IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, v. SOLCO I, LLC, et al., Defendants/Appellants, and RAPOWER-3, LLC, et al., Defendants.	Appeal No. 19-4089
R. WAYNE KLEIN, Receiver/Appellee.	

On Appeal from
The United States District Court for the District of Utah
(Civil No. 2:15-cv-00828 - Judge David O. Nuffer)

APPELLEE'S SUPPLEMENTAL APPENDIX, VOLUME 1

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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, 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.

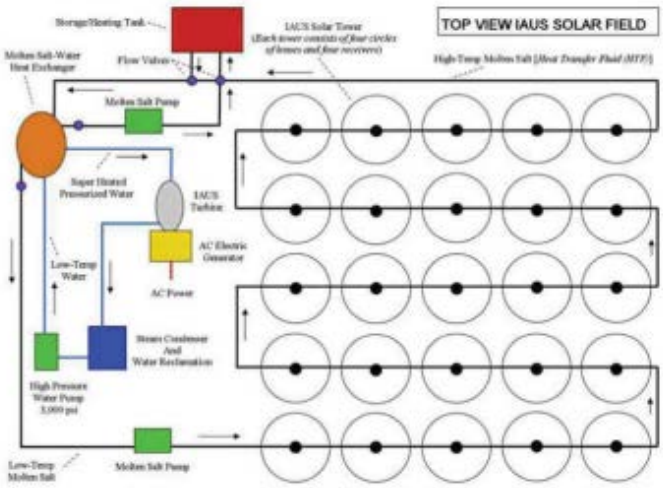
(continued...)

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.

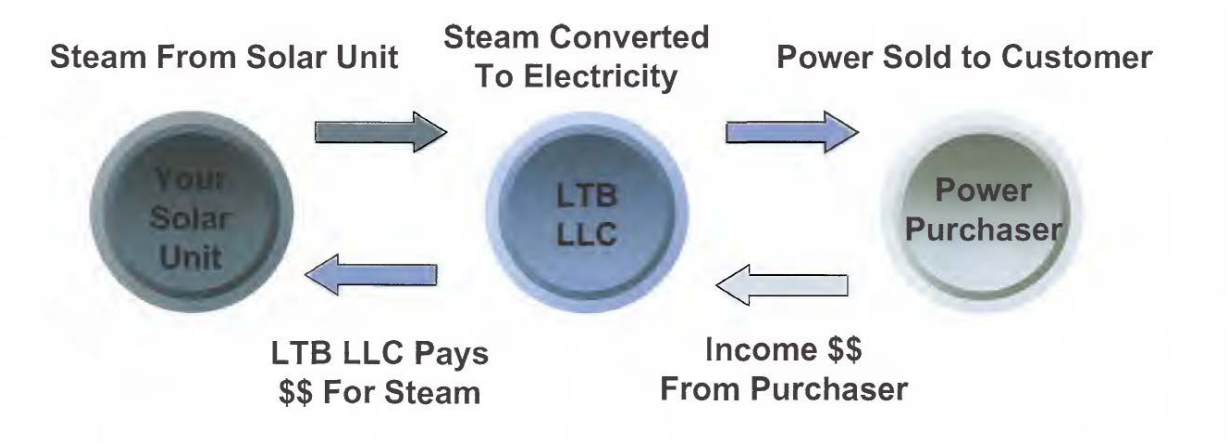
[26] LTB, LTB1, and still another entity called LTB O&M, LLC, are all Johnson-created and -controlled entities. Pl. Ex. 673, Deposition Designations for LTB1, LLC, ("LTB1 Dep.") 8:11-13:23 (July 1, 2017). The only difference between them is their names. *Id.* For all practical purposes, Johnson makes 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]

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[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]

[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).

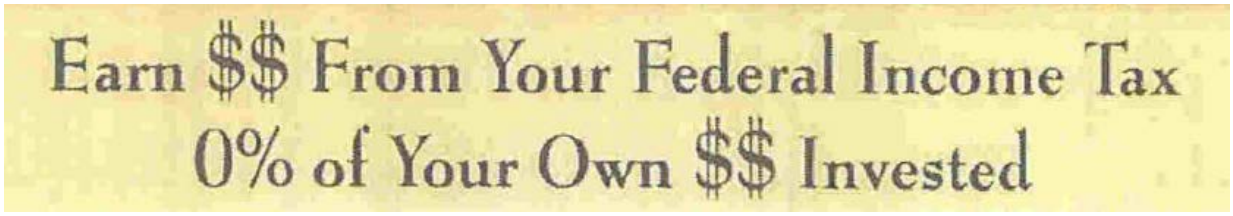
[230] Pl. Ex. 181 at 2 ¶ 6; Pl. Exs. 30, 40 at 4, 146, 147 at 1, 205, 346.

[231] Pl. Ex. 531 at 3.

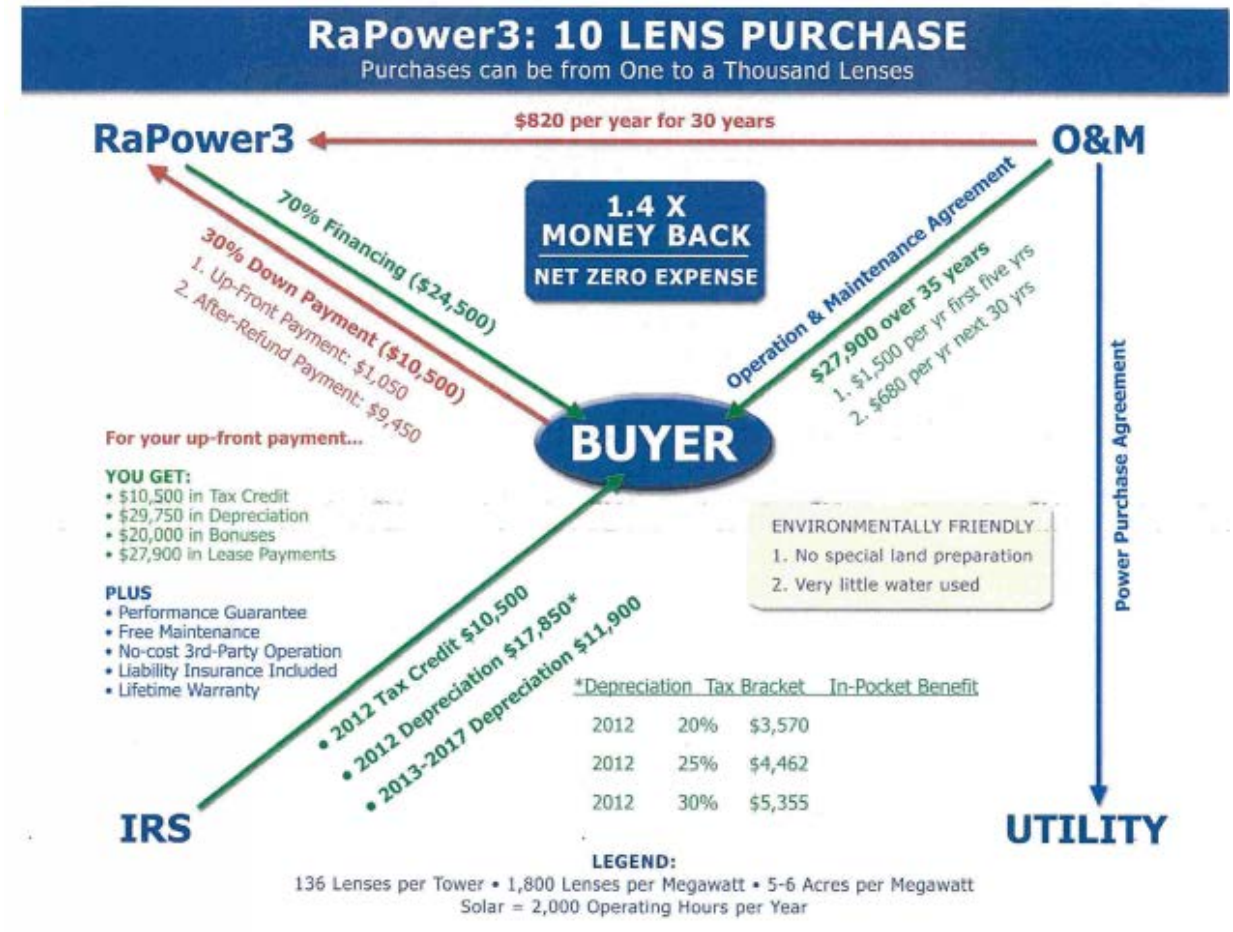
[232] Pl. Ex. 531 at 3.

[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.

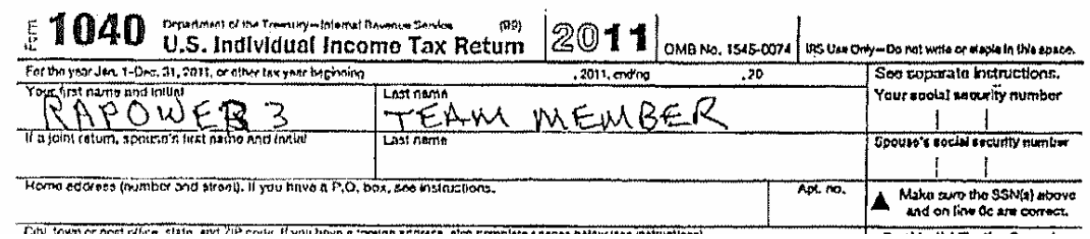
[238] Pl. Ex. 20 at 2.

[239] Pl. Ex. 24 at 1; *see also id.* at 2.

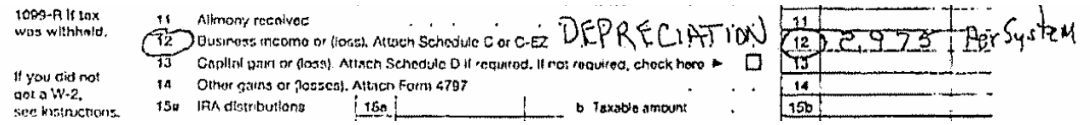
[240] Pl. Ex. 24 at 1; *see also* Pl. Ex. 20 at 2.

(continued...)

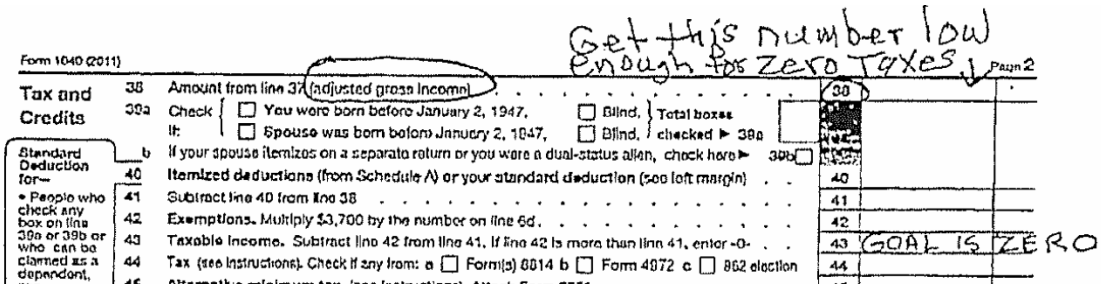
217. Put more simply, Shepard showed customers exactly where and how, on a federal individual income tax return, to enter numbers to "zero out" their tax liability[241]:


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.

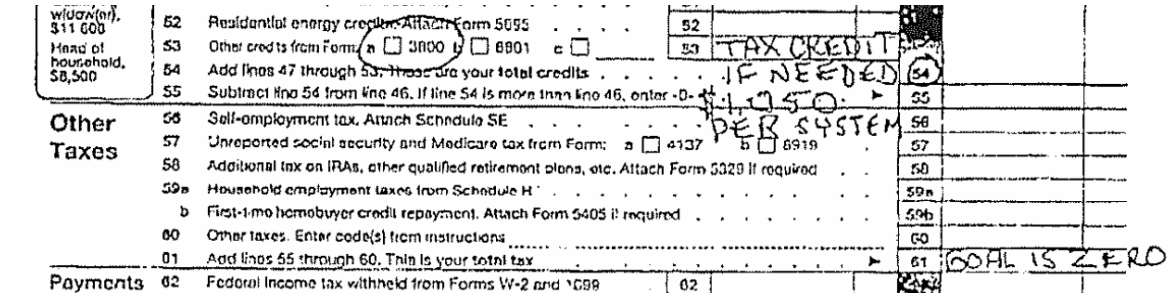
. . .


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 2,973 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

. . .

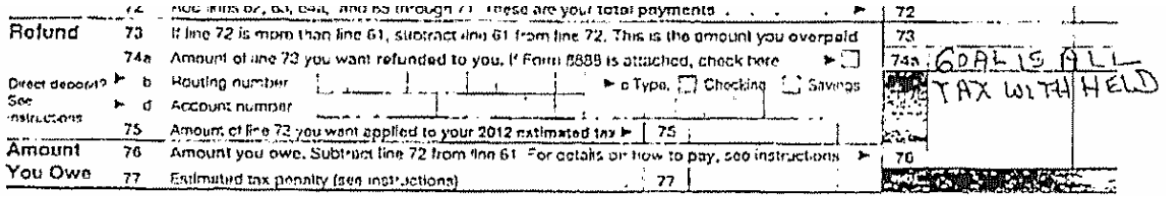

Get this number low Enough for Zero Taxes
Form 1040 (2011) Page 2
Tax and Credits
38 Amount from line 37 (adjusted gross income) 38
39a Check if: ☐ You were born before January 2, 1947, ☐ Blind, ☐ Spouse was born before January 2, 1947, ☐ Blind, Total boxes checked ▶ 39a
b If your spouse itemizes on 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) 40
41 Subtract line 40 from line 38 41
42 Exemptions. Multiply $3,700 by the number on line 6d. 42
43 Taxable Income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0- 43 GOAL IS ZERO
44 Tax (see instructions). Check if any from: a ☐ Form(s) 8814 b ☐ Form 4972 c ☐ 962 election 44

. . .


Head of household, $8,500
52 Residential energy credits. Attach Form 5695 52
53 Other credits from Form: a ☐ 3800 b ☐ 8801 c ☐ 53 TAX CREDIT IF NEEDED
54 Add lines 47 through 53. These are your total credits 54
55 Subtract line 54 from line 46. If line 54 is more than line 46, enter -0- $1,950. PER SYSTEM 55
Other Taxes
56 Self-employment tax. Attach Schedule SE 56
57 Unreported social security and Medicare tax from Form: a ☐ 4137 b ☐ 8919 57
58 Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required 58
59a Household employment taxes from Schedule H 59a
b First-time homebuyer credit repayment. Attach Form 5405 if required 59b
60 Other taxes. Enter code(s) from instructions 60
61 Add lines 55 through 60. This is your total tax ▶ 61 GOAL IS ZERO
Payments 62 Federal income tax withheld from Forms W-2 and 1099 62

. . .

[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]

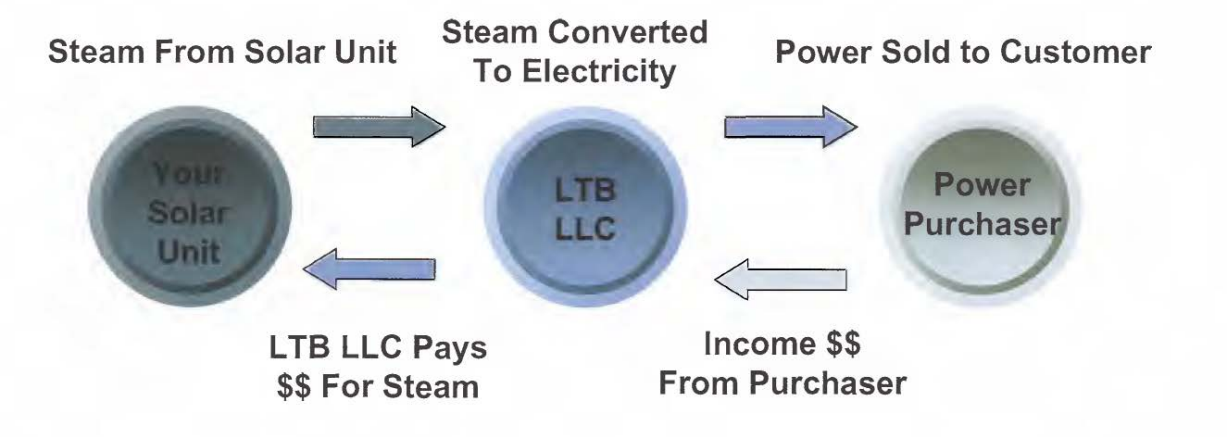
[329] Johnson Dep., vol. 1, 192:15-197:1; *compare* Pl. Ex. 2 *with* Pl. Ex. 460.

[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]

[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]

[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.

[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

[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]:

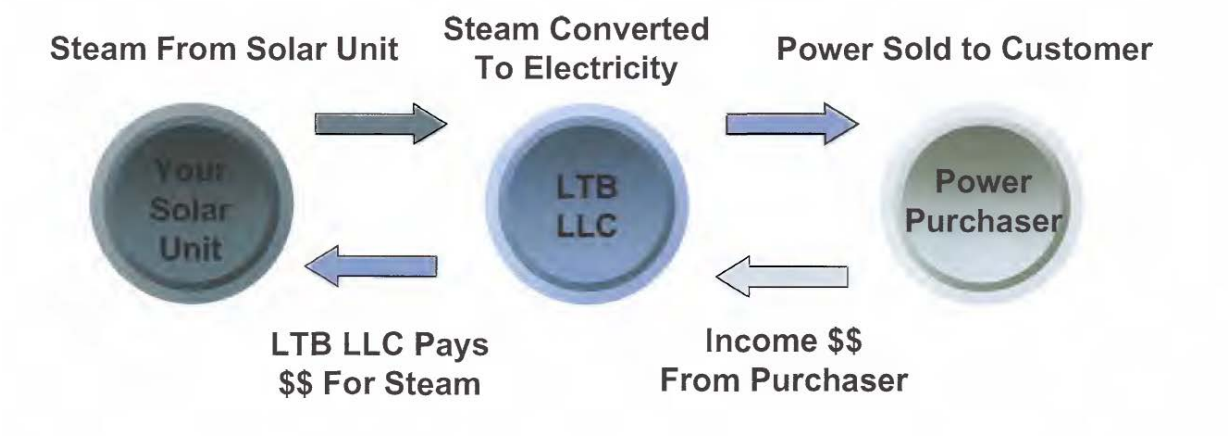
[526] *United Energy Corp.*, 1987 WL 4787, *4.

