that broad discretion requires the court to "make at least a reasonable approximation of the defendant's unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment ("Restatement") § 51 cmt. i; *accord Contorinis*, 743 F.3d at 305; *Maxxon*, 465 F.3d at 1179. "Exactitude is not a requirement; so long as the

measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer." *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004); *accord Contorinis*, 743 F.3d at 305-06; Restatement § 51 cmt. i.

Accordingly, the plaintiff bears only "the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain." Restatement § 51(5)(d); *accord SEC v. Curshen*, 372 F. App'x 872, 883 (10th Cir. 2010). The burden then shifts to the defendant to "show that the true extent of unjust enrichment is something less." Restatement § 51 cmt. i; *accord Calvo*, 378 F.3d at 1217. This allocation of burdens is consistent not only with "the equitable principle that the wrongdoer should bear the risk of any uncertainty affecting the amount of the remedy," *Contorinis*, 743 F.3d at 306, but also with the common sense notion that it is the defendant, not the plaintiff, who is in the best position to know and be able to prove the precise amount of the defendant's own gain.

Although the defendant is generally entitled to a deduction for any proven costs that the defendant incurred in producing the revenues subject to disgorgement, "it is well established that defendants in a disgorgement action are not entitled to deduct costs associated with

committing their illegal acts." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 375 (2d Cir. 2011) (internal quotation marks omitted); *accord FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1327 (11th Cir. 2013); *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114-15 (9th Cir. 2006); Restatement § 51(5)(c) & cmt. h. Thus, in cases involving the operation of a fraudulent business, courts accept revenues or gross receipts obtained by the defendant as a reasonable measure of disgorgement, regardless of the defendant's expenses. *See, e.g.*, *United States v. Stinson*, 729 F. App'x 891, 899 (11th Cir. 2018); *Bronson Partners*, 654 F.3d at 375; *FTC v. Direct Mktg. Concepts*, 624 F.3d 1, 14-15 (1st Cir. 2010).

The federal courts have typically addressed these disgorgement principles in the context of SEC and FTC enforcement actions. But as defendants correctly acknowledge (Br. 22, 25), the same principles apply equally to the disgorgement sought in this case "for the enforcement of the internal revenue laws," I.R.C. § 7402(a). *See, e.g.*, *Stinson*, 729 F. App'x at 898-99.

B. The disgorgement ordered by the district court is a "reasonable approximation" of defendants' receipts from lens sales

Defendants argue that the evidence at trial was insufficient to support disgorgement of $50,025,480. But their position is not merely that the district court ordered an "excessive" amount of disgorgement (Br. 21); it is that the evidence does not support *any* amount. Accordingly, the only relief they seek from this Court is that "disgorgement . . . be disallowed." (Br. 56.)

In advocating for that relief, however, they are fatally hamstrung by their decision to rest at trial without calling a single witness or offering any pertinent documents. (*See* A.168.) Indeed, they are now so eager to avoid the consequences of that decision that they have resorted to asserting as fact (but without citation to the record) what they apparently *wish* they had tried to prove. As just one example, defendants' counsel averred during trial that Glenda Johnson would testify in their case-in-chief about entries she made in defendants' sales database and "to address what she viewed as a massive database that she was trying to work with." (S.A.149:13-150:2.)

But despite changing their minds and declining to call *any* witnesses, their brief to this Court blithely asserts that the database's "raw data included 'test' transactions and posted 'sales' that did not result in any revenue for Defendants." (Br. 29.) This bare assertion of "facts" that defendants declined the opportunity to prove, along with the many other such assertions in their brief, should be disregarded.[8]

Having been either unable or unwilling to put on any better evidence of the revenues from their scheme, defendants are now left to argue that the Government's evidence was insufficient to shift the

---

[8] Other examples of their bare assertions for which there is no evidence include the following:

- "All amounts claimed against individual Defendants are entirely derived from and included in the RaPower-3 total . . . ." (Br. 27.)
- "All money from lens sales passed through RaPower-3. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS, identified in PLEX 735-738 came directly from RaPower-3." (Br. 27 (footnote omitted).)
- "RaPower did not collect on all sales. What was 'booked' and 'collected' are very different. Collections were much lower." (Br. 28 n.69.)
- "Much of [the evidence of bank deposit amounts] was double-, perhaps triple-counted." (Br. 34.)