[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...)

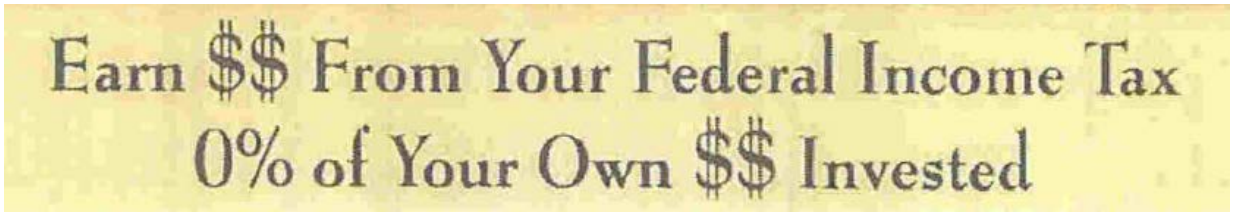
liability, while enriching Defendants with funds rightfully owed the Treasury.[547] Johnson's system since 2010 allowed customers to pay RaPower-3 only $105 of the $3,500 purchase price per lens in the year they wish to "buy" the lenses and claim the associated tax benefits. Johnson allows customers 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

[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

[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.

(continued...)

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

[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

[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 ;

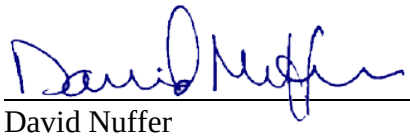
b. International Automated Systems, Inc.: $5,438,089;

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

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**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; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	**RECEIVER'S REPORT AND RECOMMENDATION ON INCLUSION OF AFFILIATES AND SUBSIDIARIES IN RECEIVERSHIP ESTATE** Civil No. 2:15-cv-00828-DN District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of RaPower-3, LLC ("RaPower"), International Automated Systems, Inc. ("IAS"), and LTB1, LLC ("LTB1") (collectively, the "Receivership Entities"), as well as certain of their subsidiaries and affiliates ("Related Entities") and the assets of Neldon Johnson ("Johnson") and R. Gregory Shepard ("Shepard") (collectively "Receivership Defendants"), hereby submits this Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate ("Report")

and his Motion and Memorandum in Support for Expansion of Receivership Estate ("Motion"). This Report is to comply with directions from the Court in the Corrected Receivership Order ("Order")[1] "to investigate all subsidiaries and affiliated entities of the Receivership Defendants to determine whether the assets, property, property rights, or interests of the subsidiaries and affiliated entities derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity."[2] Within 120 days after the Order, the Receiver is to "make a recommendation to this Court about whether the Receivership should extend to any of the investigated subsidiaries and affiliates or specific property of those entities."[3] The Order provides that the entities the Receiver is to investigate and about which he is to make recommendations are not limited to the entities listed in paragraph 2 of the Order.[4]

[1] Docket No. 491, filed Nov. 1, 2018.
[2] *Id*., at § 5 (citation omitted).
[3] *Id*.
[4] *Id*.

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RECEIVER'S REPORT AND RECOMMENDATION ON INCLUSION OF RELATED ENTITIES IN RECEIVERSHIP ESTATE

A. EFFECTS OF DEFENDANTS' FAILURES TO MEET THEIR AFFIRMATIVE DISCLOSURE OBLIGATIONS AND TO COOPERATE WITH THE RECEIVER

1. Defendants Provided Few Records to the Receiver. As detailed in the *Receiver's Initial Quarterly Status Report*,[5] Defendants have failed to meet their obligations imposed by the Order to disclose financial information; they have failed to cooperate with the Receiver and have provided few records of the Receivership Entities.[6] These failures include: a) Neldon and Glenda Johnson failing to deliver financial and other records relating to themselves, IAS, RaPower, and other entities created by Johnson,[7] and records relating to Johnson's assets, b) LaGrand and Randale Johnson failing to deliver financial and other records they possess or control as a result of their roles as officers of IAS, and c) Greg Shepard failing to deliver financial and other records he controls for himself and his entities.[8] The Receiver notes particularly that Defendants failed to provide a sworn accounting and relevant documentation of all significant expenditures by Defendants and all transfers of assets as required by paragraphs 26 (g) and (h) of the Order. The Receiver expects this information would be extremely helpful in identifying transfers of funds between the Receivership Defendants and the affiliates. Their refusal to provide that

[5] Docket No. 557, filed Jan. 28, 2019.
[6] Defendants have provided copies of personal (but not business) tax returns; incomplete lists of assets; compliance verifications required by the Order and the Findings of Fact and Conclusions of Law; corporate documents for the N. P. Johnson Family Limited Partnership, DCL-16A, and DCL16BLT, excerpts from Neldon Johnson's prior bankruptcy; log books for one aircraft; documents relating to Neldon Johnson's divorce (which documents did not reveal the presence of any assets or any financial information), and correspondence from counsel (which transmitted few documents and lacked verifications of the information by the Defendants).
[7] In its bankruptcy filing, RaPower identified Glenda Johnson as the person in possession of the company's books of account and records. *In re: RaPower-3, LLC*, Case No. 18-24865, Docket No. 11, filed Jul. 13, 2018 at 9.
[8] *See Receiver's Initial Quarterly Status Report*, Docket No. 557, filed Jan. 28, 2019 at Part V; *United States' Motion to Show Cause*, Docket No. 559, filed Jan. 29, 2019.

information leads the Receiver to be concerned that there have been significant transfers with affiliated entities.

Even when the Receiver asked Defendants to produce these materials (triggering their duty to cooperate with, and not hinder the Receiver),[9] they provided no accounting records, no bank records[10] no payroll records, and no credit card records. Defendants have not given stock ledgers for IAS or corporate resolutions and minutes for any of the Receivership Entities or affiliated entities. The few corporate records that were provided have been in circumstances where it appears the production was strategically designed to lead to the conclusion that assets had been previously transferred to entities outside the reach of the Receivership Estate.[11] The Receiver suspects that the reason he has not been given more of the corporate records of the affiliated entities is because those records would show the close relationship between the Receivership Entities and the affiliates or would show control of the affiliates by Neldon Johnson. Curiously, some of the most useful information Defendants have furnished were not directed to the Receiver at all; they were contained in motions filed with the Court, such as the *Motion to Lift Asset Freeze Order as to Solco 1 and XSun Energy*,[12] which belatedly revealed the location of bank accounts of the Receivership Entities and the existence of funds being held by Nelson Snuffer.

Defendants continue to rebuff the Receiver's request for documents showing the amount Glenda Johnson paid for properties transferred to her by Neldon Johnson and the source of funds

[9] Order at ¶¶ 23-24, 28, 35.
[10] On February 8, 2019, Steven Paul did provide the Receiver with a flash drive containing some bank records that he had obtained from counsel for the United States. The flash drive did not contain bank records provided by Defendants.
[11] Defendants provided copies of corporate agreements showing Neldon Johnson's assignment of intellectual property in his name to other entities, Johnson's sale of his interests in the N. P. Johnson Family Limited Partnership and DCL—16A to Roger Hamblin, and the N. P. Johnson Family Limited Partnership's transfer of assets to non-U.S. entities.
[12] Docket No. 509, filed Nov. 16, 2018.

used by Glenda Johnson to buy other properties she purchased in her name. When Neldon and Glenda Johnson refused to show up for the depositions they agreed to give, the Receiver was compelled to issue deposition and document subpoenas. The day before the documents were to be produced to the Receiver, both Neldon and Glenda Johnson filed motions seeking protective orders excusing them from the obligation to produce documents.[13]

Similarly, Neldon and Glenda separately filed objections and motions for protective order regarding their deposition testimony just one business day before each of the scheduled depositions.[14] These filings did not excuse or stay their depositions.[15] Both Neldon and Glenda Johnson separately failed to appear at their scheduled depositions.

2. Effect of Non-Cooperation. The Order permits the Receiver to seek additional time to complete his investigation.[16] Under the circumstances, however, the Receiver has determined to proceed with his report at this time for three primary reasons. First, there is little reason to suspect that the Defendants will be more cooperative and forthcoming as time passes. Second, the Receiver believes he has gathered sufficient information to make a recommendation without waiting for Defendants to provide required documents or waiting for the forensic reconstruction of financial records to be completed. For example, the Receiver has obtained information from a variety of sources indicating that particular entities made payments to Neldon Johnson or his sons. The Receiver may not yet know the number and amounts of those payments,

[13] *Motion for Protective Order for Non-Party Glenda Johnson*, Docket No. 565, filed Feb. 7, 2019; *Neldon Johnson's Pro Se Motion for Protective Order*, Docket No. 568, filed Feb. 7, 2019. The Receiver has opposed these motions. *See* Docket No. 579, filed Feb. 20, 219; Docket No. 580, filed Feb. 20, 2019.
[14] *Neldon Johnson's Objection to Deposition (5th Amendment Claim)*, Docket No. 574, filed Feb. 15, 2019; *Glenda Johnson Motion for Protective Order*, Docket No. 577, filed Feb. 19, 2019.
[15] The Receiver responded to both Neldon Johnson's Objection and Glenda Johnson's Motion before their scheduled depositions. *See Receiver's Response to Neldon Johnson's Objection*, Docket No. 575, filed Feb. 18, 2019; Email from Parr Brown to Nelson Snuffer, Feb.19, 2019. Neither filing by the Johnsons asserted any valid basis to delay or excuse their absence from the depositions. *Id*.
[16] Order at ¶ 6.

but the facts that such payments were made is sufficient to suggest a close relationship. Third, the total resistance to the Receivership by Defendants, Glenda Johnson, Randale Johnson, LaGrand Johnson, and others impel a recommendation that the Receiver have complete control over all avenues Defendants and Johnson's family members might pursue to avoid the Order's mandates.

While that the Receiver believes he has sufficient information to make recommendations to the Court, he readily acknowledges that there is much information he does not have and that there may be documents or financial records that warrant different conclusions than the ones he has reached. However, because Defendants have failed to make all of the necessary information available to the Receiver during the period in which the Receiver was directed to conduct this investigation, the Receiver believes there should be a presumption in favor of the conclusions he has drawn from the available information. Moreover, any attempts by Defendants to contest the Receiver's recommendation should require the Defendants to: 1) provide persuasive documentation in support of the interpretations they urge, 2) justify why this information was not provided to the Receiver, and 3) demonstrate a willingness and intent to comply with all provisions of the Order (*i.e.*, show clean hands).[17]

B. DESCRIPTIONS OF ENTITIES, ROLES, MANAGEMENT, AND FINANCES

This part describes information about each of the affiliates and subsidiaries, as well as several entities not identified in the Order. Information is listed about: a) the organization and current status of each entity, b) the ownership and management of the entity, c) the business operations of the entity, and d) financial information, if known.

[17] Because receiverships operate in equity, Defendants must have clean hands in seeking relief from the Court. *See Wing v. Horne, et al.*, No. 2:08-CV-0717 (Memorandum Decision and Order, Sep. 8, 2009) (D. Utah) (discussion of challenges faced by a receiver).

1. Solco I, LLC (Solco).

a. Company Organization, Status. Solco was formed as a Utah limited liability company ("LLC") on December 13, 2010. The company was initially established as a member-managed LLC. In 2017, Solco's Articles of Organization were amended to change the entity to being manager managed.[18] The company's status is delinquent.[19]

b. Ownership and Management. The initial members were LaGrand Johnson, Randale Johnson, and Glenda Johnson. David Nelson (of Nelson Snuffer Dahle and Poulson) was the organizer and LaGrand Johnson was the initial registered agent. The 2017 "Amendment to Certificate of Organization" appointed Neldon Johnson as the manager. Glenda Johnson signed tax forms identifying herself as "Assistant Manager" of Solco. The Solco articles of organization limit the members' ability to transfer their membership interests to others,[20] likely as a device to ensure that control over the entity remained with members of Johnson's immediate family.

c. Business Operations. The declared business purpose of Solco was the production of alternative electric power. Solco sold solar lenses—the same lenses sold by RaPower and XSun Energy.[21] Solco's only business was marketing lenses on behalf of IAS.[22] Johnson was a seller of solar lenses for Solco.[23] Solco had a royalty agreement with IAS, requiring Solco to pay royalties to IAS. Under the agreement, 85% of profits were to be paid to IAS, with 15% paid to Solco's owners.[24] Neldon Johnson signed the royalty agreement between

[18] *Amendment to Certificate of Organization of Solco I, LLC*, Aug. 18, 2017.
[19] The company failed to renew its registration that was due January 16, 2019.
[20] *Articles of Organization of Solco I, LLC*, Dec. 10, 2010 at Art. X.
[21] Deposition of Neldon Johnson, Jun. 28, 2017 at 86:15 – 86:17.
[22] Deposition of Neldon Johnson, Jun. 29, 2017 at 45:10 – 45:15.
[23] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at V.3.
[24] Deposition of Neldon Johnson, Jun. 29, 2017 at 45:18 – 46:1. Solco made no payments to IAS under this agreement.

Solco and IAS—on behalf of both Solco and IAS.[25] Johnson testified that the company has sold tens of millions of dollars of lenses.[26] Johnson testified that Solco had a contract with a company "back east" where the company paid over $1 million as a down payment on a project involving three contracts.[27] Johnson signed the contract (with the "back east" company) on behalf of Solco.[28] The Receiver obtained documents relating to a $70 million contract involving Solco and an unidentified purchaser for the purchase of 20,000 lenses.[29] Johnson signed this document on behalf of Solco.[30]

d. Financial Activities. At the time the Receiver was appointed, Solco had $265.11 in a bank account at Bank of American Fork. These funds are in the possession of the Receiver. Based on exhibits admitted during the trial, Solco had three years of significant income—from 2012 to 2014—as show in the table below.[31] The Receiver does not yet know the sources of the revenue but expects the forensic accounting will show the extent to which the revenue came from sales to outsiders or from inter-entity transfers.

Year	Revenue
2010	$12,450.00
2011	$5,200.05
2012	$1,269,595.55
2013	$891,859.29
2014	$1,138,606.87
2015	$59,630.45
2016	$57,650.08

[25] Deposition of Neldon Johnson, Jun. 29, 2017 at 47:15 – 47:19.
[26] Deposition of Neldon Johnson, Jun. 28, 2017 at 84:19 – 84:24. A 2012 Solar Lens Purchase Agreement and related Escrow Agreement indicated Solco would sell 20,000 solar lenses to the unidentified buyer for $70 million. The buyer was to deposit $10.5 million into an escrow account at the bank as a down payment. Soco1 0001-0028. The Receiver does not know if this agreement was actually implemented or whether the counterparty was affiliated with Defendants.
[27] Deposition of Neldon Johnson, Jun. 28, 2017 at 123:12 – 124:15.
[28] Deposition of Neldon Johnson, Jun. 28, 2017 at 123:12 – 124:15.
[29] SOLCO1 0025; 0013.
[30] It is possible that this $70 million contract is the same contract Johnson referenced in his June 28, 2017 deposition. Because information about the buyer is redacted in the purchase documents, the Receiver does not know if the buyer is an affiliate or an unrelated third party.
[31] PLEX00739.

Total	**$3,434,992.29**

2. XSun Energy, LLC ("XSun").

a. Company Organization, Status. XSun was formed on April 18, 2011 as a Utah LLC. XSun was a manager-managed LLC. The company's status is active.

b. Ownership and Management. Neldon Johnson is the manager of XSun. Johnson is an employee of XSun[32] and the sole decision maker.[33] Glenda Johnson filed federal tax forms identifying herself as "Assistant Manager" of XSun. The Articles of Organization and subsequent filings with the Utah Division of Corporations do not identify any of the members of XSun. The initial registered agent was David Nelson. Defendants aver that 100% of the interests in XSun are owned by Solstice Enterprises, a foreign (Nevis) entity.[34]

c. Business Operations. XSun's stated business purpose was the production of alternative electric power. The company sold solar lenses—the same lenses that were sold by Solco and RaPower.[35] The company marketed lenses through direct sales.[36] It had a contractual relationship with IAS to sell lenses for IAS, with XSun promising to pay royalties to IAS.[37] The royalty agreement between XSun and IAS was signed by Neldon Johnson on behalf of both parties.[38] XSun is the entity that engaged Nelson Snuffer to file the appeal on behalf of RaPower, IAS, and Neldon Johnson.[39] Defendants have represented to the Receiver that XSun has no value, other than the value of the bank account balances that were seized by the Receiver.

[32] Deposition of Neldon Johnson, Jun. 8, 2017 at 18:15 – 18:17.
[33] Deposition of Neldon Johnson, Jun. 8, 2017 at 80:2 – 80:7; Deposition of Neldon Johnson, Jun. 29, 2017 at 38:21 – 38:22.
[34] *Motion to Lift Asset Freeze Order as to Solco I and XSun Energy*, Docket No. 509, filed Nov. 16, 2018 at 3; Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.14.
[35] Deposition of Neldon Johnson, Jun. 28, 2017 at 86:15 – 86:17.
[36] Deposition of Neldon Johnson, Jun. 28, 2017 at 80:8 – 80:22.
[37] Deposition of Neldon Johnson, Jun. 29, 2017 at 46:10 – 47:3.
[38] Deposition of Neldon Johnson, Jun. 29, 2017 at 47:10 – 47:18.
[39] *Motion to Lift Asset Freeze Order as to Solco I and XSun Energy*, Docket No. 509, filed Nov. 16, 2018 at 5.

d. Financial Activities. Based on the information contained in a trial exhibit, XSun had significant income during 2011 and 2012 as shown in the table below:[40]

Year	Revenue
2011	$442,355.43
2012	$660,462.57
2013	$21,298.73
2014	$1,170.10
2015	$813.17
2016	$788.18
Total	**$1,126,888.18**

XSun used this revenue to make payments to Neldon Johnson and to members of his family. Neldon Johnson reported on his 2012 tax returns that he and Glenda Johnson received $2,125,910 from XSun Energy for the sales of lenses.[41] Johnson's counsel admitted that XSun also made payments to LaGrand and Randale for work they performed for XSun.[42] XSun paid $23,000 to a Linda Johnson in 2012.[43]

XSun opened a savings account at Wells Fargo bank on January 10, 2012 with $100. Additional monthly deposits of $100 were made through June 2010, giving the account a June 30, 2012 balance of $600.15 (with accumulated interest). On July 23, 2012, Glenda Johnson deposited $1,498,150.85 in this account. These funds came directly from the RaPower bank account at Zions Bank. [In June 2012, Zions Bank told RaPower that RaPower needed to close its accounts at Zions Bank. Zions Bank gave Glenda Johnson a cashier's check for $1.498 million, made payable to her, representing RaPower's bank account balance at Zions Bank.[44]] At

[40] PLEX00740.
[41] PLEX00909.0012 (Neldon Johnson Petition for Redetermination of Deficiency before U.S. Tax Court). The Receiver understands that this exhibit was not admitted at the trial.
[42] Deposition of Neldon Johnson, Oct. 3, 2017 at 219:16 – 219:22.
[43] The Receiver does not know if Linda Johnson is related to Neldon Johnson or the reason for XSun's payment to her.
[44] The Receiver has a copy of the cashier's check issued by Zions Bank with a notation that the money was withdrawn from the RaPower bank account and a copy of the account statements for the XSun account at Wells Fargo showing this deposit. Glenda Johnson submitted a declaration stating that Zions Bank required certain

the time the Receiver was appointed, XSun had $224,093.73 in a bank account at Bank of American Fork. Those funds are being held by the Receiver. The law firm of Nelson Snuffer also disclosed it is holding $735,202.22 in its retainer account, which it received from XSun. The Court ruled those funds are subject to the asset freeze until decisions are made on the Receiver's report on affiliates and subsidiaries.[45]

In November 2012, $241,200 of XSun funds (from the account into which the RaPower money was deposited) were wired to a bank account in the name of "Network International." The Receiver has so far been unable to determine the purpose of this payment.[46]

3. Cobblestone Center, LC.

a. Company Organization, Status. Cobblestone was formed on December 9, 2002, initially as a Nevada limited company. It is manager managed. On February 19, 2014, Cobblestone registered in Utah as a foreign LLC. The company was domesticated to Utah effective January 1, 2017. Cobblestone's status as a foreign (Nevada) corporation expired on January 1, 2017, when the domestication of Cobblestone became effective.[47] The domesticated Cobblestone's Utah registration became delinquent on January 16, 2019 when it failed to renew its registration.

b. Ownership and Management. When Cobblestone was first formed in Nevada, the manager was RLN Management Company LC, a Utah company with ties to Neldon

businesses associated with the Johnsons to close their accounts at Zions. *Neldon Johnson v. United States of America*, 2:15-cv-00742, Docket No. 7-1, Jan. 6, 2016 at ¶ 6.

[45] Docket No. 550, filed Dec. 27, 2018.

[46] The Receiver sent a letter to a Texas company with this name, but that company has not responded. This transfer occurred after Johnson's awareness of the criminal investigation.

[47] The Nevada Cobblestone had Utah Division of Corporations Entity Number 8952715-1061. On January 1, 2017, when the domestication took effect, the Division of Corporations assigned it Entity Number 8952715-0160.

Johnson.[48] When Cobblestone registered its foreign (out-of-state) corporation in Utah, David Nelson signed the domestication filings on behalf of the owners (signing as "Attorney for Registrant & Manager").[49] Neldon Johnson became the registered agent in Utah and RLN Management Company was again listed as the sole manager. The Utah domestication papers identified Neldon Johnson as a member of Cobblestone. The company's headquarters is the same as that of IAS.[50] Neldon Johnson owns one third of this company.[51]

Johnson described himself as an employee of[52] and the sole decision maker for Cobblestone.[53] Johnson testified: "I have the right to write a check to whoever I choose to because of my position as manager of Cobblestone Center" and stated he did not have to account to others for payments made by Cobblestone.[54] He also claimed the sole right to identify which company would operate and maintain the lenses once they were installed[55] and to decide who owned the towers that Cobblestone constructed.[56]

c. Business Operations. Neldon Johnson testified that Cobblestone manufactured "the solar energy project" and that it employed 30 people at one time.[57] The company built towers and installed solar lenses on the towers.[58] According to Johnson,

[48] RLN Management Company LC was a Utah LLC formed the same date as Cobblestone: December 9, 2002. RLN Management was based in Payson, Utah. David Nelson was its organizer and registered agent. The manager was Stacy Snow, who was an officer of IAS.
[49] *Foreign Registration Statement (Foreign Limited Liability Company): Cobblestone Centre, L.C.*, Feb. 19, 2014.
[50] Deposition of Neldon Johnson, Jul. 1, 2017 at 65:10 – 65:24.
[51] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2; deposition of Neldon Johnson, Oct. 3, 2017 at 210:6 – 2010:25.
[52] Deposition of Neldon Johnson, Jun. 28, 2017 at 18:15 – 18:17.
[53] Deposition of Neldon Johnson, Jun. 28, 2017 at 74:11 – 74:14.
[54] Deposition of Neldon Johnson, Oct. 3, 2017 at 211:7 – 211:14.
[55] Deposition of Neldon Johnson, Jul. 1, 2017 at 34:2 – 34:6.
[56] Deposition of Neldon Johnson, Jun. 30, 2017 at 95:14 – 95:19.
[57] Deposition of Neldon Johnson, Jun. 28, 2017 at 53:4 – 53:24. Cobblestone employees cut the rectangular plastic sheets into triangles to fit into the solar towers. *Id.* at 196:21 – 196:25. Elsewhere in his deposition, Johnson described the activity as Cobblestone manufacturing the infrastructure for the lenses. *Id.* at 86:23 – 86:25.
[58] Deposition of Neldon Johnson, Jul. 1, 2017 at 32:13 – 32:17.

Cobblestone also sold pipe.[59] In 2010, Cobblestone assumed the role of operating and maintaining the solar lenses, which functions previously had been performed by IAS.[60] After this, whenever IAS, RaPower, Solstice (or another entity) sold lenses, the selling entity hired Cobblestone to maintain the lenses that were sold and then installed.[61] RaPower paid Cobblestone for services, including erection of solar towers.[62] Among its duties, Cobblestone applied serial numbers to the lenses.[63] IAS instructed Cobblestone to place lenses "in service."[64]

Its business operations showed close ties to other affiliates. When Neldon Johnson first purchased the Mooney aircraft in February 2017, Cobblestone was initially listed as the owner of the aircraft.[65] During at least one year, Cobblestone paid property taxes on the Texas property that is owned by the N. P. Johnson Family Limited Partnership ("NPJFLP")—and which property ostensibly had previously been transferred to Black Night and Starlight.[66] Defendants reported to the Receiver that Cobblestone "has no assets and is not believed to have any value."[67]

d. Financial Activities. According to a trial exhibit, Cobblestone had only one year of significant revenue: 2015. The annual revenue is shown in the table below.[68] As with Solco and XSun, the Receiver is still investigating the extent to which this revenue came from third parties or affiliates.

[59] Deposition of Neldon Johnson, Oct. 3, 2017 at 216:2 (explaining the reason Cobblestone had paid a commission to his son).
[60] Deposition of Neldon Johnson, Jun. 28, 2017 at 136:15 – 137:11.
[61] Deposition of Neldon Johnson, Jun. 28, 2017 at 139:1 – 139:8
[62] Deposition of Neldon Johnson, Jun. 30, 2017 at 84:14 – 84:16; 95:2 – 95:13.
[63] Deposition of Neldon Johnson, Jun. 28, 2017 at 202:20 – 202:23.
[64] Deposition of Neldon Johnson, Jun. 30, 2017 at 112:2 – 112:7.
[65] *Aircraft Registration Application*, FAA Certified Copies (in possession of Receiver), Feb. 7, 2017. On Apr. 4, 2017, Johnson and the persons from whom he bought the aircraft amended the bill of sale stating that the original bill of sale was erroneous and that Johnson, not Cobblestone, was the purchaser of the aircraft. *Id*.
[66] PLEX00649; Deposition of Neldon Johnson, Oct. 3, 2017 at 207:14 – 208:19. In this deposition, Johnson refused to answer questions from counsel for the United States about this payment.
[67] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[68] PLEX00741.

Year	Revenue
2013	$65,000.04
2014	$45,091.81
2015	$201,832.14
2016	$2,272.79
Total	**$314,196.78**

Cobblestone also received enormous amounts of money from RaPower. The RaPower bankruptcy filing disclosed that between June 29, 2017 and June 29, 2018, RaPower transferred $1,710,000 to Cobblestone. These payments purportedly were for "research and development expenses." By November 2018, 96% of this money was spent.[69] Recipients of Cobblestone funds included Glenda Johnson, LaGrand Johnson, and Randale Johnson, including one $30,000 check to Randale Johnson as commissions.[70]

4. DCL-16A, Inc.

a. Company Organization, Status. This company was formed November 2, 2004 as a Utah corporation. The original DCL-16A's registration expired on February 23, 2006. Neldon Johnson formed a new corporation with the same name on November 19, 2008. The articles of incorporation for the successor DCL-16A are essentially the same as the first company with that name. The status of the successor company expired on March 3, 2015.

b. Ownership and Management. DCL-16A's initial owners were Neldon Johnson, LaGrand Johnson, and Randale Johnson, each owning one third of the company's shares.[71] Neldon Johnson was its president[72] registered agent,[73] and the sole initial board

[69] At the time the Receiver was appointed, Cobblestone had two bank accounts at Bank of American Fork holding a combined $73,548.02. The Receiver is holding these funds.
[70] Deposition of Neldon Johnson, Jun. 30, 2017 at 214:7 – 214:23; 217:22 – 218:18.
[71] *Share Transfer and Consent Agreement*, Jan. 14, 2011 at 1.
[72] *Share Transfer and Consent Agreement*, Jan. 14, 2011 at 4.
[73] *Articles of Incorporation*, Article IX.

member.[74] The company's articles of incorporation contain restrictions on transfers of the shares,[75] presumably to ensure that control of the company remains with family members and trusted associates.

On January 14, 2011, Neldon Johnson sold his one-third interest in DCL-16A to Roger Hamblin, a close associate.[76] This was six days before Johnson filed for personal bankruptcy.[77] Hamblin agreed to pay Johnson $18,500 for the one-third interest in DCL-16A. Hamblin wired this money to Johnson's bank account at Bank of American Fork on January 18, 2011.[78] The next day, Johnson wired $59,000 to Snell & Wilmer's trust account, for anticipated work preparing his personal bankruptcy and $15,000 to Corporate Financial Advisors.[79] After payment of the funds to Snell & Wilmer and Corporate Financial Advisors, Johnson's bank account balance dropped back to $160.80.[80]

LaGrand Johnson and Randale Johnson consented to Neldon Johnson's sale of this interest to Roger Hamblin.[81] Notwithstanding this purported sale to Hamblin, Johnson testified in 2017 that he and his sons were the only owners of DCL-16A.[82] Neldon Johnson indicated he was an employee of DCL-16A.[83]

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[74] *Articles of Incorporation*, Article X. Neldon Johnson is listed here as president, director, and shareholder.
[75] *Articles of incorporation*, at Article VII.
[76] *Share Transfer and Consent Agreement* at 4.
[77] *In re Neldon P. Johnson*, Case No. 11-20679, Bankr. Utah.
[78] The wire amount was $74,000 and included $55,500 for Hamblin's purchase of Neldon Johnson's interest in NPJFLP, which is discussed below.
[79] This was for an appraisal of the assets being sold to Hamblin. Corporate Financial Advisors is the official name of Lone Peak Valuation Group, the forensic accountants appointed to assist the Receiver in this matter. This prior work was disclosed to the Court in the *Motion for Order Authorizing Receiver to Employ Accountants*, Docket No. 496, filed Nov. 2, 2018.
[80] In his bankruptcy filings, Neldon Johnson declared his bank account balance as being $100. *In re Neldon P. Johnson*, Statement of Financial Affairs, Schedule B, item 2, filed Feb. 3, 2011.
[81] Due to restrictions on the transfers of interests, LaGrand and Randale had to consent to the sale to Hamblin.
[82] Deposition of Neldon Johnson, Jun. 28, 2017 at 66:8 – 66:12. In his Amended Declaration, Johnson stated he expected to repurchase the interests in DCL-16A and NPJFLP from Hamblin, but never did. Docket No. 510, filed Nov. 16, 2018 at ¶ 9.
[83] Deposition of Neldon Johnson, Jun. 28, 2017 at 18:15 – 18:17.

c. Business Operations. The Company's stated primary purpose was to "act as the general partner in a Utah Limited Partnership." DCL-16A was one of two general partners of NPJFLP. This appears to be DCL-16A's sole asset. The assets of NPJFLP—but not the NPJFLP entity—were sold to Black Night Enterprises and Starlight Holdings (discussed below) in October 2012.[84] In return, Black Night and Starlight issued shares in their entities to DCL-16A and other owners of NPJFLP.[85] It should be noted that this transfer of NPJFLP assets to the two Nevis entities was a transfer without value to NPJFLP and, therefore, likely a fraudulent transfer. Assets were transferred from NPJFLP to the foreign entities and NPJFLP received nothing in return. Instead, the consideration given by Black Night and Starlight went to DCL-16A, Hamblin, and Randale and LaGrand Johnson.

The 2012 agreement to sell assets to Black Night and Starlight required approval of the two general partners of NPJFLP—LaGrand Johnson and DCL-16A. Neldon Johnson signed the transfer documents on behalf of DCL-16A despite the fact that he purportedly had sold his interest in DCL-16A to Hamblin the year before.

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. Hamblin provided no information about this entity other than a single page from a bank statement showing his payment to Neldon Johnson of the purchase price. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

[84] This transaction occurred five months after Johnson became aware of the criminal investigation.
[85] *Partnership Asset Purchase Agreement* [Black Night], Oct. 23, 2012 at ¶ 3; *Partnership Asset Purchase Agreement* [Starlight Holdings], Oct. 23, 2012 at ¶ 3.

5. DCL16BLT, Inc.

a. Company Organization, Status. DCL16BLT was a corporation formed in Wyoming on October 8, 2009. Its registration as a foreign corporation in Utah expired on February 25, 2014. On April 7, 2014 DCL16BLT again qualified to conduct business in Utah as a foreign corporation. DCL16BLT was domesticated to Utah on September 18, 2017.[86] The company's status expired on January 28, 2019.

b. Ownership and Management. The owners of DCL16BLT are Neldon Johnson, LaGrand Johnson, and Randale Johnson.[87] The Utah qualification form listed Neldon Johnson as the sole officer and director, identifying him as president and director. David Nelson was listed as the registered agent. In the Articles of Domestication Neldon Johnson was listed as the sole officer and director, again identified as president and a director. In his February 3, 2011 bankruptcy filing, Neldon Johnson indicated he had been a director and the registered agent of DCL16BLT since November 17, 2009.[88] Johnson described himself as an employee of DCL-16BLT.[89]

The Articles of Incorporation listed Neldon Johnson, Randale Johnson, and LaGrand Johnson as officers. Randale Johnson owned 25,000 shares, LaGrand Johnson owned 25,000 shares, and Neldon Johnson owned 100 shares. Even though Randale and LaGrand were designated as officers of the company, they signed a Voting Trust Agreement stating they "do not intend to take an active part in the Company's management . . . ."[90] To accomplish this

[86] The foreign entity had Entity Number 7521404-0143 (for the first qualification) and Entity Number 9003638-0143 (for the requalified entity). The domesticated entity has Entity Number 9003638-0142.
[87] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.4; *Consent to Action Without a Meeting of the Board of Directors of DCLBLT, Inc.*, Jul. 14, 2011. Neldon Johnson was named president, Randale Johnson was secretary, and LaGrand Johnson was treasurer.
[88] This information was contained in Neldon Johnson's Compliance Verification. Docket No. 510, filed Nov. 16, 2018.
[89] Deposition of Neldon Johnson, Jun. 18, 2017 at 18:15 – 18:17.
[90] *Voting Trust Agreement*, Jul. 14, 2011 (Source: corporate binder delivered to Receiver Feb. 28, 2019.)

objective, they transferred all their stock to Neldon Johnson, giving him "the exclusive right to vote the stock."[91] As a consequence, Neldon Johnson, who owned 100 shares, controlled all 50,100 shares of the company. A separate shareholder agreement provided that Neldon Johnson would remain the sole director of the company.[92]

c. Business Operations. DCL16BLT is the sole member of RaPower-3, LLC; it owns RaPower-3, LLC. For tax purposes, RaPower-3, LLC has been designated as a pass-through entity, meaning it is not taxed as a separate entity. Instead, all income and deductions were treated as belonging to DCL16BLT. When the IRS conducted an audit of DCL16BLT, the Receivership Entities paid the legal fees for Paul Jones to represent DLC16BLT in Tax Court proceedings.[93]

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

6. LTB O&M, LLC.

a. Company Organization, Status. LTB O&M was formed as a Utah LLC on March 17, 2017. It was a manager-managed LLC. LTB O&M's corporate status is currently active.

b. Ownership and Management. David Nelson submitted the Certificate of Organization for LTB O&M. The certificate listed Neldon Johnson as the only manager and as

[91] *Voting Trust Agreement*, Jul. 14, 2011 at 2. (Source: corporate binder delivered to Receiver Feb. 28, 2019.)
[92] *Shareholder Agreement for DCLBLT, Inc.*, Jul. 14, 2011 Source: corporate binder delivered to Receiver Feb. 28, 2019.)
[93] Source: Hale and Wood invoices provided to the Receiver on Jan. 3, 2019.

the registered agent. No one other than Neldon Johnson had authority to make decisions on behalf of this company.[94] Neldon Johnson owns one third of the company.[95] The other owners appear to be Randale Johnson, and LaGrand Johnson.[96]

c. Business Operations. The company's stated purpose is: "Operation and maintenance of alternative energy systems and components."[97] Johnson testified the company was formed to operate and maintain energy production.[98] Defendants reported to the Receiver that "[t]his company has no assets and is not presently conducting business."[99]

d. Financial Activities. The company had no employees, income, bank accounts, or daily operations.[100]

7. N.P. Johnson Family Limited Partnership (NPJFLP).

a. Company Organization, Status. NPJFLP was formed on November 2, 2004 as a Utah limited partnership.[101] NPJFLP's status expired as of March 3, 2015.

b. Ownership and Management. At the time of its formation, Neldon Johnson was the registered agent and one of two general partners.[102] The second general partner was DCL-16A.[103] On January 14, 2011—a week before he filed for personal bankruptcy—Neldon Johnson sold his 20% interest in NPJFLP to Roger Hamblin for $55,000.[104] As part of the

[94] Deposition of Neldon Johnson, Jul. 1, 2017 at 16:8 – 16:10.
[95] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[96] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.4.
[97] *Certificate of Organization*, filed Mar. 17, 2017 at Article II.
[98] Deposition of Neldon Johnson, Jul. 1, 2017 at 13:7 – 13:16.
[99] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[100] Deposition of Neldon Johnson, Jul. 1, 2017 at 10:10 – 10:17; 16:4 – 16:22.
[101] On November 17, 2004, the NPJFLP filed a *Restated Certificate of Limited Partnership* with revised language on dissolution of the entity.
[102] *Certificate of Limited Partnership*, filed Nov. 2, 2004 at ¶ 1(e). Neldon Johnson signed the Certificate on behalf of himself and DCL-16A.
[103] Neldon Johnson owned one third of DCL-16A. As discussed in Part B.7., above, Neldon Johnson sold his interest in NPJFLP and DCL-16A to Roger Hamblin a week before Johnson's 2011 bankruptcy.
[104] *Partnership Interest Sale and Transfer Agreement*, Jan. 14, 2011. As described in Part B.4.b., below, the proceeds from this sale were paid to Snell & Wilmer to pay legal fees for the pending bankruptcy and for an appraisal of the assets being sold to Hamblin.

agreement to sell his interest to Hamblin, Neldon Johnson resigned as a general partner of NPJFLP and LaGrand Johnson became a general partner. LaGrand Johnson, Randale Johnson, and David Nelson (as trustee for LaGrand and Randale's trusts) consented to the admission of Hamblin as a new partner.