burden of proof to them in the first place. But the threshold burden on the plaintiff to produce evidence from which the court may make a "reasonable approximation" is not a high bar. Its only purpose is to establish that the plaintiff's claim of unjust enrichment is not "merely speculative." Restatement § 51 cmt. i. Thus, "a claimant who is prepared to show a causal connection between the defendant's wrongdoing and a measurable increase in the defendant's net assets will satisfy the burden of proof as ordinarily understood." *Id.*

Here, as the district court acknowledged, defendants did their utmost to prevent the Government from making that showing by "obstruct[ing] discovery about their gross receipts and other topics involving their finances" and failing to "produce relevant documents and information to the United States on these issues." (A.298.) But nevertheless, the Government was able to prove the following at trial:

- defendants sold at least 49,415 lenses (*id.*; S.A.271);
- the price customers were actually required to pay for each lens, according to defendants' own transaction documents, was the "down payment" amount of $9,000 (2006-2009) or $1,050 (after 2009) (A.196-197, 200, 273);

- bank accounts of the lens-selling entities (RaPower-3, IAS, Solco I, and XSun Energy) received deposits totaling at least $44,129,012 through 2016 (A.635, 637-639); and
- the total sales price of the more than 7,000 lens orders recorded in defendants' database through February 2018 was between $50,025,480 and $50,097,672 (PLEX749, "Combined Sheet" tab, line 7072; S.A.94:10-113:10).[9]

This evidence was more than sufficient to allow the court to make a reasonable approximation of defendants' gross receipts, as the district court's analysis (A.298-299) demonstrates. The court found that "[t]he best evidence that I have shows over $50 million in revenue has been received." (S.A.175:19-21.) That "best evidence" included not only the range of $50,025,480—$50,097,672 revealed by defendants' own sales database, but also the $51,885,750 that would result from sales of 49,415 lenses at $1,050 per lens (A.298), and the greater amount that would result if the higher down payment of $9,000 for lenses sold before

[9] Contrary to defendants' repeated suggestions (Br. 7, 26-28, 34-35, 39-41), the Government's evidence on the issue of disgorgement did not include evidence of "harm to the Treasury." *See infra* pp. 51-52.

2010 were accounted for. The court acknowledged, however, that there was "some testimony" that not all of defendants' customers paid the full $1,050 or $9,000, though defendants "offered no credible evidence of the amount of any missing down payments." (A.186, 298.) So the court relied on the records of actual sales in defendants' own database to determine that $50,025,480 is a reasonable approximation of their gross receipts from their solar energy scheme. (A.298-299.)

This Court and its sister circuits have affirmed disgorgement amounts based on similar evidence. *See, e.g.*, *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 427 (9th Cir. 2018) (reliance "on data from [defendant]'s loan management software to determine how much money [defendant] received from consumers in excess of the [loan] principal disbursed plus the initial 30-percent finance charge"); *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1163 (10th Cir. 2013) (reliance on "PayPal sales records" to determine amount of defendant's wrongful sales, even though those records likely did not include all such sales). Accordingly, the district court did not abuse its discretion here.

To be sure, the district court could have reasonably settled on a different approximation of defendants' gross receipts. The Government

readily acknowledged at trial (*e.g.*, S.A.142:24-149:5) that the evidence it presented could be construed in a number of ways to support a range of different amounts. (*See, e.g.*, A.185-187.) But defendants' argument that this lack of certainty in the Government's evidence precluded the district court from making *any* reasonable approximation misconstrues both the trial court's function and the proper allocation of the risk of uncertainty. *See, e.g.*, *Esgar Corp. v. Commissioner*, 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."); *Contorinis*, 743 F.3d at 306 (restating the "equitable principle that the wrongdoer should bear the risk of any uncertainty affecting the amount of [disgorgement]").

Indeed, the allocation of the risk of uncertainty to the wrongdoer is the very reason the burden of proof shifts to the defendant upon the plaintiff's production of evidence supporting a reasonable approximation. And it also yields the long-settled 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." *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) (L. Hand, C.J.). Thus, when "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." Restatement § 51 cmt. i (citing *Gratz*, 187 F.2d at 51-52).