The Receiver believes the current ownership of NPJFLP is as shown in the table below:[105]

Owner	Type	Share	Comment
~~Neldon Johnson~~	G.P.	20%	Sold to Hamblin
~~DCL-16A~~	G.P.	20%	Sold to Hamblin
Randale Johnson	L.P.	15%	
Randale Johnson Trust[106]	L.P.	15%	
LaGrand Johnson	L.P.	15%	Substitute G.P.
LaGrand Johnson Trust	L.P.	15%	

c. Business Operations. The partnership agreement discloses its purpose as facilitating the transfer of assets from Neldon Johnson to his family members:

> **N. P. JOHNSON FAMILY LIMITED PARTNERSHIP** was created in whole or in part so that during the life of Neldon P. Johnson, he could make completed gifts of present interests to members of his family and others. Unless otherwise stated, this agreement shall be construed in such a manner as best to effect these intents.[107]

In furtherance of this objective, Neldon Johnson assigned 14 of his patents and patent applications to NPJFLP. The Receiver has not found any record that NPJFLP paid any consideration to Johnson for these assigned patents and applications. As such, these appear to be

[105] *Amended and Restated Limited Partnership Agreement*, Nov. 15, 2004 at 1. Despite this, Neldon Johnson submitted a Compliance Verification that listed himself as the contact person for DCL-16A and as the owner of an interest in NPJFLP. Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.8. Johnson later submitted an amended declaration retracting his earlier answers. Docket No. 510, filed Nov. 16, 2018.
[106] David Johnson is the trustee of the Randale P. Johnson Family Trust and the LaGrand T. Johnson Family Trust.
[107] *Amended and Restated Limited Partnership Agreement*, Nov. 15, 2004 at Section 4.8. Similarly, the Certificate of Limited Partnership provides that the partnership is to be dissolved at the death of Neldon Johnson (¶ 1(f)(1)). The stated purpose of Neldon Johnson making gifts to his family members suggests that Randale Johnson and LaGrand Johnson did not make material capital contributions to the NPJFLP.

fraudulent transfers that can be recovered as assets belonging to the Receivership Estate.[108] On November 15, 2004 Neldon Johnson assigned to NPJFLP 100 million warrants to purchase IAS stock.[109] Neldon Johnson also assigned to NPJFLP 10 million shares of IAS preferred stock.[110]

In March 2006, NPJFLP purchased two tracts of real property in Texas: an 18.38-acre parcel with a tax valuation of $49,950 and a 608.68-acre parcel with a tax valuation of $608,680. This real estate was recorded in the name of NPJFLP. The Receiver has obtained some preliminary information that at least one of these properties is being used for oil and gas development. The Receivership Defendants have provided no records to the Receiver regarding the purchase or use of these properties. Thus far, the Receiver has been unable to determine the source of funds used to purchase these properties. The Receiver suspects that the NPJFLP had no independent source of funds and that funds from IAS or RaPower (directly or indirectly) were used to purchase these properties. If so, placing ownership of these properties in the NPJFLP was a fraudulent transfer which can be recovered for the Receivership Estate.

In connection with the January 2011 sale of interests in NPJFLP to Hamblin, Neldon Johnson represented that NPJFLP assets were: i) seven patents, ii) two patent applications, iii) 5 million shares of IAS preferred stock, and iv) warrants to purchase 50 million IAS shares.[111] The agreement between Neldon Johnson and Roger Hamblin did not reference the Texas real estate owned by NPJFLP but the subsequent agreement between NPJFLP and Black Night identified the real estate as an asset of NPJFLP.

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[108] To the extent NPJFLP and subsequent transferees of assets of NPJFLP become part of the Receivership Estate, the Receiver would control these assets without having to avoid prior transfers of these assets.
[109] IAS granted these warrants to Neldon Johnson on October 13, 2003 as compensation for patents he assigned to IAS. Randale Johnson signed the warrant agreement on behalf of IAS, granting these warrants to Neldon Johnson. The Receiver does not believe the NPJFLP paid any consideration to Neldon Johnson for the warrants he assigned to NPJFLP.
[110] IAS granted these shares to Neldon Johnson on May 14, 2004 in exchange for patents Neldon Johnson transferred to IAS. The agreement granting these shares were signed by Randale Johnson and Neldon Johnson.
[111] These warrants and preferred shares had been assigned to NPJFLP by Neldon Johnson.

On October 23, 2012, the Texas properties were ostensibly transferred from NPJFLP to Black Night and Starlight, with each getting a 50% undivided interest in the property. However, the real property is still listed as being owned by NPJFLP on the records of the Howard County Texas court clerk. Not only has the property remained in the name of NPJFLP, but Neldon Johnson has continued to exercise actual control over the property and to sign documents on behalf of NPJFLP three times over a four-year period granting easements on the property. Johnson signed all these easements after he had sold his interests in NPJFLP to Hamblin and after NPJFLP had purportedly transferred ownership of these properties to Black Night and Starlight.

In 2013, NPJFLP granted an easement on the Texas property to Power Resources, Ltd.[112] This easement also was signed by Neldon Johnson on behalf of NPJFLP. In 2015, NPJFLP granted an easement to Navigator BSG Transportation and Storage, LLC.[113] This easement also was signed by Neldon Johnson as the manager of NPJFLP. On October 31, 2017, NPJFLP granted an easement across a portion of the Texas property to Solaris Midstream MB, LLC. The easement was signed by Neldon Johnson as manager for NPJFLP.[114]

One of the documents used to effectuate NPJFLP's October 12, 2012 sale of assets to Black Night and Starlight was denominated "Exhibit 4: Consent to Agreement and Sale of Assets." This consent was required to be signed by the limited partners and the general partners. One of the general partners was the entity DCL-16A. Neldon Johnson signed this consent in October 2012 as president of DCL-16A. However, Neldon Johnson had previously

[112] *Permanent Easement and Right of Way Agreement*, Recording No. 2014-00001699, Howard County, TX, filed Mar. 7, 2014.
[113] *Right-of-Way and Easement Agreement*, Recording No. 2015-00001788, Howard County, TX, filed Mar. 17, 2015.
[114] *Permanent Easement Agreement*, Recording No. 2017-00011855, Howard County, TX, filed Nov. 7, 2017.

signed a document (on January 14, 2011) purporting to sell his interest in DCL-16A to Roger Hamblin.

d. Financial Activities. The capital contributions of each general and limited partner are listed in the partnership agreement as "undetermined."[115] The Receiver has, to date, not found any information indicating that any of the general or limited partners contributed any material amount as a capital contribution.

8. Shepard Energy.

a. Company Organization, Status. This is an assumed name of R. Gregory Shepard. The assumed name was registered on July 14, 2014. Shepard canceled the assumed name's registration on October 16, 2018.

b. Ownership and Management. Shepard was the sole owner and was the registered agent.

c. Business Operations. The business' stated purpose was "Selling Renewable Energy Products."

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

[115] *Partnership Interest Sale and Transfer Agreement*, Jan. 14, 2011 at Section IV.

9. Shepard Global.

a. Company Organization, Status. Shepard Global began as an assumed name for Greg Shepard on December 20, 2010. On September 12, 2012, it converted to a Utah corporation. The corporation was voluntarily dissolved on October 16, 2018.

b. Ownership and Management. The address of the company is Shepard's home. He is listed in filings with the Utah Division of Corporations as the incorporator, registered agent, president, and director. In 2013, Matthew Shepard was added as vice-president and a director and Mark Shepard was added as secretary and a director.

c. Business Operations. The company's articles of incorporation describe its purpose as being "to engage in all forms of renewable energy from funding projects to manufacturing to purchasing land and real estate."[116]

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

10. Solstice Enterprises.[117]

a. Company Organization, Status. Solstice is a corporation formed in Nevis on March 8, 2011.[118] It has the same address in Nevis as Black Night and Starlight.

b. Ownership and Management. Solstice has a Utah address of 2730 West 4000 South in Oasis—which is the same address as RaPower and IAS. Neldon Johnson was an

[116] *Articles of Incorporation*, Sept. 27, 2012 at Article II.
[117] There is a Utah-based entity named Solstice Enterprises, L.C. that is controlled by a Ryan Freeman. This entity appears to have no relationship with the Receivership Defendants.
[118] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.

employee of Solstice.[119] LaGrand Johnson appears to be an officer, having signed contracts on behalf of Solstice. According to Defendants, Neldon Johnson originally owned one third of Solstice but sold his interest to Roger Hamblin at the same time that Neldon Johnson sold his interests in DCL-16A and NPJFLP to Hamblin.[120] Notwithstanding this claim, Johnson's first Compliance Verification stated that he currently holds an interest in Solstice.[121]

c. Business Operations. Solstice is the sole owner of XSun.[122] Solstice claimed that it manufactured and sold "proprietary alternative energy systems."[123] Solstice also sold solar lenses.[124] Solstice paid Cobblestone to operate and maintain the solar towers where Solstice-sold lenses would be placed.[125] Promissory notes from lens purchasers were to be assigned to Solstice.[126] Solstice also owns some unspecified "various pieces of equipment located at the warehouse with unknown value."[127] RaPower assigned 81.3% of its revenues to Solstice, which obligation could be satisfied by RaPower "purchasing power generating equipment and material."[128] Defendants assert that RaPower still owes significant amounts to Solstice.[129]

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[119] Deposition of Neldon Johnson, Jun. 28, 2017 at 18:15 – 18:17.
[120] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2. The sale of Johnson's interests in Solstice could not have occurred at the same time Johnson sold his interests in NPJFLP and DCL-16A because those interests were sold January 14, 2011 and Solstice was not formed until March 8, 2011. Nevertheless, it is possible that Johnson sold his interests in Solstice to Hamblin at some date after March 8, 2011. Defendants represented to the Receiver that Hamblin signed documents on behalf of Solstice after its creation. The Receiver has not seen documents relating to the creation of Solstice, Johnson's ownership interest in Solstice, the transfer of Johnson's interests to Hamblin, or the documents that Hamblin signed on behalf of Solstice.
[121] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.12. Neldon Johnson's *Amended Declaration* (Docket No. 510, filed Nov. 16, 2018) did not identify Solstice as an entity whose ownership information (listed in the prior Compliance Verification) was inaccurate. Thus, the only indication that Neldon Johnson is not an owner of Solstice is S. Paul's December 28, 2018 letter that provided no documentary support for his assertion.
[122] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[123] *Equipment Wholesale Agreement*, Aug. 1, 2011 at 1.
[124] Deposition of Neldon Johnson, Jun. 28, 2017 at 139:3 – 139:8.
[125] Deposition of Neldon Johnson, Jun. 28, 2017 at 139:3 – 139:8.
[126] *Equipment Wholesale Agreement*, Aug. 1, 2011 at 3.
[127] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[128] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[129] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

11. Black Night Enterprises, Inc.[130]

a. Company Organization, Status. Black Night is a Nevis company.

b. Ownership and Management. The company has six owners, whose ownership is shown on the table below, but all the shares are beneficially owned or controlled by three persons: Roger Hamblin, LaGrand Johnson, and Randale Johnson.[131]

Share Owner	# Shares	%
DCL-16A	2,000	20%
Roger Hamblin	2,000	20%
Randale Johnson	1,500	15%
Randale Johnson Trust[132]	1,500	15%
LaGrand Johnson	1,500	15%
LaGrand Johnson Trust	1,500	15%

While Neldon Johnson is not identified as an owner or officer of Black Night, he signed documents on behalf of Black Night. The license agreement to allow IAS to use technology owned by Black Night was signed by Neldon Johnson on behalf of both parties.[133] Neldon Johnson receives—through Black Night and Starlight—a 10% royalty on gross sales of lenses.[134]

[130] There is a Utah assumed name registration in the name of Black Night Enterprises controlled by Stephen Rose. This Utah-based entity appears to have no relationship with the Receivership Defendants.
[131] David Nelson is the trustee for the two family trusts of LaGrand Johnson and Randale Johnson.
[132] David Nelson is the trustee of the Randale P. Johnson Family Trust and the LaGrand T. Johnson Family Trust. While Nelson is the trustee of the trusts, Neldon Johnson's initial Compliance Verification indicated that Randale and LaGrand should be contacted about these trusts, not David Nelson.
[133] Deposition of Neldon Johnson, Jun. 29, 2017 at 53:18 – 54:1.
[134] Deposition of Neldon Johnson, Jun. 29, 2017 at 199:8 – 199:15.

c. Business Operations. As discussed in Part B.7.c., above, Black Night acquired assets from NPJFLP on October 23, 2012. These assets were four patents, IAS shares and warrants, and a 50% interest in Texas real property. The consideration for the acquisition of these assets was for Black Night to issue shares in Black Night to the owners of NPJFLP. It is significant that the shares were issued to the owners of NPJFLP when the assets that were transferred to Black Night came from NPJFLP itself. In other words, the shares went to different persons than the ones who provided the assets to Black Night. The Receiver believes Black Night issued these shares to these new owners for no consideration.

As a result of the patents being assigned to Black Night and then licensed back to IAS and RaPower, the purported technology used by IAS and RaPower was owned by Black Night and Starlight.[135]

d. Financial Activities. Neldon Johnson testified that he received a 10% royalty on gross sales of lenses through Black Night and Starlight.[136] No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

12. Starlight Holdings, Inc.[137]

a. Company Organization, Status. Starlight is a Nevis company.

[135] Deposition of Neldon Johnson, Jun. 28, 2017 at 40:16 – 40:22.
[136] Deposition of Neldon Johnson, Jun. 29, 2017 at 199:8 – 199:15.
[137] The Receivership Order identified this entity as Starlight Enterprises. The name of the Nevis-based entity associated with the Receivership Defendants is Starlight Holdings. There is a Utah-based assumed name of Starlight Enterprises owned by Crystal Star Smith. The Utah-based entity appears to have no connection with the Receivership Defendants.

b. Ownership and Management. The company has six owners, whose ownership is shown on the table below, but all the shares are beneficially owned or controlled by three persons: Roger Hamblin, LaGrand Johnson, and Randale Johnson.[138]

Share Owner	# Shares	%
DCL-16A	2,000	20%
Roger Hamblin	2,000	20%
Randale Johnson	1,500	15%
Randale Johnson Trust[139]	1,500	15%
LaGrand Johnson	1,500	15%
LaGrand Johnson Trust	1,500	15%

The agreements to transfer assets from NPJFLP to Starlight were signed by Neldon Johnson, LaGrand Johnson, Randale Johnson, David Nelson as trustee, and Roger Hamblin. Because the technology that RaPower used in its business had been transferred to Starlight, RaPower signed an agreement promising to pay royalties to Starlight. Johnson signed the royalty agreement on behalf of both Starlight and RaPower.[140] Neldon Johnson individually was entitled to receive a 10% royalty on gross sales by RaPower (through Black Night and Starlight).[141]

c. Business Operations. As discussed in Part B.7.c, above, Starlight acquired assets from the NPJFLP on October 23, 2012. These assets were four patents, IAS shares and warrants, and a 50% interest in Texas real property.[142] As with Black Night, the consideration for the acquisition of these assets was for Starlight to issue shares in Starlight to the owners of NPJFLP. It is significant that the shares were issued to the owners of NPJFLP when the assets

[138] David Nelson is the trustee for the two family trusts of LaGrand Johnson and Randale Johnson.
[139] David Johnson is the trustee of the Randale P. Johnson Family Trust and the LaGrand T. Johnson Family Trust.
[140] Deposition of Neldon Johnson, Jun. 29, 2017 at 54:6 – 54:12.
[141] Deposition of Neldon Johnson, Jun. 29, 2017 at 199:8 – 199:15.
[142] The assets purchased by Starlight and Black Night do not correlate exactly with the NPJFLP assets identified in Neldon Johnson's sale of his interest to Roger Hamblin.

that were transferred to Starlight came from NPJFLP itself. In other words, the shares went to different persons than the entity that provided the assets to Starlight. The Receiver believes that Starlight issued these shares to these new owners for no consideration.