Accordingly, the district court did not abuse its discretion in fixing disgorgement at an amount near the top of the range supported by the Government's evidence. If there exists any evidence that defendants' actual receipts were less, the burden was on defendants to produce it at trial. It is not enough for them to argue (Br. 29-30) that their own sales records were insufficiently clear to be free from ambiguity on their face. Defendants declined to offer any testimony or other evidence about the meaning and significance of those records despite the presence at trial of Glenda Johnson, Neldon Johnson's wife, who reportedly made most of the entries in defendants' database. (S.A.92:5-6, 149:13-150:2, 156:5.) Any ambiguity is therefore properly resolved against them. *See, e.g.*, *Direct Mktg. Concepts*, 624 F.3d at 15 ("Any fuzzy figures due to a

defendant's uncertain bookkeeping cannot carry a defendant's burden to show inaccuracy.").

C. The district court properly allocated the disgorgement among the individual defendants

Defendants also challenge (Br. 30, 35-36) the district court's apportionment of liability for the $50,025,480 disgorgement amount, but they cite no evidence or authority demonstrating an abuse of discretion. The district court held that Neldon Johnson is liable for the entire amount because he created the solar energy scheme, owns and exclusively controls the entities involved, directed those entities' actions to sell the scheme, and was personally enriched by their gross receipts. (A.299-300; *see also* A.174, 180-181, 187-188.) Defendants dispute none of this.

The district court held that defendants RaPower-3 and IAS are jointly and severally liable with Neldon Johnson up to the amount of gross receipts they each received, which the court determined was $25,874,066 for RaPower-3 and $5,438,089 for IAS. (A.187, 300, 311.) Defendants argue (Br. 35) that the evidence of RaPower-3's bank deposits (on which the district court primarily based its determination of RaPower-3's gross receipts) did not exclude "redeposits or inter-

account transfers," but they cite no evidence that any such amount was actually included, much less improperly so. They also argue (Br. 35-36) that the district court improperly double-counted $3,077,000 that RaPower-3 transferred to IAS in the gross receipts of both entities. But since RaPower-3 undisputedly obtained the $3,077,000 that it transferred to IAS from lens sales, it was appropriate, and was not double-counting, to hold them jointly and severally liable for that amount. (*See* A.118 ("Defendants may, when appropriate by transmission of funds from one to another, be jointly and severally liable for disgorgement.").)

D. Defendants were not entitled to a credit or deduction for any alleged expenses of their scheme

There is no merit to defendants' argument (Br. 25-26) that the district court, in determining the disgorgement amount, should have offset its approximation of their gross receipts against their alleged business expenses. The district court declined to do so because "[w]hen a defendant defrauds the claimant, as the United States has shown Defendants have done," allowing a credit for expenses associated with the fraud is "not consistent with principles of equitable disgorgement." (A.301 (citations omitted).) As we have explained, *supra* pp. 39-40, and

as defendants acknowledge (Br. 25), that is a correct statement of the law. *See, e.g.*, Restatement § 51(5)(c) & cmt. h ("The defendant will not be allowed a credit for the direct expenses of an attempt to defraud the claimant.").

Defendants' only response (Br. 25-26) is to repeat their argument that there was no fraud because "[a]t every level, Defendants encouraged [their] customers to seek their own tax advice." Because, as explained *supra*, that argument is meritless, the district court did not abuse its discretion in declining to reduce the disgorgement amount to account for any alleged expenses. Moreover, even if defendants' scheme had not been fraudulent, their one paragraph (Br. 26) of allegedly "legitimate business expenses" and exhibit citations, unaccompanied by any argument or explanation, fails to show that their claim of more than $43 million in relevant expenses is even plausible, much less that the district court abused its discretion. *See, e.g.*, *United States v. Johnson*, 732 F. App'x 638, 645 (10th Cir. 2018) (declining to address arguments that appellant "fails to adequately develop"); *Maxxon*, 465 F.3d at 1183 n.20 ("[I]t is insufficient merely to state in one's brief

that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for the appeal.").

E. Defendants' complaints about the district court's evidentiary rulings are meritless

Defendants argue (Br. 26-29, 36-41) that the district court abused its discretion in admitting what they contend was the Government's disgorgement evidence. They focus most of their attention on the evidence of "harm to the Treasury," which consisted of a summary exhibit (A.641-643), along with explanatory testimony of the paralegal who prepared it (S.A.117:19-140:16), showing (a) the total amount of the depreciation deductions and solar energy credits that a sample of defendants' customers claimed on their 2013-2016 tax returns, and (b) the total value of those claimed tax benefits—$14,207,517—if the annual average tax rates published by the IRS are applied.

But despite defendants' repeated suggestions to the contrary (Br. 7, 26-28, 34-35, 39-41), that evidence was neither offered by the Government, nor relied upon by the district court, as a measure of disgorgement. (S.A.147:8-20; A.294, 296.) As the Government explained at trial (S.A.147:11-12), the evidence of "harm to the Treasury" went instead to its claim for injunctive relief. *See, e.g.*,

United States v. Estate Pres. Servs., 202 F.3d 1093, 1105 (9th Cir. 2000) (factors court may consider in deciding whether to grant a § 7408 injunction include "the gravity of the harm caused by the [defendant's violation of § 6700]").[10]

As for the Government's evidence that actually did go to the measure of disgorgement, defendants' complaints about the purported lack of pretrial disclosure (Br. 36-41) amount to an argument that they were unfairly surprised at trial by their own sales and banking records. Defendants cite Federal Rule of Civil Procedure 26(a)(1)(A)(iii), which requires the pretrial disclosure of "a computation of each category of damages claimed."

But as the district court correctly explained in denying defendants' motion in limine to exclude testimony, Rule 26(a)(1)(A)(iii) does not apply to disgorgement because "[d]isgorgement is not a damages remedy." (A.115 (quoting *United States v. Stinson*, 2016 WL 8488241, at *7 (M.D. Fla. 2016)).) Indeed, "[d]efendants should know

---

[10] The district court appears to have also used the amount of "harm to the Treasury" shown by the Government in determining the priority of claims to the receivership estate. (S.A.77 ¶ 89(b).)

the total amount of lenses sold and how much money was derived from those sales." (*Id.*) Their argument that it was the Government's job to tell them how much money they made defies credulity. Moreover, defendants "repeatedly withheld information from [the Government] regarding the basis for disgorgement, despite being ordered to [produce it]." (*Id.* (footnote omitted).)

Defendants also cite Federal Rule of Civil Procedure 26(a)(2)(B), which requires pretrial disclosure of expert reports, but their argument (Br. 39-41) is just more of the same. They offer an abundance of hyperbole but no serious argument that the witnesses who testified about their sales data and bank deposits offered expert opinions. Their real complaint is that they "were robbed of their opportunity to have an expert witness examine the surprise material and refute the DOJ/IRS's 'summary calculations' and 'arithmetic' " (Br. 39), or in other words, that they again were unfairly surprised by their own sales and banking records.

These arguments fail to show any abuse of discretion in the district court's denial (A.45 (Dkt.371), 114, 122) of defendants' motions to exclude the Government's disgorgement evidence. And the same is

true of their argument (Br. 5-6, 41) challenging the denial (A.74) of their motion to exclude the Government's solar energy expert, Dr. Mancini, which argument is merely a list of unsubstantiated objections unaccompanied by any analysis or rebuttal of the district court's reasoning (A.87-94).

III

The district court properly exercised its discretion in denying defendants' belated motion for a jury trial on the issue of disgorgement

Standard of review

The grant or denial of a motion for trial by jury is reviewed for abuse of discretion. *Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980); *see* Fed. R. Civ. P. 39(b). Whether the movant had a federal right to a jury trial is a question of law reviewed *de novo*. *J.R. Simplot v. Chevron Pipeline Co.*, 563 F.3d 1102, 1115 (10th Cir. 2009); *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1158 (10th Cir. 1998).

A. Introduction

A party that has a Seventh Amendment or federal statutory right to a jury trial may seek to exercise that right in either of two ways. The

party may claim a jury trial *as of right* by making a timely jury demand. Fed. R. Civ. P. 38(b), 39(a). And if a jury "is not properly demanded," the party may ask the court to exercise its *discretion* to order a jury trial "on motion." Fed. R. Civ. P. 39(b); *see also Paramount Pictures*, 621 F.2d at 1090. In either case, however, the claims or issues sought to be tried to a jury must be one for which there is a federal right to a jury trial. Fed. R. Civ. P. 38(b), 39(a)(2), (b).

Here, defendants argue that they had a Seventh Amendment right to a jury trial on the Government's claim for disgorgement.[11] But it has long been settled that the Seventh Amendment applies only when "the plaintiff's claims are legal rather than equitable." *Thompson v. Kerr-McGee Ref. Corp.*, 660 F.2d 1380, 1386 (10th Cir. 1981); *see Manning v. United States*, 146 F.3d 808, 811-12 (10th Cir. 1998) ("Actions at law entitle the parties to a jury, but equitable cases do not.").