The fact that the transfers of real property interests were "undivided" interests of 50% of the property means that neither entity could act by itself relating to the property; Black Night and Starlight had to cooperate. Such a structure would make sense only if the owners of Black Night and Starlight were assured of being able to work closely with the other entity—an outcome that was assured if the owners of both entities were identical.[143]

d. Financial Activities. Neldon Johnson testified that he received a 10% royalty on gross sales of lenses through Black Night and Starlight.[144] No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. In addition, because the Defendants did not provide, by December 31, 2018, an accounting of all transfers to affiliates, the Receiver will have to await the results of the forensic accounting to evaluate the financial transactions between this company and Defendants.

13. U-Check, Inc. Neldon Johnson formed and controlled a corporation called U-Check, Inc. This entity is not listed in the Order as being subject to the Extended Asset Freeze and was not one of the entities the Receiver was directed to investigate.[145] Nevertheless, the Order authorizes the Receiver to investigate and recommend entities beyond those listed in the Order.[146]

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[143] One wonders why Neldon Johnson created two separate entities to hold these assets. Why not just create one entity and put all the assets in that entity? Because Johnson had counsel help him set up these entities, the Receiver assumes there was a purpose. The Receiver is not yet able to guess at that purpose.
[144] Deposition of Neldon Johnson, Jun. 29, 2017 at 199:8 – 199:15.
[145] Order at ¶ 5.
[146] *Id*.

a. Company Organization, Status. U-Check was formed December 30, 1996. The company's corporate status expired on March 24, 2004.

b. Ownership and Management. Neldon Johnson was the sole incorporator and the registered agent. Randale Johnson and LaGrand Johnson were officers and Neldon Johnson was a director.

c. Business Operations. U-Check owned a supermarket in Salem, Utah containing approximately 285,000 square feet of space. It implemented a self-checkout system designed by Neldon Johnson.[147] The first circular solar lens array was constructed at this location.[148] The store was deeded to Johnson's former wife as part of the property settlement in their divorce.[149] While U-Check transferred its real property and its corporate status has expired, it continues to own a Cessna Model 414 aircraft.[150]

d. Financial Activities. No Defendant or family member has provided financial information to the Receiver on this entity under their affirmative obligations under the Order. While this is not identified as an affiliated entity in the Order, Defendants were obligated to provide, by December 31, 2018, an accounting of all transfers to entities such as U-Check and information about assets controlled by Johnson—which would include the aircraft owned by U-Check. The Receiver will have to await the results of the forensic accounting to identify financial transactions between this company and Defendants.

C. RECEIVER'S RECOMMENDATION

The Receiver recommends that the 12 affiliated entities identified in the Order, as well as one additional entity, U-Check, Inc., be included in the Receivership Estate as Entity

[147] Deposition of Neldon Johnson, Oct. 3, 2017 at 59:2 - 59:24.
[148] Deposition of Neldon Johnson, Jun. 30, 2017 at 10:18 - 10:23.
[149] Deposition of Neldon Johnson, Jun. 30, 2017 at 16:24 – 17:3.
[150] *See* https://registry.faa.gov/aircraftinquiry/NNum_Results.aspx?NNumbertxt=N31BS.

Receivership Defendants. The reasons and justifications for this recommendation are described in Part E, Rationales for Recommendation.

The Receiver investigated three additional entities controlled by Receivership Defendants and determined not to recommend their inclusion in the Receivership Estate:

1. RLN Management, L.C. This company was formed by Neldon Johnson in December 2002. Stacy Snow was the initial manager. Johnson owns one third of the company.[151] The company was formed at the same time as Cobblestone and acted as its manager. The company's stated purpose was to own and operate communal restaurant facilities. The company's corporate status expired on March 28, 2018. Defendants represented to the Receiver that the "company has no assets and is not presently conducting business."[152] Because the company ceased being the manager of Cobblestone, its stated corporate purpose is unrelated to alternative energy systems, it has no known assets, and its status has expired, the Receiver is not recommending that RLN be included in the Receivership Estate.

2. Theta Energy, LLC. This limited liability company was formed by Neldon Johnson on September 5, 2017. Its certificate of organization lists no company purpose, but the company name indicates it was to operate in the energy field. Neldon Johnson was the initial registered agent. David Nelson was the organizer. According to Johnson, IAS was the sole owner of Theta Energy.[153] The company's status expired on December 31, 2018. Neldon Johnson represented that the company has never conducted any business.[154] The Receiver has not found any indication Theta conducted business with lens purchasers or held itself out as being related

[151] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2.
[152] Letter from S. Paul to Receiver, Dec. 28, 2018 at 2. *See also* Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at I.11.
[153] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at III.1.
[154] Undated (believed to be around Nov. 1, 2018) Compliance Verification required by Docket No. 467 at III.1.

to RaPower or IAS. For these reasons, the Receiver is not asking that Theta Energy be included in the Receivership Estate.

3. MAGR Technologies. This company was formed by Greg Shepard on September 24, 2018—after conclusion of the trial and the Court's entry of an asset freeze. The company's stated business purpose was to "engage in all forms of renewable energy."[155] The officers were Greg Shepard, Matthew Shepard, and Diana Shepard. Greg Shepard owned 98% of the company.[156] The company obtained an employer identification number. A corporate resolution was adopted on October 5, 2018 authorizing the company to "[e]mbark on the selling of solar lenses," "move forward on selling energy systems," "work with foreign nations in providing them energy," and "[d]eveloping home energy systems."[157] While the timing of the formation of this company and its stated corporate purposes ordinarily would merit inclusion in the Receivership, Shepard voluntarily dissolved the company on October 15, 2018—three weeks after its formation. Shepard represented to the Receiver that the company did not engage in any business during that interregnum. Because it was in existence for such a short time and never engaged in any business, the Receiver is not recommending its inclusion as a Receivership Entity.

D. RECOMMENDATION THAT ADVERSE INFERENCES BE DRAWN

The Order requires Receivership Defendants as well as employees, accountants, and family members to provide records relating to the Receivership Defendants and Receivership assets to the Receiver. The Receivership Defendants and their employees and family members

[155] *Articles of Incorporation*, Sep. 24, 2018 at Article II.
[156] *MAGR Technologies, Inc.: Membership Restriction and Redemption Agreement*, Oct. 4, 2018.
[157] *Corporate Resolution of MAGR Technologies, Inc.*, Oct. 5, 2018.

have provided very little information to the Receiver. These cooperation failures were detailed in the Receiver's *Initial Quarterly Status Report*.[158]

In his investigation, the Receiver has been able to obtain information regarding some transactions between the Receivership Defendants and the affiliates and subsidiaries. Counsel for Defendants have provided the Receiver with limited information about certain transactions relating to assignments of patents, sales of Neldon Johnson's interests in entities, and agreements with foreign entities created to take possession of assets. What is notable about the limited information that Defendants have provided is that the information appears to fit a pattern; if there are documents that would show assets have been transferred out of the control of Neldon Johnson or one of the Receivership Entities, those documents have been provided to the Receiver.[159] However, Defendants have not provided information to the Receiver showing that assets in the name of affiliates and subsidiaries were and should be Receivership assets.

For example, Defendants filed a *Motion to Lift Asset Freeze Order as to Solco I and XSun Energy*.[160] The motion was premised on the assertion: "Both Solco I and XSun sold and collected their own sales revenue and kept those funds apart from any of the Defendants."[161] The motion avers a lack of nexus between Receivership Defendants and XSun and Solco, with statements such as: "No Defendant owns an interest in XSun or Solco,"[162] "Mr. Johnson has

[158] Docket No. 557, filed January 28, 2019 at Part V. Subsequent cooperation failures by Neldon and Glenda Johnson are documented in Part A.1., above. *See also United States' Motion to Show Cause*, Docket No. 559, filed Jan. 29, 2019.
[159] The Receiver suspects the efforts to transfer assets and create foreign entities to hold assets were not all designed with the Receiver in mind. During the relevant time period, Neldon Johnson also was going through a divorce where he was required to pay $2.8 million to his former spouse (*See Johnson v. Johnson*, 2010 UT 27, ¶ 2, 234 P.3d 1100), was being audited by the IRS, and was the subject of a criminal investigation. These other events likely were factors in creation of some of the entities discussed in this report and in transactions described herein.
[160] Docket No. 509, filed Nov. 16, 2018.
[161] *Id.*, at 5.
[162] *Id.*, at 3.

served as a manager but owns no interest in XSun,"[163] and "Mr. Johnson served as a manager of Solco I, but does no longer and has no ownership interest in it."[164] With these premises, Nelson Snuffer argued that the non-refundable legal retainer it received from XSun should not be subject to the asset freeze.[165]

In fact, the Receiver has found strong indications that the funds that XSun paid to Nelson Snuffer came directly from RaPower. In a related litigation matter, Glenda Johnson submitted a declaration stating that in 2012 Zions Bank required RaPower to close its bank accounts at Zions Bank.[166] This was during the same time frame that criminal investigators seized records of RaPower, alerting Neldon Johnson to the existence of a criminal investigation of his conduct.[167] Glenda Johnson had Zions Bank issue a cashier's check to her in the amount of $1,498,150.85 on June 27, 2012. On July 23, 2012, $1,498,150.85 was deposited into the savings account of XSun Energy.[168] The latest bank records the Receiver has seen for the XSun account indicated that as of February 1, 2017, $1,175,262.36 remained in this account. The Receiver expects that he will find that the amount XSun paid to Nelson Snuffer for its retainer fee derived from this $1.498 million transfer from RaPower to XSun.[169] This is all information that is known to the Receivership Defendants, yet they have not provided these types of records to the Receiver.

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[163] *Id*.
[164] *Id*., at 4.
[165] *Id*., at 5. The Court rejected this premise, ordering that the retainer funds continue to be subject to the asset freeze. *Memorandum Decision and Order Denying Motion to Life Asset Freeze as to Solco I and XSun Energy*, Docket No. 550, filed Dec. 27, 2018.
[166] *Declaration of Glenda Johnson*, Case No. 2:15-cv-00742, Docket No. 7-1, filed Jan. 1, 2016.
[167] The Receiver understands that Greg Shepard's trial testimony indicated this seizure of records occurred on June 29, 2012.
[168] The account had a balance of $700.15 prior to this deposit. This deposit was after the date of the seizure of records in connection with the criminal investigation into Neldon Johnson's conduct.
[169] The Receiver has not yet been able to confirm that the retainer came from this account due to several factors: a) Nelson Snuffer has refused to provide information showing the date, amount, and bank account source of funds deposited into its retainer account, b) the bank records the United States obtained for trial only go through February 2017, and c) Wells Fargo Bank has not yet provided the Receiver with copies of bank statements for the period after February 2017.

In sum, Receivership Defendants have provided some records to the Receiver showing a number of transactions by which funds or other assets have supposedly been transferred to entities other than Receivership Defendants but have refused to provide records that would enable the Receiver to determine whether these transfers of assets were illusory or shams. Disclosures by Defendants have been selective; Defendants have not provided the most relevant information—a list of all transfers by them, as required by Paragraph 26(h) of the Order. Defendants have refused to provide information showing the sources of funds Glenda Johnson used to purchase the 18 properties held in her name (including two transferred to her by Neldon Johnson). Additional instances where the supposed transfers of assets to affiliates and subsidiaries are revealed to be illusory are discussed below.

In light of this pattern of providing the Receiver with documents that suggest assets are outside the Receivership Estate and failing to provide documents that would allow the Receiver to determine whether the transactions are illusory, the Receiver is recommending that all the affiliates and subsidiaries identified in the Order be permanently included as Receivership Entities. If there is information indicating that the information on which the Receiver has based his recommendation is incorrect, that information appears to be in the exclusive possession of Receivership Defendants, and they are not sharing it with the Receiver. Consequently, the Receiver asks the Court to apply an adverse inference that the refusal of Receivership Defendants to provide all records to the Receiver creates a presumption that the unproduced documents would show that the affiliates and subsidiaries should be Receivership Entities. The burden then should shift to Defendants to produce records showing that the affiliates and subsidiaries should not be part of the Receivership Estate.

Moreover, as noted in the Receiver's Initial Quarterly Status Report, the records that Defendants have provided to the Receiver have often contained inconsistent information or information that contradicted other information provided by Defendants. The Receiver does not know whether these inconsistencies are caused by the companies' failures to observe corporate formalities and failing to properly document transactions or whether different documents were and are used for different occasions, depending on what objective the Defendants were trying to achieve. Regardless, Defendants should not be able to rely on certain documents to the exclusion of contradictory documents they themselves created. The Receiver believes the delivery of inconsistent or contradictory documents to the Receiver should shift the burden to Defendants to produce all relevant company records and to demonstrate which records are reliable.

If Defendants fail to produce conclusive—and consistent—documentary evidence that all the transactions were conducted for legitimate business purposes, the documents should be construed against any result that would result in assets being placed out of the reach of the Receiver. Put differently, the Receiver believes that the documents (or the absence of documents) should be interpreted in ways that are the least likely to sanction sham transactions or fraud. If Defendants oppose the Receiver's recommendation, Defendants should be required to explain the business reasons for incorporating entities in Nevis and for ostensibly transferring assets to these foreign-based entities. For example, why would RaPower contract with a Nevis-based entity (Solstice) to manufacture alternative energy systems that were created by Neldon Johnson, were based on technology Johnson developed, and would be marketed to citizens who are subject to U.S. tax laws?

E. RATIONALES FOR RECOMMENDATION

1. Receiver's Rationales. The Receiver's recommendation that Solco I, LLC; XSun Energy, LLC; Cobblestone Centre, LC; DCL-16A, Inc.; DCL16BLT, Inc.; LTB O&M, LLC; N.P. Johnson Family Limited Partnership; Shepard Energy; Shepard Global, Inc.; Solstice Enterprises, Inc.; Black Night Enterprises, Inc.; Starlight Holdings, Inc.; and U-Check, Inc. be permanently made part of the Receivership Estate is based on one or more of five rationales. First, in many cases, these entities have close associations with the original Receivership Entities. They have common officers, directors, members, and managers. Their corporate purposes are similar. There have been numerous and substantial financial transactions between many of the affiliates and IAS or RaPower, indicating common purposes and interdependence.

Second, assets have been transferred to or are being held by the affiliates. In the case of XSun, $1.498 million of funds belonging to RaPower were taken from a bank account of RaPower and deposited into a bank account of XSun. Patents owned by Neldon Johnson were transferred to NPJFLP, likely for no consideration. Ten million shares of IAS preferred stock and 100,000,000 warrants given to Neldon Johnson were transferred to NPJFLP. Assets of NPJFLP were later transferred to foreign entities, Black Night and Starlight. Consideration for these transfers went to the owners of NPJFLP, not to NPJFLP itself—which appear to be fraudulent (voidable) transfers. A Cessna twin-engine airplane, which might have significant value, is held in the name of U-Check, which was owned and controlled by Neldon Johnson.

Third, in many instances, the only assets of these subsidiaries and affiliates are their ownerships of patents, IAS shares, of bank account balances. In each of these instances, the Receiver believes these assets were transferred to these affiliates in fraudulent or voidable transfers. If the affiliates were not made part of the Receivership Estate and the Receiver brought

successful avoidance actions, the affiliates would end up as empty shells with no assets. In the interim, the persons controlling these affiliates would be expected to use those assets to oppose the Receiver's efforts to recoup those fraudulent transfers. Instead, since the assets tied to RaPower are often the only assets of the entities, it makes more sense to put the entities themselves under the control of the Receiver so there can be no further dissipation of assets. If a third party has a claim for any of these assets, the third party can provide evidence to the Receiver of their claims to the asset and the Receiver can either recognize the claim and release part or all of the asset or the matter can be brought to the Court for resolution. In the interim, there would be no reason to fear dissipation of the assets.

Fourth, the creation of the foreign entities and transactions with them appear to have been designed to put those assets out of the reach of government agencies or the courts. Neldon Johnson testified at trial that contracts between the foreign entities and IAS provide that if IAS is declared insolvent or a government agency causes problems, "the contracts are relinquished back to the foreign company until those issues are resolved."[170]

Finally, it is the case that many of these affiliates are defunct and devoid of assets. Bringing those entities into the Receivership Estate is not likely to result in any recovery of assets. However, in light of the quasi-public role the Receiver has in this case, the Receiver believes it will further public policy for him to take control of these entities to ensure that none of them are used by Defendants—or anyone else—to perpetuate what this Court has already declared as a massive fraud. By putting these entities in the Receivership Estate, the entities can be liquidated and dissolved rather than continue in existence and risk being used for improper purposes.

[170] Trial transcript, 2175:4 – 2175:14.

2. Neldon Johnson's Sworn Testimony on Purposes and Uses of Affiliates. Neldon Johnson testified that, in fact, he controls all the entities and that he is able to (and does) decide which of the multifarious entities is used to accomplish his objectives:

> Q. . . . . I'm not asking who RaPower3 might pay. I'm asking who RaPower does pay.
>
> A. And I haven't made up my mind yet and that's what I'm telling you. And that's my right as the operator and manager of all the companies. I have the right to choose who I purchase and who I designate as the purchaser and who owns those plants. It can be from any company I choose. I can designate Numis, I can – I can designate Blacknight, I can designate Solco1. That's my choice. . . .
>
> I have a right to operate my business the way I choose. . . . .[171]

The Receiver believes that this exclamation by Johnson accurately reflects both his attitude about the roles of these affiliates and the reality of what transactions occurred within and between the affiliated entities. The analysis below identifies numerous instances that are consistent with Johnson's exclamation.

F. TRANSACTIONS BY AFFILIATES AND SUBSIDIARIES

1. Solco I. Solco is closely tied to the Receivership Entities. Neldon Johnson was the manager of Solco at one time. Its owners are Glenda Johnson, Randale Johnson, and LaGrand Johnson. Glenda Johnson was the assistant manager. David Nelson, of Nelson Snuffer, was its organizer. Solco, along with XSun were the entities seeking a tax opinion from the law firm Kirton & McConkie that was promoted in solicitations and on the RaPower website as evidence that the purchase of RaPower solar lenses enabled purchasers to qualify for tax deductions and tax credits.[172] Solco sold solar lenses that were tied to the IAS and RaPower alternative energy scheme. Neldon Johnson sold solar lenses through Solco. Neldon Johnson signed agreements

[171] Rule 30(b)(6) deposition of Neldon Johnson, Jun. 30, 2017, 89:18 – 90:6.
[172] Purchasers of lenses from RaPower used the tax memorandum that Solco obtained from Kirton & McConkie in litigation before the Oregon Tax Court, showing that Solco's solicitation of the tax memorandum was used by RaPower customers. *Gregg v. Department of Revenue* (Final Decision, Oct. 13, 2014) Oregon Tax Court.

between IAS and Solco, where Johnson was the signatory for both sides. Johnson also signed, on behalf of Solco, contracts with third parties.