---

[11] The remedy of disgorgement "consists of factfinding by a district court to determine the amount of money acquired through wrongdoing—a process sometimes called 'accounting'—and an order compelling the wrongdoer to pay that amount plus interest to the court." *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016) (internal quotation marks omitted).

And it is well settled that disgorgement of ill-gotten gains, like injunctive relief, is an equitable remedy. *See, e.g.*, *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) ("[W]e have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.' "); *Tull v. United States*, 481 U.S. 412, 424 (1987) ("[A]n action for disgorgement of improper profits [is] traditionally considered an equitable remedy."); *Badger*, 818 F.3d at 566-67 (remedy of disgorgement is among the court's "equitable powers"); *SEC v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006) ("Disgorgement is by nature an equitable remedy as to which a trial court is vested with broad discretionary powers."); *SEC v. Commonwealth Chem. Secs., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978).

Accordingly, the magistrate judge below held that there is no right to a jury on the Government's claims and struck defendants' jury demand. (A.70.) Defendants filed no objections to the magistrate judge's order and, as a result, are precluded from challenging the striking of their jury demand on appeal. *See* Fed. R. Civ. P. 72(a) ("A party may not assign as error a defect in the [magistrate judge's] order

not timely objected to."); *Klein-Becker USA, LLC v. Englert*, 711 F.3d 1153, 1165 (10th Cir. 2013) ("Because he never formally objected to the magistrate judge's ruling [striking] his jury demand, Mr. Englert waived this argument on appeal."); *In re Key Energy Res., Inc.*, 230 F.3d 1197, 1199-1200 (10th Cir. 2000) (discussing this Court's "firm waiver rule").

Defendants do not deny that they had no federal right to a jury trial under then-existing law, but argue that the law changed. Citing the Supreme Court's intervening decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), they contend (Br. 42-51) that disgorgement is no longer an equitable remedy and is now a legal remedy, specifically, a "penalty," for which there is a Seventh Amendment right to a jury trial. As we will explain, defendants are wrong; *Kokesh* did not overturn longstanding precedent regarding the basic nature of disgorgement.

The issue before this Court, however, is not whether defendants are right about *Kokesh*, but whether the district court abused its broad discretion in denying (A.95-103) the motion in which they asked the court to order a jury trial based on *Kokesh*. The infirmity of their legal

argument is only one of several grounds on which this Court may affirm that discretionary denial.

B. The undisputed tardiness of defendants' motion was reason enough to deny it

Although the district court also rejected the merits of defendants' motion for a jury trial, it began by holding that "[t]he Motion is untimely" and that "[t]he untimeliness of the Motion *by itself warrants denial*." (A.96 (emphasis added).) As the district court explained, defendants "had ample time to file a timely motion" because "*Kokesh* was decided in June 2017, over five months before the motions cut-off date" set by the scheduling order. (*Id.*)

But defendants waited to file their motion until February 9, 2018, nearly three months after the motions deadline, more than eight months after *Kokesh* was decided, and less than two months before the start of the scheduled bench trial. (*Id.*) Moreover, only two weeks earlier, the court had modified the trial schedule, "[a]fter input of counsel," to split the ten-day trial into four nonconsecutive sessions spread over two months, "mak[ing] a jury trial difficult." (*Id.*)

On these grounds, the denial of defendants' jury motion was well within the district court's discretion. *See, e.g.*, *U.S. ex rel. Schumer v.*

Hughes Aircraft Co., 63 F.3d 1512, 1527-28 & n.6 (9th Cir. 1995) (affirming denial of "motion to reinstate the action on the jury docket" because movant failed the raise the alleged grounds for reinstatement "in a timely manner"), *vacated on other grounds*, 520 U.S. 939 (1997); *Musick v. Norton*, 215 F. Supp. 2d 171, 173 (D.D.C. 2002) (denying motion to "reinstate" waived jury demand where movant filed it "after both the close of discovery and the deadline for filing dispositive motions, and two months before the trial is scheduled to commence").

Indeed, this Court has affirmed the denial of a motion for jury trial in far less egregious circumstances. *See Dill v. City of Edmond, Okla.*, 155 F.3d 1193, 1208 (10th Cir. 1998) (affirming denial of jury motion filed more than five months before trial, but almost a year and half after the original complaint, based solely on appellant's failure to offer any excuse for not requesting a jury trial sooner or to demonstrate that it "was due to anything other than inadvertence or oversight").

Defendants do not even acknowledge that the district court questioned the timeliness of their motion, much less challenge the court's holding that untimeliness alone warranted denial. Because they have thus forfeited the right to challenge the denial of their motion for

untimeliness, this Court should affirm and need not consider the merits of their argument under *Kokesh*.

C. Even if defendants' motion had been timely, the district court would have lacked discretion to grant it

Defendants cite no authority for the proposition that a district court may order a jury trial on motion based on an intervening change in law that establishes a "new" jury right, and the plain language of the applicable rules is to the contrary. Under Rule 39(b), a district court's discretion to order a jury trial on motion is limited to "issue[s] for which a jury might have been demanded." And under Rule 38(b)(1), a jury might have been demanded only on issues that were "triable of right by a jury" as of "no later than 14 days after the last pleading directed to the issue [was] served."

That time expired here on February 9, 2016 (*see* A.10), more than a year before *Kokesh* purportedly changed disgorgement from an equitable remedy to a legal remedy. So even if defendants were right about the effect of *Kokesh* (which they are not), the Government's claim for disgorgement was not an "issue for which a jury might have been demanded" and therefore not an issue on which the district court had discretion to order a jury trial. Fed. R. Civ. P. 39(b).

D. Defendants' reliance on the Supreme Court's decision in *Kokesh* is misplaced

Although this Court need not consider defendants' argument that *Kokesh* changed the law and established disgorgement as a legal remedy for which there is a Seventh Amendment right to a jury trial, that argument is unavailing for several reasons. First, it stretches the holding of *Kokesh* far beyond its breaking point. Indeed, *Kokesh* had nothing to do with jury rights or even the question whether disgorgement is an equitable remedy or a legal remedy.[12] Instead, the Supreme Court summarized the narrow issue and the equally narrow holding in *Kokesh* as follows:

> 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

---

[12] In *Kokesh*, the disgorgement and other remedies issues were decided by the district court, but the underlying question whether the defendant had committed securities violations was tried before a jury. *Kokesh*, 137 S. Ct. at 1641. The same situation occurred in *Maxxon*, 465 F.3d at 1177-78, in which this Court held that disgorgement is an equitable remedy, *id.* at 1179. Unlike the instant case, the SEC in *Kokesh* and *Maxxon* sought not just an injunction and disgorgement, but also the established legal remedy of statutory monetary penalties, which is likely why the predicate misconduct was tried before a jury.

> 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.

Kokesh, 137 S. Ct. at 1639.

And lest there be any doubt about the narrow scope of its holding, the Court reiterated repeatedly, on every page of its analysis, *see id.* at 1642-45, that it was concerned with disgorgement only in the specific context of SEC enforcement proceedings and only for the specific purpose of determining whether it is a "penalty" within the meaning § 2462. *See, e.g.*, *Kokesh*, 137 S. Ct. at 1642 n.3 ("The sole question presented in this case is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period.").

Defendants would have this Court disregard the narrow confines to which the Supreme Court expressly limited its decision and hold that *Kokesh* instead changed the very nature of disgorgement. This Court stated in *Maxxon* that "[d]isgorgement is by nature an equitable remedy as to which a trial court is vested with broad discretionary powers" and therefore rejected an argument that facts on which a disgorgement

amount is based must be found by a jury. 465 F.3d at 1179 (internal quotation marks omitted).

But from *Kokesh*'s narrow holding that the disgorgement sought in SEC enforcement actions is a "penalty" for statute of limitations purposes, defendants ask this Court to infer: (1) that the remedy of disgorgement of improper gains is now, in *any* context, a penalty for *all* purposes; (2) that disgorgement is therefore now a legal remedy for which there is a Seventh Amendment right to a jury; and (3) that the Supreme Court overruled, *sub silentio*, this Court's decision in *Maxxon* and the many other prior authorities characterizing disgorgement as an equitable remedy, *see, e.g.*, *supra* p. 56, including its own decisions in cases like *Terry* and *Tull*. (Br. 46-48, 50-51.)