2. XSun Energy. Neldon Johnson was the manager at one time and described himself as the company's sole decision-maker. Glenda Johnson was the assistant manager. David Nelson was the organizer and registered agent for XSun. Along with Solco, XSun sought the legal opinion from Kirton & McConkie to facilitate the marketing of solar lenses. XSun sold solar lenses. Neldon and Glenda Johnson received $2.1 million in gross sales from XSun during 2012 and XSun paid additional amounts to the sons Randale and LaGrand. At least $23,000 was paid to Linda Johnson.

The $1.498 million, representing the amount in RaPower's bank account at Zions Bank on June 27, 2012, was deposited into an XSun bank account. In November 2012, XSun wired $241,200 of these funds to a bank account in the name of "Network International." The Receiver has so far been unable to determine the purpose of this payment. There is a website for a Texas company having this name that sells oil and gas equipment. Based on real estate records and aerial photographs the Receiver has obtained relating to the Texas real estate owned by NPJFLP, that property appears to have oil and gas operations on the property. Moreover, the easements that NPJFLP granted on the property were given to oil and gas operators. This causes the Receiver to suspect that XSun funds have been used for some type of oil and gas operations on the Texas property. If so, it shows: first that Johnson has used funds from some affiliates to fund activities of other affiliates and second that XSun assets (which derived from RaPower) have been used for the benefit of NPJFLP. If the latter occurred, there were transfers of funds belonging to the Receivership Estate that should be recovered from NPJFLP.

XSun signed a royalty agreement with IAS. Johnson signed the agreement on behalf of both XSun and IAS—showing his authority to act on behalf of XSun. While Defendants contend that Neldon Johnson is not currently a manager of XSun, filings with the Utah Division of Corporations identify Johnson as the manager.[173]

Defendants assert that XSun is owned by Solstice Enterprises[174] but Solstice is not listed as an owner in records filed with the Division of Corporations. Moreover, Defendants have given the Receiver no information identifying the owners of Solstice. It is possible that Johnson is the owner of Solstice—or that he exercises de facto control over its operations. The Receiver simply cannot recommend that XSun not be part of the Receivership Estate without knowing the identity of the owner of Solstice. The Receiver fears that XSun was put under the ownership of foreign-based Solstice to put assets outside the reach of the U.S. government and U.S. courts.[175]

XSun's "selection" of Nelson Snuffer (the firm that represented IAS and RaPower in this litigation) to file the appeal on behalf of IAS and RaPower illustrates the ties between XSun and the Receivership Entities. It would defy logic for XSun to pay more than $735,000 to Nelson Snuffer to prosecute the appeal of this Court's judgment against RaPower and IAS if the companies were not intimately related. Because XSun has no assets other than its bank balance (seized by the Receiver), its sole purpose for existing seems to be to fund the appeal for IAS and RaPower.

3. Cobblestone Centre. Neldon Johnson owns one third of this company. His two sons own the remaining two thirds. He is a member and was the sole manager. This company states it is in the energy business. The company has the same address as IAS. Cobblestone built

[173] Utah Division of Corporations, *Summary of Online Changes* for XSun Energy, Mar. 18, 2016.
[174] *Motion to Lift Asset Freeze Order*, Docket No. 509 at 3.
[175] Neldon Johnson's trial testimony explicitly admitted this. 2175:4 – 2174:14.

solar towers and installed and maintained lenses in those towers. This made Cobblestone an essential component of the "investment contract" securities that RaPower sold. Under the investment program, the investors (lens purchasers) had a passive role; Cobblestone would manage the lenses for the purchaser and send profits as they were earned.

At least in recent years, its funds came from RaPower. From 2017 to 2018, RaPower sent $1.7 million to Cobblestone for "research and development expenses." Cobblestone made large payments to family members. Cobblestone paid property taxes for the Texas property, a payment that benefitted either NPJFLP or Black Night and Starlight—depending on who really owns the Texas property.

It was this entity about which Johnson declared that he could decide to make payments to anyone he wants from this entity because he controls all the entities. Similarly, he testified that regardless of whether the towers were built by Cobblestone or a different entity, Johnson had the right to decide who owned the towers.

4. DCL-16A. Originally, Johnson was a one-third owner of DCL-16A. He signed documents in 2011 purporting to sell his interests in DCL-16A to Hamblin—one week before Johnson filed for personal bankruptcy. Despite purporting to have transferred ownership to Hamblin and to have relinquished control over DCL-16A, Johnson continued to assert control and claim ownership.

In 2017, Johnson claimed he still owned DCL-16A. Johnson also testified that he currently owns 20% of Black Night and Starlight (which is the percentage of Black Night and Starlight that DCL-16A owns).

When NPJFLP transferred its assets to Black Night and Starlight on October 12, 2012, DCL-16A had to give its consent (as one of the general partners of NPJFLP). Neldon Johnson

signed consents to these sales as president of DCL-16A. This demonstrates that Johnson's January 14, 2011 transfer of his interests in DCL-16A to Roger Hamblin was a sham. Twenty-one months after the sale of his DCL-16A interest, Neldon Johnson was still signing documents on behalf of DCL-16A, evincing his actual control over DCL-16A. Moreover, in one of his compliance verifications filed in this case, Neldon Johnson identified himself as the contact person for DCL-16A.[176] If Neldon Johnson truly had conveyed his ownership and management interest in DCL-16A to Hamblin on January 14, 2011, Johnson would have identified Hamblin as the contact person, not himself. If he truly had transferred ownership and management control over DCL-16A to Hamblin in 2011, Johnson would have refused to sign documents giving DCL-16A's consent to the sale of NPJFLP's assets to Black Night and Starlight.

Indeed, if the 2011 sale of DCL-16A to Hamblin was legitimate, NPJFLP's transfer of its assets to Black Night and Starlight is likely void for DCL-16A's lack of consent to the transfers. If Johnson's deposition testimony that he owns 20% of Black Night and Starlight is correct, then he was a party to a fraudulent transfer of NPJFLP assets where the benefit of the transfer went to NPJFLP owners instead of NPJFLP itself.

5. DCL16BLT. This company is the sole member of RaPower. RaPower was a pass-through entity for tax purposes, making DCL16BLT the entity in control of RaPower. And, Neldon Johnson controlled DCL16BLT. He is president and director of the company. The other owners are his sons, Randale and LaGrand. A voting trust agreement between the three gave Neldon Johnson complete control over the company.

[176] Undated Compliance Verification required by Docket No. 467 at I.1. This Compliance Verification appears to be dated November 1, 2018. Johnson later submitted an amended declaration stating that information in this initial Compliance Verification was not accurate. Docket No. 510, filed Nov. 16, 2018.

Because DCL16BLT is the sole member of RaPower, DCL16BLT is the only entity with the ability to control what RaPower does (or did). And Neldon Johnson had complete control over DCL16BLT. This means Neldon Johnson exclusively controlled the actions of RaPower. It would be anomalous to determine that RaPower should be in the Receivership Estate but not have its sole owner also in the Receivership Estate. Moreover, having RaPower as a pass-through entity might create difficulties for the Receiver in trying to recover assets if DCL16BLT were not in the Receivership Estate. If the Receiver attempts to recover voidable transfers that RaPower made to others, the recipients of those transfers might argue that the transfers really were from DCL16BLT, not RaPower, and challenge the Receiver's authority to avoid those transfers.

Further evidence of the close relationship of DCL16BLT is shown by IAS and RaPower paying the legal fees of Paul Jones to represent DCL16BLT in Tax Court proceedings.

6. LTB O&M. LTB O&M, like Cobblestone, was to manage lenses on behalf of lens purchasers. This means LTB O&M was integral to the investment contracts between RaPower and investors/lens purchasers. Because no purchasers were likely to install and manage their own solar lenses, LTB O&M was an important part of the inducement for purchasers. Neldon Johnson was the sole decision maker for this company.

7. N. P. Johnson Family Limited Partnership. This entity was the epicenter of fraudulent transfers and sham transactions:

a. Neldon Johnson transferred at least 14 patents and other intellectual property to NPJFLP for no apparent consideration. These were fraudulent transfers that diminished the assets of Johnson—assets that otherwise could be used to satisfy the judgments entered by the Court;

b. Neldon Johnson transferred 10 million shares and 100 million warrants in IAS to NPJFLP for no apparent consideration. These were fraudulent transfers that diminished the assets of Johnson.

c. NPJFLP acquired two Texas real properties. Because NPJFLP has not disclosed that it had any source of funds, the Receiver suspects NPJFLP was the beneficiary of fraudulent transfers of the Texas properties to NPJFLP. If IAS or RaPower funds were used to purchase these properties, the properties belong in the Receivership Estate—regardless of whether NPJFLP's transfers of the property to Black Night and Starlight were effective.

d. The transfers of assets to Black Night and Starlight were fraudulent transfers, made without NPJFLP receiving any benefit from the transfer of assets. The consideration for the transfer of the assets instead went to Roger Hamblin, LaGrand Johnson, and Randale Johnson.

e. These fraudulent transfers are consistent with the expressed purposes of NPJFLP: facilitating Johnson's transfer of assets to family members.

f. The transfers to Black Night and Starlight revealed that Johnson's prior transfer of his ownership of DCL-16A was a sham. Johnson signed consents to the transfers to Black Night and Starlight as the authorized representative of one of the general partners of NPJFLP—despite having signed documents the prior year purporting to transfer his general partner rights to Hamblin.

g. Cobblestone paid the property taxes for the NPJFLP-owned Texas properties after the properties were purportedly transferred to Black Night and Starlight, evidence of Johnson's claim that he was entitled to use any entity to make any payment he wanted.

h. Despite NPJFLP's apparent transfer of the real estate to Black Night and Starlight, no deeds were filed in the Texas real property records; the property was left in the name of NPJFLP.

i. The transfers of real property to Black Night and Starlight were revealed as shams in 2013, in 2015, and again in 2017 when Johnson signed documents (on behalf of NPJFLP) granting easements on the Texas properties to three different companies—at a time when NPJFLP purportedly no longer owned the properties and when Johnson purportedly no longer was one of general partners of NPJFLP and controlled the other general partner.[177] An additional defect of granting the 2015 and 2017 easements is that NPJFLP's existence had expired on March 3, 2015. Because NPJFLP's existence had expired, the only business allowed for NPJFLP would be in connection with winding down the partnership. The Receiver believes the granting of this easement is not consistent with "winding down" NPJFLP.

j. Despite Johnson's apparent assignment of his preferred shares and warrants to NPJFLP and the subsequent transfer of those shares and warrants to Black Night and Starlight, Neldon Johnson's name remained on most of the shares and warrants issued to Johnson.

8. Shepard Energy. This entity was just an assumed name, which has been canceled. Nevertheless, the Receiver recommends putting this entity into the Receivership Estate to ensure this name is not used to perpetuate this scheme. If, after being in the Receivership Estate, the

[177] If NPJFLP had believed that the Texas property had been transferred to Black Night and Starlight, NPJFLP would have refused to sign the easement, instead instructing the requesting entity to contact Black Night and Starlight to obtain the easement. That did not happen; NPJFLP granted the easement. Moreover, Neldon Johnson signed as manager for NPJFLP despite having signed documents in January 2011 transferring his interest in NPJFLP to Roger Hamblin. If Neldon Johnson had intended the transfer of his interests in NPJFLP to be real, the easement would have had to have been signed by LaGrand Johnson (one of the general partners) or Roger Hamblin on behalf of DCL-16A (the other general partner).

same name were ever used again, it is more likely counterparties would be on notice that the entity was associated with the prior fraud.

9. Shepard Global. This company has also been voluntarily dissolved. Nevertheless, the Receiver recommends putting this entity into the Receivership Estate to ensure the name is not used to perpetuate this scheme. If someone later uses the same name again, counterparties would be on notice that the name entity was associated with the prior fraud.

10. Solstice Enterprises. Solstice is the owner of XSun. The Receiver does not know who the owners of Solstice are. The activities of Solstice appear to have been heavily intertwined with the activities of RaPower and IAS. Solstice sold solar lenses. It paid Cobblestone to manage the lenses and solar towers. Promissory notes from purchasers of lenses were intended to be assigned to Solstice by RaPower and other lens sellers.[178] Solstice owns equipment that is stored in a warehouse in Utah. It had the same address as RaPower. Its only business appears to be in the U.S. and the only contract that the Receiver has found involving Solstice specified that Utah law would apply to the contract and any alternative dispute resolution would occur in Utah. Solstice has a contractual right to receive 81.3% of RaPower's revenues.[179]

The only evidence the Receiver found of Solstice actually conducting business was an Equipment Wholesale Agreement between Solstice and RaPower. The Receiver has found no indication that Solstice conducted any business with entities other than RaPower.[180] Under the contract, Solstice was to manufacture and sell "alternative energy systems" to RaPower. The Receiver has not found any evidence that Solstice has any manufacturing capability anywhere

[178] The Receiver does not know if any purchaser promissory notes were actually assigned to Solstice.
[179] Since RaPower's obligations under this financing arrangement could be satisfied by RaPower purchasing equipment from Solstice, it appears to the Receiver that this revenue arrangement may have been designed to transfer RaPower revenues to the foreign entity or to hide revenues.
[180] Such documents may exist but the Defendants' refusal to provide documents to the Receiver deny him the ability to make better assumptions.

but doubts that the intent of the parties to this agreement was that the alternative energy systems would be constructed in Nevis—using Johnson's technology—and shipped to Utah. Instead, the Receiver believes construction of any alternative energy systems that might have occurred would have been in Utah. Thus, Solstice's actual business operations would have been conducted primarily—if not exclusively—in Utah.[181]

11. Black Night Enterprises. Black Night acquired assets from NPJFLP but gave consideration to LaGrand Johnson, Randale Johnson, and Roger Hamblin. While the Receiver has not found evidence that Neldon Johnson was an owner or officer of Black Night, Johnson did sign a licensing agreement between IAS and Black Night—on behalf of both parties to the agreement. Neldon Johnson claims he is entitled to a royalty on revenues from lens sales under this licensing agreement.

Black Night owns and controls the technology that Johnson insists is essential to the operations of IAS and RaPower. While the Receiver will not be resuming development or promotion of the alternative energy scheme that RaPower promoted, so long as the technology remains with Black Night and Starlight, Johnson or others could continue their scheme under different companies—all the while claiming that they have and are using the technology underlying the energy systems of IAS and RaPower. If that technology is not brought back into the Receivership Estate, it may be used to continue the deception.

Johnson testified that the intellectual property he developed is worth billions of dollars.[182] The majority of the intellectual property was transferred to NPJFLP and from there to Black

[181] Notwithstanding that Solstice and RaPower have the same address and the owners are related, the agreement contains a term asserting: "The parties to this Agreement are independent entities and neither is the agent, representative, employee, employer, partner or joint venture of the other . . . ." *Equipment Wholesale Agreement*, Aug. 1, 2011 at ¶ 3.
[182] Deposition of Neldon Johnson, Oct. 3, 2017 at 220:3 – 220: 16.

Night and Starlight. If the intellectual property is worth billions (or even millions or thousands), those assets will go to LaGrand Johnson, Randale Johnson, and Roger Hamblin. If those assets are to be used to satisfy obligations of the Receivership Estate, Black Night need to be brought into the Receivership Estate.

The Receiver believes all the transfers to Black Night were avoidable both because there was no reasonably equivalent value given to NPJFLP and because Neldon Johnson illegitimately signed documents necessary to the transfer. In addition, securities and real estate were purportedly transferred to Black Night, which transfers were not perfected by recording Black Night's name on the property titles and on the stock transfer ledgers. For these reasons, the Receiver expects to bring avoidance actions to recover these assets. If Black Night is not made a part of the Receivership Estate before these avoidance actions are brought, the Receiver is concerned that the owners of Black Night will dissipate its assets in defending the Receiver's intended avoidance actions or borrow against the value of the real estate. Further, the Receiver is concerned that the IAS preferred shares and warrants might be transferred out of Black Night or used to manipulate the market of this public company or induce unsuspecting investors to buy the stock.

12. Starlight Holdings. The situation with Starlight Holdings is identical to that of Black Night. The same reasons that impel a conclusion that Black Night should be brought into the Receivership Estate apply to Starlight Holdings.

13. U-Check. This *expired* company owns a 1984 Cessna twin-engine aircraft. Johnson has refused to tell the Receiver where the aircraft is located. Johnson has stated elliptically that the aircraft was damaged and is in "the shop," and that the damages may be greater than the value of the aircraft. However, he has refused to identify what shop has the

aircraft. [183] The Receiver does not know whether the aircraft is, in fact damaged, the extent of the damage, or whether there is an insurance policy that might cover the damage to the aircraft.

If the aircraft has any value—and U-Check is not brought into the Receivership Estate—Neldon Johnson would have the ability to sell the aircraft. While the Order would require that Johnson pay over the proceeds of any such sale—as an asset of Johnson—to the Receiver, the Receiver does not have confidence that Johnson would sell the aircraft for reasonably equivalent value or that he would pay the proceeds over to the Receiver. The only sure way for the Receivership Estate to ensure it gets the value from this asset is to put U-Check into the Receivership Estate so the Receivership can control any sale of the aircraft.

CONCLUSION

Most if not all of the affiliates have been used either as instruments of the tax fraud or as vehicles to shield assets from the United States or other creditors. The Receiver believes that all the affiliates and U-Check should be made part of the Receivership Estate to maximize the Receiver's ability to recover assets, to prevent dissipation of assets that belong to the Receivership Estate as a result of fraudulent transfers, and to prevent a renewal of the fraudulent tax promotion.

The Receiver has not identified any assets, property, property rights, or interests of the affiliates and subsidiaries that derived from business activity unrelated to the abusive solar energy scheme at issue here. Even IAS, whose annual report to shareholders identified the many Johnson-invented technologies it owned, stated it was focusing exclusively on promoting Johnson' solar energy program.