These inferences are unwarranted because *Kokesh* can easily be construed more narrowly, as the Supreme Court appears to have intended, so as not to conflict with this Court's decision in *Maxxon*. *See AMG Cap. Mgmt.*, 910 F.3d at 427 (holding that court remained bound by prior Ninth Circuit precedent, which treated disgorgement of unjust gains as equitable relief, because it was not "clearly irreconcilable" with *Kokesh*); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 27 (D. Conn. 2018)

("[N]othing in *Kokesh* disturbed Second Circuit precedent that disgorgement is a proper equitable remedy."); *SEC v. Camarco*, No. 17-CV-2027-RBJ, 2018 WL 6620878, at *3 & n.2 (D. Colo. Dec. 18, 2018) (following *Maxxon* and rejecting argument that *Kokesh* entitled defendants to a jury on disgorgement).

Indeed, the leaps of logic that defendants ask this Court to make are precisely the sort that the *Kokesh* opinion's careful use of narrow, qualified language seems designed to avoid. *See AMG Cap. Mgmt.*, 910 F.3d at 427 ("*Kokesh* itself expressly limits the implications of the decision."); *United States v. Dyer*, 908 F.3d 995, 1003 (6th Cir. 2018) ("The holding in *Kokesh* was narrow and limited solely to the statute of limitations in 28 U.S.C. § 2462."); *FTC v. Credit Bureau Ctr.*, 284 F. Supp. 3d 907, 909 (N.D. Ill. 2018) (argument that disgorgement and restitution remedies were penalties was "a considerable overstatement of *Kokesh*"); *SEC v. Jammin Java Corp.*, No. 15-cv-8921, 2017 WL 4286180, *3 (C.D. Cal. Sept. 14, 2017) ("To hold that disgorgement operates as a penalty under § 2462 is to define 'penalty' in that statutory context, *not to characterize 'disgorgement.'* As it presently stands, *Kokesh* is best seen as a decision clarifying the statutory scope

of § 2462, rather than one redefining the essential attributes of disgorgement." (emphasis in original)).

Accordingly, the federal courts, including those cited above and the district court here (A.99), have consistently declined to extend *Kokesh* beyond the specific context of SEC disgorgement as it relates to the statute of limitations. *See, e.g.*, *Ahmed*, 343 F. Supp. 3d at 26-27 (citing cases); *Camarco*, 2018 WL 6620878, at *2-3 & n.2 (same).

Moreover, disgorgement under I.R.C. § 7402(a) is distinguishable from the SEC disgorgement at issue in *Kokesh*. The Supreme Court held that SEC disgorgement is a "penalty" primarily because it "is not compensatory," since the SEC is not the victim of the underlying securities violations, and the disgorged funds are not necessarily distributed to the injured investors who are the victims. *Kokesh*, 137 S. Ct. at 1644. As the Court explained, "When the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Id.* at 1643.

But here, the United States *is* the injured party. As defendants' own marketing materials illustrated (A.209), the lenses they sold were

bought with funds that otherwise would have been paid as taxes to the U.S. Treasury; defendants fraudulently told their customers they were entitled to claim depreciation deductions and solar energy tax credits. So unlike SEC disgorgement, where a defendant is ordered to disgorge money that rightfully belongs to injured investors, the gross receipts that defendants here have been ordered to disgorge "came from money that rightfully belonged to the U.S. Treasury." (A.299.) Accordingly, the disgorgement in this case presents neither the Supreme Court's chief concern that disgorgement may not be compensatory, nor its additional concern that disgorgement may "leave[ ] the defendant worse off" instead of "simply restor[ing] the status quo," *id.* at 1645.

Finally, defendants argue (Br. 48-49) that the disgorgement in this case was punitive because the amount ultimately awarded was, in their view, excessive. But the proper remedy on appeal for an excessive disgorgement award is to seek to reduce it, not to hold that the excessive amount somehow effected an after-the-fact transformation of the nature of disgorgement requiring a new trial before a jury. *See* Wright & Miller, *Federal Practice and Procedure* § 2304 ("The right to a jury trial is to be determined from the pleadings . . . .").

IV

The district court properly exercised its discretion in freezing certain assets of nonparty entities controlled by Neldon Johnson

Standard of review

The issuance of an injunction freezing assets is reviewed for abuse of discretion. *SEC v. Scoville*, 913 F.3d 1204, 1213 (10th Cir. 2019); *Resolution Tr. Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

Defendants have largely abandoned their interlocutory appeal of the asset freeze injunction and appointment of a receiver, challenging only the district court's freeze of assets held by nonparties Solco I, LLC and XSun Energy, LLC.[13] (Br. 51-54.) According to defendants, the asset freeze deprived those entities of due process because they are not parties to this action and therefore did not have an opportunity to be heard. But defendants fail to explain how they have standing to enforce the alleged due process rights of nonparty entities.