[183] The Receiver has recently learned the location of this aircraft.

If the Court determines not to bring these entities into the Receivership Estate, the Receiver requests that the Court continue the asset freeze against them until fraudulent transfer actions brought by the Receiver are completed—so their assets are not dissipated in defending the Receiver's fraudulent conveyance actions. If the Court determines not to bring entities into the Receivership Estate that are dissolved or have no assets, the Court should consider ordering them dissolved so they cannot be used to promote subsequent tax frauds or continue marketing the discredited solar lens scheme. The United States has informed the Receiver that it consents to the recommendations made by the Receiver herein.

DATED this 25th day of February 2019.

Wayne Klein
Receiver

PARR BROWN GEE & LOVELESS

/s/ Jonathan O. Hafen
Jonathan O. Hafen
Joseph M.R. Covey
Michael S. Lehr
Attorneys for Receiver

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the above **RECEIVER'S REPORT AND RECOMMENDATION ON INCLUSION OF AFFILIATES AND SUBSIDIARIES IN RECEIVERSHIP ESTATE** was filed with the Court on this 25th day of February, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Natalie McKean

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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; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	**RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN THE RECEIVERSHIP ESTATE** Civil No. 2:15-cv-00828-DN District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of RaPower-3, LLC ("RaPower"), International Automated Systems, Inc. ("IAS"), and LTB1, LLC ("LTB1") (collectively, the "Receivership Entities"), as well as certain of their subsidiaries and affiliates and the assets of Neldon Johnson ("Johnson") and R. Gregory Shepard ("Shepard") (collectively "Receivership Defendants" or "Defendants"), hereby submits this Motion to Include Affiliates and Subsidiaries in the Receivership Estate.

ARGUMENT

I. The Receiver Recommends the Receivership Estate be Expanded to Include Affiliated Entities and Subsidiaries.

The Corrected Receivership Order ("Order") directed the Receiver to "investigate all subsidiaries and affiliates of the Receivership Defendants to determine whether the assets, property, property rights, or interests of the subsidiaries and affiliated entities derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity."[1] The Receiver was directed to file a "report and recommendation . . . as to whether the receivership should be extended to any of the investigated subsidiaries and affiliated entities"[2] or to entities other than the identified affiliates.[3]

The Receiver filed his Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate ("Report and Recommendation") on February 25, 2019.[4] In the Report and Recommendation the Receiver:

1. Described the effects of the Defendants' failures to cooperate with his investigation;

2. Detailed each affiliated entity and subsidiary, including company organization, ownership and management, business operations, and financial activities;

3. Recommended that adverse inferences be drawn due to Defendants' noncooperation;

4. Recommended that the 12 affiliated entities identified in the Order and one additional entity be included in the Receivership Estate;

[1] Docket No. 491, filed on November 1, 2018, at ¶ 5.
[2] *Id.* at ¶ 6.
[3] *Id.* at ¶ 5.
[4] Docket No. 581.

5. Provided rationales for his recommendation; and

6. Detailed transactions made by the affiliates and subsidiaries.

The findings, descriptions, recommendations, rationales, and any other relevant parts of the Report and Recommendation are hereby incorporated into this Motion by reference.

As a consequence of the findings detailed in the Report and Recommendation, the Receiver now files this Motion to add 13 entities to the Receivership Estate permanently. These entities are Solco I, LLC; XSun Energy, LLC ("XSun"); Cobblestone Centre, LC; DCL-16A, Inc.; DCL16BLT, Inc.; LTB O&M, LLC; N.P. Johnson Family Limited Partnership ("NPJFLP"); Shepard Energy; Shepard Global, Inc.; Solstice Enterprises, Inc.; Black Night Enterprises, Inc. ("Black Night"); Starlite Holdings, Inc. ("Starlite"); and U-Check, Inc. ("U-Check") (collectively "Affiliated Entities").

Although U-Check was not identified in the Order as subsidiary or affiliated entity, the Order anticipates that the Receiver may recommend entities other than those expressly identified for inclusion in the Receivership Estate.[5] Moreover, courts have recognized that receivership estates may be expanded to include additional entities when appropriate.[6]

II. Rationales for Recommendation to Include the Affiliated Entities Permanently.

There are six primary reasons why the Receiver seeks to add the Affiliated Entities to the Receivership Estate. First, in many cases, the Affiliated Entities have close associations with the original Receivership Entities. They have common officers, directors, members, and managers.

[5] *Id.* at 5
[6] *See SEC v. Wolfson, et al.*, No. 2:03-cv-0914, Docket No. 268 (Order Expanding Receivership, March 17, 2004) (D. Utah).

Their corporate purposes are similar. There have been numerous and substantial financial transactions between many of the Affiliated Entities and IAS or RaPower, indicating common purposes and interdependence.[7]

Second, assets belonging to the Receivership Estate have been transferred to or are being held by the Affiliated Entities. In the case of XSun, $1.498 million of funds belonging to RaPower were taken from a bank account of RaPower and deposited into a bank account of XSun.[8] Patents owned by Neldon Johnson were transferred to NPJFLP, likely for no consideration.[9] Ten million shares of IAS preferred stock and 100,000,000 warrants issued to Neldon Johnson were transferred to NPJFLP. Assets of NPJFLP were later transferred to foreign entities, Black Night and Starlite. Consideration for these transfers went to the owners of NPJFLP, not to NPJFLP itself—which appear to be fraudulent (voidable) transfers.[10] A Cessna twin-engine airplane, which might have significant value, is held in the name of U-Check, which was owned and controlled by Neldon Johnson.[11]

Third, in many instances, the only assets of the Affiliated Entities are their ownerships of patents, IAS shares, or bank account balances. In each of these instances, the Receiver believes these assets were transferred to these Affiliated Entities in fraudulent or voidable transfers. If the Affiliated Entities were not made part of the Receivership Estate and the Receiver brought successful avoidance actions, the Affiliated Entities would end up as empty shells with no assets. In the interim, the persons controlling the Affiliated Entities would be expected to use those assets

[7] *See* Docket No. 581, at §§ B, D.
[8] *Id.*, at § B.2.d.
[9] *Id.*, at § B.7.c.
[10] *Id.*
[11] *Id.*, at § B.13.c.

to oppose the Receiver's efforts to recoup those fraudulent transfers. Instead, since the assets tied to RaPower are often the only assets of the Affiliated Entities, it makes more sense to put the entities themselves under the control of the Receiver so there can be no further dissipation of assets. If a third party has a claim for any of these assets, the third party can provide evidence to the Receiver of its claim to the asset and the Receiver can either recognize the claim and release part or all of the asset or the matter can be brought to the Court for resolution. In the interim, there would be no opportunity for further dissipation of the assets such as with XSun Energy funds in the Nelson Snuffer retainer account.

Fourth, the creation and use of the foreign entities Black Night and Starlite appear to have been designed to put assets out of the reach of government agencies and courts. Neldon Johnson testified at trial that contracts between the foreign entities and IAS provide that if IAS is declared insolvent or a government agency causes problems, "the contracts are relinquished back to the foreign company until those issues are resolved."[12]

Fifth, it is the case that many of these Affiliated Entities are defunct and devoid of assets. Bringing those Affiliated Entities into the Receivership Estate is not likely to result in any recovery of assets. However, in light of the quasi-public role the Receiver has in this case, the Receiver believes it will further public policy for him to take control of the Affiliated Entities to ensure that none of them is used by Defendants—or anyone else—to perpetuate what this Court has already declared as a massive fraud. By putting the Affiliated Entities in the Receivership Estate, the entities can be liquidated and dissolved rather than continue in existence and risk being used for improper purposes.

[12] *Id.*, at § E.1.

Finally, Neldon Johnson testified that, in fact, he controls all the Affiliated Entities and that he is able to (and does) decide which of the multifarious Affiliated Entities is used to accomplish his objectives.[13] The Receiver believes Johnson's cited testimony accurately reflects both his attitude about the roles of the Affiliated Entities and the reality of the transactions that occurred within and between the Affiliated Entities.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and expand the Receivership Estate to include the Affiliated Entities. Adding the Affiliated Entities would help prevent the dissipation of assets, ensure that they are not used to perpetuate fraud, and keep them out of the control of Defendants who have demonstrated—and continue to demonstrate—their intent to work against the Receiver and his investigation, despite the Court's Order.

A proposed order is submitted herewith.

DATED this 1st day of March, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr
Jonathan O. Hafen
Michael Lehr
Attorneys for R. Wayne Klein, Receiver

[13] *Id.*, at § E.2.

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER** was filed with the Court on this 1st day of March, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr

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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, and NELDON JOHNSON, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **RESPONSE TO RECEIVER'S REPORT AND RECOMMENDATION AND MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN THE RECEIVERSHIP ESTATE** Judge David Nuffer

COME NOW XSun Energy, LLC ("XSun") and Solco I, LLC ("Solco"), Solstice LLC and Glenda Johnson, who have been named as "Receivership Entities" without any due process, and hereby respond to Receiver's Report and Recommendation. Counsel has been dismissed as counsel for the remaining Defendants, including Neldon Johnson who has appeared pro se.

I. The Receiver's Recommendation Violates Due Process.

The Receiver's motion, in essence, asks this Court to ignore the fundamental rights of due process, ignore the government's decision when they filed this case to not name as defendants Solco I and XSun despite knowing of them and using as exhibits documents written for/by them,

skip any claim or finding of alter ego or opportunity to defend against that claim, and leap to the conclusion that these unnamed parties are equally liable for the judgment entered against those named. Such a leap violates 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."[1] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[2]

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."[3] Neither the Florida nor the Pennsylvania statute provided for notice or an opportunity to be heard *before* the seizure. The issue is whether procedural due process in the context of these cases requires an opportunity for a hearing *before* the State authorizes its agents to seize property in the possession of a person upon the application of another.[4]

> ″The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. “If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact

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[1] Id. at 81 (citing *Baldwin v. Hale*, 1 Wall. 223, 233. See *Windsor v. McVeigh*, 93 U.S. 274; *Hovey v. Elliott*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385.)

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

[3] Id.

[4] Id.

> that the arbitrary taking that was subject to the right of procedural due process has already occurred. "This Court has not … embraced the general proposition that a wrong may be done if it can be undone." *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 by this Court 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, 378, the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.[5]

In past briefings, Plaintiff has argued that because Defendants have previously argued that Solco I and XSun Energy should not be subject to the asset freeze, that these non-parties have fully received all required due process. The Plaintiff's argument misses both critical steps. The asset freeze imposes a penalty without either Solco I or XSun Energy having been afforded the notice of a complaint against them, an opportunity to answer or move to dismiss, discovery, motion practice, or a trial to hear the claims against them or an opportunity to prove their claimed defenses before a fact finder. This is all the more alarming because both Solco I and XSun were known to

[5] *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).

the Plaintiff long before this matter was filed. The Plaintiff used exhibits throughout discovery and trial written for/by Solco I and XSun, but deliberately chose not to include them in this case.

Both of these entities were deliberately omitted from this case by the Plaintiff without the Plaintiff ever giving an explanation.[6] And since no explanation was given, these non-entities are entitled to benefit of an adverse inference that the Government intentionally and strategically omitted them to avoid facing the obvious defenses these parties would assert. Both these parties sought, obtained and relied on advice letters from legal counsel. Because the other named Defendants were not the recipients of the legal advice, the Plaintiff chose to omit Solco I and XSun as parties. Moreover, neither of these entities ought to be affected by orders entered against others who were afforded the opportunity to participate as parties to the case.

In *United States v. Mesadieu*, 108 F.Supp 3d. 1113 (M.D. Fla. 2016), the trial court questioned whether it had authority to disgorge revenue "obtained by Mesadieu's companies – entities that are not before the Court."[7] The Government urged the trial court to include the non-parties alleging that "Mesadieu is the sole owner of the companies and uses his companies as a vehicle for fraud."[8] But the Government did not join the companies as a defendant."[9] Like *Mesadieu*, the Government failed to join non-entities Solco I and XSun, yet sought disgorgement against them under the same reasoning in *Mesadieu* (i.e., alleging that the named defendants used

[6] *See United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) (Because the United States failed to join defendant's companies, Court questioned whether it would have had jurisdiction to order disgorgement of revenue obtained by defendant's non-party companies and entities that were not before the court.*); see also Bolsa Res., Inc. v. AGC Res., Inc.*, 2013 U.S. Dist. LEXIS 137604, *7 (Colo.) (District court declined to order non-party corporations to disgorge stock to satisfy judgment.)

[7] *Mesadieu*, 180 F. Supp. 3d at 1123.

[8] Id.

[9] Id.

the companies as a vehicle of fraud.) Fortunately, this Court properly refused to order disgorgement against these entities in its final order.[10]

Adherence to due process was short-lived, however, as now the Receiver is attempting to gift the government the relief it sought at the end of trial by including Solco I and XSun into the Receivership Estate. If the Receiver's motion is granted, then Solco I and XSun will be no differently situated than if disgorgement was ordered against them at the close of trial, all without providing Solco I and XSun the benefit of raising defenses that uniquely apply to them. For example, the XSun was the client referred to in the "McKonkie Memorandum," placing XSun I in a stronger position assert a reliance of counsel defense. Both these entities had written legal advice and followed it.

Additionally, inclusion of these entities and Glenda Johnson goes well beyond the asset freeze. Once these entities and Mrs. Johnson are included, the Receiver will take complete "custody, control, and possession of all assets, bank accounts or other financial accounts, contents of safe deposits boxes, books, records, and all other documents or instruments"[11] allowing the receiver to "direct and develop a plan for the fair, reasonable, and efficient recovery and liquidation of all remaining, recovered, and recoverable Receivership Property"[12] **without a showing that the property belonging to these entities and Mrs. Johnson are ill-gotten gains subject to disgorgement.** Indeed, the Receiver's proposed order states the following:

> All other provisions of the Corrected Receivership Order shall apply to the Affiliate Receivership Entities to the same extent as Receivership Entities as necessary and appropriate to allow the Receiver to accomplish the duties required of him in the Corrected Receivership Order.[13]

[10] ECF 467 at pg. 149.

[11] EFC 444 at pg. 7, ¶ 15.

[12] Id. at ¶ 83.

[13] See Proposed Order at ¶ 12.

Additionally, Solco I and XSun's attorneys will be immediately terminated, leaving both entity without legal counsel to contest the Receivership's authority to include them in the Receivership Estate, including, but not limited to asserting a claim of laches against the Government's effort through the receiver to include them now, rather than affording them a trial on the merits of their defenses.[14],[15],[16]

In sum, without due process, a claim should not proceed against them. In *United States v. 51 Pieces of Real Property Rosell*, N.M., 17 F.3d 1306 (10th Cir. 1994), relied upon by Plaintiff, 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 which was specifically void of any due process requirements, the Court recognized that "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest."[17] No such hearing has ever taken place in this case. The assets of these parties (and others similarly situated) have already been frozen by this Court's order and then confiscated by the Receiver without any proof justifying these draconian steps to occur. There was no due process provided these parties. Now, the Receiver is asking the Court to take a further leap and find their assets to be the same as the

[14] *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001) "[I]n order to prove the affirmative defense of laches, the defendant must demonstrate that there has been an unreasonable delay in asserting the claim and that the defendant was materially prejudiced by the delay." Id. (emphasis added).

[15] Further, assuming there is a reason to allow even temporarily some freeze, it should not in any event affect a legal retainer required to pay legal counsel to defend these entities and the Defendants for which they intended to provide assistance. If Defendants succeed on appeal, both Solco I and XSun Energy can never face a claim against them. Therefore, they are the direct beneficiaries of the prophylactic effect of Defendants' successful appeal.

[16] See *infra* at II and III.

[17] *Id*. (citing *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 32 L. Ed. 2d 556, 92 S. Ct. 1983 (1972)).

party Defendants – essentially making them liable for another entity's actions. The Receiver's request goes too far.

II. Solco

Solco is a Utah limited liability company. It was organized on December 13, 2010. Its status became delinquent in January of this year because its assets are frozen. Solco did business selling lenses prior to 2016. All of its sales occurred prior to the trial of this case, and a majority of them occurred prior to the filing of the Complaint in this case. Solco's activities were known to Plaintiff. Indeed, the Plaintiff relied upon opinion letters prepared for Solco by attorneys in its presentation of their case. More than half a day was spent examining the attorney who drafted those letters. The Court received that evidence and relied upon the testimony of that witness to make its Findings of Fact and Conclusions of Law. Plaintiff never named Solco as a party to this action. Judgment was not entered against Solco. Solco has never been served as a party and has never been allowed any opportunity to defend itself in this case. The Court has not established jurisdiction over Solco. Nonetheless, the Court has extended jurisdiction, without even the allegation of a claim of alter ego to freeze the assets of this company. Now, the Receiver seeks this Court's approval to leap frog the constitutional rights of this entity, ignore due process, and to include it as though it were a Defendant all along in this case. The recommendation is overreaching, unconstitutional, and beyond the duties and obligations of this Receiver. In doing so, the Receiver sheds his responsibility to collect on the judgment entered against the named Defendants, and advocates for the Plaintiff against an entity it deliberately chose not to name as a party. The recommendation should not be followed as to Solco.

III. XSun

XSun is a Utah limited liability company. It was formed in April, 2011. Its sole member is Solstice Enterprises, a foreign entity. This is not an averment, but the reality known to the Receiver. See attached Operating Agreement for XSun Energy, LLC, provided as Exhibit UU to the Receiver by David Nelson. Like Solco, XSun sold lenses. The sales of those lenses occurred mainly in 2011 and 2012.

In 2011, like RaPower-3, XSun Energy had its own Zions Bank accounts (Accounts ending in 3293 and 6920).[18] By July, 2012, those accounts had more than $650,000 in them. Limited amounts of those funds were used to pay employees. $2,125,910 was *not* reported as income for Neldon and Glenda Johnson on his taxes. Indeed, their 2012 tax return reported income of $18,879.[19]

Like Solco, XSun's activities were known to Plaintiff. Indeed, the Plaintiff relied upon opinion letters prepared for XSun by attorneys in its presentation of their case. More than half a day was spent examining the attorney who drafted those letters. The Court received that evidence and relied upon the testimony of that witness to make its Findings of Fact and Conclusions of Law. Plaintiff deliberately chose to not name XSun as a party. Judgment was not entered against XSun. XSun has never been served as a party and has never been allowed any opportunity to defend itself in this case. The Court has not established jurisdiction over XSun. Nonetheless, the Court has extended jurisdiction, without even the allegation of a claim of alter ego to freeze the assets of this company. Now, the Receiver seeks this Court's approval to leap frog the constitutional rights of this entity, ignore due process, and to include it as though it were a Defendant all along in this case. The recommendation is overreaching, unconstitutional, and beyond the duties and

[18] Despite having received bank statements for this account, for some unknown reason, the Receiver has failed to identify this to the Court.