---

[13] The operative asset freeze order is set forth in the Corrected Receivership Order (S.A.35). Its scope with respect to Solco I and XSun is narrower than defendants suggest. (*See* S.A.36-39.)

Moreover, their due process argument is meritless. Referring to Solco I and XSun collectively as "Solco," the district court recently rejected that same argument when defendants raised it as grounds for lifting the freeze, explaining:

> At all relevant times, Solco has had notice of the Asset Freeze and an opportunity to be heard regarding it. Indeed, this is at least the third time that Solco has been heard regarding it. And upon completion of the Receiver's investigation, Solco will have yet another opportunity to be heard about it.

(S.A.83.)

CONCLUSION

The judgment and orders of the district court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The facts and issues presented in this case are sufficiently complex that oral argument might be helpful to the Court.

Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

s/ Clint A. Carpenter
JOAN I. OPPENHEIMER (202) 514-2954
CLINT A. CARPENTER (202) 514-4346
Appellate.TaxCivil@usdoj.gov
Clint.A.Carpenter@usdoj.gov
Attorneys
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

Of Counsel:

JOHN W. HUBER
United States Attorney

MARCH 2019

ADDENDUM

Internal Revenue Code (26 U.S.C.)

§ 6700. Promoting abusive tax shelters, etc.

(a) Imposition of penalty

Any person who—

(1)

(A) organizes (or assists in the organization of)—

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)—

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, 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 the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated. Notwithstanding the first sentence, if an activity with respect to which a penalty imposed under this subsection involves a statement described in paragraph (2)(A), the amount of the penalty shall be equal to 50 percent of the gross income derived (or to be derived) from such activity by the person on which the penalty is imposed.

(b) Rules relating to penalty for gross valuation overstatements

(1) Gross valuation overstatement defined

For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or services if—

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related to the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) Authority to waive

The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

(c) Penalty in addition to other penalties

The penalty imposed by this section shall be in addition to any other penalty provided by law.

§ 7402. Jurisdiction of district courts

(a) To issue orders, processes, and judgments

The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

* * * * *

§ 7408. Actions to enjoin specified conduct related to tax shelters and reportable transactions

(a) Authority to seek injunction

A civil action in the name of the United States to enjoin any person from further engaging in specified conduct may be commenced at the request of the Secretary. Any action under this section shall be brought in the district court of the United States for the district in which such person resides, has his principal place of business, or has engaged in specified conduct. The court may exercise its jurisdiction over such action (as provided in section 7402(a)) separate and apart from any other action brought by the United States against such person.

(b) Adjudication and decree

In any action under subsection (a), if the court finds—

(1) that the person has engaged in any specified conduct, and

(2) that injunctive relief is appropriate to prevent recurrence of such conduct,

the court may enjoin such person from engaging in such conduct or in any other activity subject to penalty under this title.

(c) Specified conduct

For purposes of this section, the term "specified conduct" means any action, or failure to take action, which is—

(1) subject to penalty under section 6700, 6701, 6707, or 6708, or

(2) in violation of any requirement under regulations issued under section 330 of title 31, United States Code.

* * * * *

CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f):

[X] this brief contains 12,986 words, **or**

[ ] this brief uses a monospaced typeface and contains _____ lines of text.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14, **or**

[ ] this brief has been prepared in a monospaced typeface using _____ with _____.

Date: March 27, 2019

s/ Clint A. Carpenter

CLINT A. CARPENTER (202) 514-4346
Attorney for the Appellee
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Clint.A.Carpenter@usdoj.gov

CERTIFICATE OF SERVICE AND DIGITAL SUBMISSION

I hereby certify that on March 27, 2019, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Steven Richard Paul (spaul@nsdplaw.com)
Denver C. Snuffer, Jr. (dcsnuff@aol.com)

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, System Center Endpoint Protection 2016 (updated daily), and according to the program are free of viruses.

Date: March 27, 2019

s/ Clint A. Carpenter

CLINT A. CARPENTER (202) 514-4346
Attorney for the Appellee
Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044
Clint.A.Carpenter@usdoj.gov