[19] Their 2012 Tax Return is in the Receiver's possession.

obligations of this Receiver. In doing so, the Receiver sheds his responsibility to collect on the judgment entered against the named Defendants, and advocates for the Plaintiff against an entity it deliberately chose not to name as a party. The recommendation should not be followed as to XSun.

IV. Other Entities.

Like Solco and XSun, none of the other entities identified by the Receiver have ever been hailed into court. No allegation has ever been made against them. None have ever had the opportunity to defend themselves.

IV. Johnson Trust

The N.P. Johnson Family Limited Partnership was created as an estate planning vehicle. Transfers were made with consideration that is recited in the documents the Receiver has in his possession. He dismisses the significance of this by saying what has been provided is "self serving" while assuming that if he could get other documents he suspects that he might be able to find something to contradict the parties estate planning intent and structure. That is not, or should not, be found to be a sufficient basis to justify the dramatic conclusion he suspects more information might help him reach.

Response to Rationales for Recommendation

1. Close associations with the original Receivership Entities.

The receiver correctly points out Neldon Johnson signed on behalf of both parties in a number of agreements. He signed the royalty agreement between Solco and IAS on behalf of both companies. (ECF 581, pp. 5-6, 37-38) He signed on behalf of Solco. (*Id.* p. 6, 38) He signed royalty agreements on behalf of Starlight and RaPower. (*Id.*, p. 26) He signed a royalty agreement between IAS and XSun on behalf of both parties. (*Id.*, p. 39) He signed on behalf of the family

limited partnership. (*Id.* p. 44) There is a reason why Neldon Johnson was the one to sign on behalf of various entities.

Judge Dee Benson entered an Order that required International Automated Systems to be operated by Neldon Johnson along with two independent directors serving as the Board of Directors. (See Exhibit 1, Final Judgment as to International Automated Systems, Inc., in Case No. 2:89 CV 0687B.) The Final Judgment reads, in relevant part:

> IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that Defendant shall appoint a board of directors whose majority consists of independent directors. For purposes of this Consent and Judgment, a person shall be considered an independent director if the person: (i) has no family or material relationship with Neldon P. Johnson, is a current officer, director or employee of International Automated Systems, Inc. or has been an officer, director or employee of International Automated Systems at any point during the preceding ten (10) years; (ii) is not an affiliate of International Automated Systems, Inc., or any of International Automated Systems, Inc.'s subsidiaries; (iii) accepts no consulting, advisory or other compensation fee from International Automated Systems, Inc. except director's fees, and (iv) does not own or control 5% or more of the voting securities of International Automated Systems, Inc.

(See Exhibit 1, p. 3, Part III.)

That Order remains in effect. Although this Court can remove Neldon Johnson, it cannot remove the other two independent directors without violating the prior Order of Judge Benson.

International Automated Systems had a bookkeeper-employee, Lisa Phillips, who embezzled over $200,000.00 from the company before it was discovered. Because of her embezzlement, the Board unanimously adopted a policy that required Neldon Johnson to sign on behalf of entities whenever the interests of IAS were affected directly or indirectly. In conformity with that policy, Neldon Johnson signed on behalf of entities when the agreements had any effect, directly or indirectly, on IAS. The purpose was to assure that resources would be used for their intended purpose and not diverted to unauthorized ends.

2. Assets have been transferred to or are being held by the affiliates.

The receiver recommends taking all the technology belonging to non-parties. On page 46 the receiver states:

> Black Night owns and controls the technology that Johnson insists is essential to the operations of IAS and RaPower. While the Receiver will not be resuming development or promotion of the alternative energy scheme that RaPower promoted, so long as the technology remains with Black Night and Starlight, Johnson or others could continue their scheme under different companies—all the while claiming that they have and are using the technology underlying the energy systems of IAS and RaPower. If that technology is not brought back into the Receivership Estate, it may be used to continue the deception. (ECF 581)

This position has already been rejected by the Court. When an injunction was first requested, the Court rejected the "overbroad" language of the draft findings that would enjoin all business activities. The Court correctly viewed the government's right to restrain to be limited to giving tax advice, not to selling products:

> THE COURT: Okay. My questions are about Paragraph 1. First of all, you are asking me to bar these defendants and related entities from sale of any interest in any solar lens or solar energy system. It seems to me that the evil that you're complaining of is promoting tax benefits falsely for this solar energy program, not necessarily that the sale of lens is per se wrong. So isn't this request for relief overbroad? (TR. 2510, l. 25-2512, l. 4)

The government's language that was in the draft they submitted to the Court, and which the Court believed to be overbroad, is the following:

> 1. 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; (ECF 334, p. 112)

This language was changed when the Court later entered its findings to eliminate the overbroad restriction on the continuation of selling any and all products. The final version signed by the Court states the following:

> 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 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."; (ECF 467, pp. 130-131)

The change to the language of this paragraph was to make it clear that Defendants were permitted to continue to do business, and the technology developed by the Defendants could continue to be sold. But any representation of tax benefits or qualifications was to end. ONLY the content of sales and advertising was involved, not the complete appropriation of technology and discontinuation of business, as the receiver now asks to accomplish.

Glenda Johnson

Glenda Johnson is not an officer, director or controlling officer of any entity. She has assets she acquired through inheritance, and has provided services for which she was not compensated. She separately owned shares of IAUS which she sold. Her individual assets should not be swept into the receivership, and she is entitled to all the protection of due process and the opportunity to defend against this unwarranted confiscation of her individual property. The receiver is turning the process into a sham by presuming he has a right to confiscate and manage property belonging to a third-party over whom the Court has not acquired jurisdiction.

Solstice is owed a royalty of 80% under a royalty agreement. Solstice is a foreign entity over which the Court has not acquired jurisdiction and which has the right to due process before having any of its property confiscated or controlled by the receiver (or this Court).

Production

The Receiver has failed to disclose that extensive materials have been produced. Everything that could be located within the scope of what has been requested has been produced. The DOJ, however, is believed to have a large volume of materials in their possession that is not in Defendants, nor Solco's, nor XSun's, nor Glenda Johnson's possession. Material obtained through a search warrant as far back as 2012 has been continually in DOJ's possession. When the material was returned some of the computer hard drives no longer worked and whatever had been on them was lost to Defendants. Physical files were disorganized and Defendants could not be certain things were fully returned. The time it would take to reorganize was too much, and many of the files were useless in their disorganized state. DOJ subpoenaed third-parties, including banks and obtained materials that they retain. Whether these were ever produced to Defendants is not known, but the fact that DOJ has copies is certain.

Defendants used Snow, Christensen & Martineau as counsel, replacing them with Justin Heideman. When the change of counsel took place, it is not known whether all the files were turned over to Mr. Heideman. Later Mr. Heideman was replaced by Nelson, Snuffer, Dahle & Poulsen, and that firm does not believe they received all the files previously in the possession of Mr. Heideman. The attorneys that represented Defendants during the trial of the case did not participate in the early process, including discovery. Therefore, the amount of information available to the trial attorneys was less, likely much less, than what was available to the DOJ.

The Receiver has informed Mr. Snuffer in a phone call that the DOJ has not turned over to him all their files. There are likely significant materials that are relevant to the Receiver's information quest that exists only in the files of the DOJ at this point. The Receiver should seek production from the DOJ, rather than accuse the Defendants and others of failing to produce.

Glenda Johnson produced a large thumb drive of material, which the Receiver has failed to mention in his filings. That thumb drive contained gigabytes of material, and was not limited to "self-serving" disclosures.

DATED this 15th day of March, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONSE TO RECEIVER'S REPORT AND RECOMMENDATION AND MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN THE RECEIVERSHIP ESTATE** was sent to counsel for the United States in the manner described below.

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**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; NELDON JOHNSON; and ROGER FREEBORN, Defendants.	**RECEIVER'S REPLY IN SUPPORT OF ITS MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN THE RECEIVERSHIP ESTATE** Civil No. 2:15-cv-00828-DN District Judge David Nuffer

The Receiver[1] hereby replies in support of his Motion to Include Affiliates and Subsidiaries in the Receivership Estate (the "Motion").[2]

INTRODUCTION

The Receiver has requested the Court add 13 additional entities to the Receivership Estate

[1] Defined terms have the meaning given in the Motion.
[2] Docket No. 582, filed on March 1, 2019.

permanently, including: Solco I, LLC ("Solco"); XSun; Cobblestone Centre, LC; DCL-16A, Inc.; DCL16BLT, Inc.; LTB O&M, LLC; NPJFLP; Shepard Energy; Shepard Global, Inc.; Solstice Enterprises, Inc.; Black Night; Starlite; and U-Check.

The Affiliated Entities should all be included in the Receivership Estate. They have close associations with the original Receivership Entities. Neldon Johnson testified that he controlled all the Affiliated Entities and that he could (and did) decide which of the multifarious Affiliated Entities was used to accomplish his objectives. Assets belonging to the Receivership Estate have been transferred to or are being held by the Affiliated Entities. In many instances, the only assets of the Affiliated Entities were acquired in fraudulent or voidable transfers and the Receiver is concerned that the assets will be lost, either consumed in attempts to prevent the Receiver from avoiding the transfers or dissipated by further transfers, if the Affiliated Entities are not brought into the Receivership Estate. This is particularly concerning because the foreign entities Black Night and Starlite appear to have been designed to put assets out of the reach of government agencies and United States courts. To the extent that Affiliated Entities are defunct and devoid of assets, including them in the Receivership Estate will prevent anyone from using them to commit further fraud.

Two objections were filed to the Motion. Neither is persuasive and, critically, neither attaches any evidence to controvert evidence submitted by the Receiver in support of his Report and Recommendation on Inclusion of Related Entities in Receivership Estate (the "Report").[3]

Neldon Johnson filed a pro se opposition that largely relitigates the merits of the underlying

[3] Docket No. 581.

case (the "Neldon Opposition").[4] Johnson also appears to misunderstand the justification for including the Affiliated Entities. The Receiver is not seeking to expand the Receivership Estate as a sanction for noncompliance with the Receiver's investigation. Instead, the Receiver seeks inclusion of the Affiliated Entities because (1) the limited, but compelling, evidence the Receiver has gathered justifies inclusion and (2) Defendants' noncompliance with the Receiver's investigation efforts merits a presumption in favor of the Receiver's conclusions unless Defendants provide contrary evidence and an explanation for why it was not previously provided to the Receiver.[5]

The law firm Nelson Snuffer Dahle and Poulsen, P.C. also submitted a response purporting to oppose the Motion on behalf of Glenda Johnson, Solco, and/or XSun (the "Glenda Opposition").[6] At its core, the Glenda Opposition proceeds from a fundamental misunderstanding

[4] Docket No. 597 at 3–4.

[5] This pattern of obstructive behavior has continued. For example, despite the Court's decision denying Glenda Johnson's motion for a protective order and ordering her deposition, Docket No. 593, she did not appear at a properly-noticed deposition on March 20, 2019. The Receiver may pursue appropriate remedies in due course.

[6] Docket No. 596. It is not clear whether Nelson, Snuffer, Dahle & Poulsen, P.C. ("Nelson Snuffer") represents Glenda Johnson, Solstice LLC, Solco, and XSun jointly, or only represent Glenda Johnson. *See id.* The attorney signature block indicates counsel only represents Glenda Johnson. However, the opening paragraph of the response indicates it was filed on behalf of all four. And counsel's electronic filing with the Court represents it was on behalf only of Glenda Johnson, Solco, and XSun, and not Solstice. This ambiguity is concerning for multiple reasons.

First, no response could have been authorized on behalf of Solstice, Solco, or XSun. Both Solco and XSun are solely managed by Neldon Johnson. *See* Solco I, LLC Operating Agreement (the "Solco Operating Agreement"), attached as Exhibit 1, at § 8.11; Limited Liability Company Operating Agreement (the "XSun Operating Agreement"), attached as Exhibit 2, at 1. Both are solely owned by Solstice. Solstice was owned in equal thirds by Neldon Johnson, Randale Johnson, and LaGrand Johnson. A February 2014 shareholder agreement vested Neldon Johnson with exclusive control over Solstice. Neldon Johnson terminated this agreement on July 16, 2018, relegating his status to that of a one-third owner. *See* Shareholder Agreement, attached as Exhibit 3; Voting Trust Agreement, attached as Exhibit 4; Notice of Resignation, attached as Exhibit 5. Pursuant to the Order the Receiver is the owner of Neldon Johnson's interest in Solstice and succeeded to his rights in Solstice, Solco, and XSun. The Receiver did not approve any decision to hire Nelson Snuffer and was not given any notice by Randale and LaGrand of a member meeting to consider whether the entities approved hiring Nelson Snuffer to file an opposition to the Motion.

If Nelson Snuffer was retained by Neldon Johnson to represent Solstice, Solco or XSun, the Response is procedurally deficient for not identifying the source of funding for the filing as required by ¶ 10 of the Order. *See* Docket No. 491 ¶10. This is especially concerning because Nelson Snuffer has repeatedly made filings without certifying the source of funds.

of due process. The Court and Receiver are affording the Affiliated Entities due process by giving notice that they may be included in the Receivership Estate and an opportunity to be heard by opposing the Receiver's Motion. Due process does not require the Receiver to bring separate lawsuits to expand the Receivership Estate. Finally, to the extent the Glenda Opposition addresses the Receiver's justifications for expanding the estate, it concedes that the Affiliated Entities are closely tied to Neldon Johnson and Defendants and fails to offer any evidence disputing the documents and testimony collected by the Receiver, which justifies including the Affiliated Entities.

ARGUMENT

I. Including the Affiliated Entities in the Receivership Estate Complies With Due Process.

"[A]s a general rule, due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest."[7] All the Affiliated Entities have received both actual notice and an opportunity to be heard before the Affiliated Entities will be included in the Receivership Estate. This satisfies the requirements of due process.

Due process requires that property owners receive notice. "Actual notice is not necessary .

Second, the Glenda Opposition itself demonstrates Glenda Johnson lacks authority to retain counsel on behalf of Solstice, Solco, or XSun. *See* Glenda Opposition at 12 ("Glenda Johnson is not an officer, director or controlling officer of any entity.").

Third, if the Glenda Opposition was filed on behalf of XSun, Solco, and/or Solstice, the filing of an opposition by these parties constitutes submission to the Court's jurisdiction. This moots their purported objections on the basis of jurisdiction. *See id.* at 7, 8, 12.

Fourth, it is not clear that whoever is behind the Glenda Opposition has standing to make the arguments asserted throughout the filing. For example, the opposition objects to inclusion of the N.P. Johnson Family Limited Partnership. Glenda Opposition at 9. There is no evidence that inclusion of NPJFLP will harm any of the filers. Likewise, if the Glenda Opposition is filed only on Glenda Johnson's authority, she lacks standing to object to inclusion of Solstice, Solco, and XSun because she does not have any interest in any of the three entities.

[7] United States v. 51 Pieces of Real Prop. Roswell, N.M., 17 F.3d 1306, 1314 (10th Cir. 1994) (citing *Fuentes v. Shevin*, 407 U.S. 67, 81–82 (1972)).

. . . Instead, notice satisfies due process where it either 1) is in itself reasonably certain to inform those affected or 2) where conditions to not reasonably permit such notice, the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes."[8] Neldon Johnson and the other Defendants have all received actual notice that the Affiliated Entities may be included in the Receivership Estate on numerous occasions, including in the Memorandum Decision and Order Freezing Assets and to Appoint a Receiver[9] and in the Corrected Receivership Order.[10] Critically, they also all received a copy of the Receiver's Motion through the Court's CM/ECF system. Solstice, Solco, and XSun also received actual notice that the Affiliated Entities may be included in the Receivership Estate—they must have, to have filed their opposition. In any event, each Affiliated Entity received actual notice through an agent who may act on its behalf. These agents include Neldon Johnson, Greg Shepard, David Nelson, Roger Hamblin, and Glenda Johnson.[11] As the knowledge of an artificial entity's agent is imputed to the principal,[12] the Affiliated Entities all received actual notice.

"The Due Process Clause requires provision of a hearing 'at a meaningful time.'"[13] A

[8] *Snider Int'l Corp. v. Town of Forest Heights, Md.*, 739 F.3d 140, 146 (4th Cir. 2014) (citations and internal quotation marks omitted).
[9] Docket No. 444.
[10] Docket No. 491.
[11] At least one of these individuals is an agent for each of the 13 Affiliated Entities. *See* Docket No. 581 § B. Nelson Snuffer—who represented Neldon Johnson and Greg Shepard at the time the Motion was filed—received notice through the CM/ECF system. David Nelson (of Nelson Snuffer), who received notice through the CM/ECF system, is the registered agent or trustee for many of the Affiliated Entities. *Id*. Roger Hamblin was emailed a copy of the Motion by Receiver's counsel. *See* Email, attached as Exhibit 6. Glenda Johnson received notice through counsel.
[12] *See Restatement (Third) of Agency*, § 5.03 (2006) (agent's knowledge of a material fact is imputed to the principal); *Lane v. Provo Rehab. & Nursing*, 2018 UT App 10, ¶ 27, 414 P.3d 991.
[13] *Columbian Fin. Corp. v. Stork*, 811 F.3d 390, 401 (10th Cir. 2016) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 534 (1985)); *see also Mathews v. Eldridge*, 429 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

predeprivation hearing is, classically, sufficient to satisfy due process.[14] Here, the Affiliated Entities were all provided predeprivation opportunity to be heard when they had an opportunity to oppose the Motion. At that point, the Affiliated Entities had been presented with the substantial evidence obtained by the Receiver justifying expansion of the Receivership Estate.[15] The Affiliated Entities had every opportunity to present contrary evidence in their opposition. Their decision not to do so does not negate the fact that they had an opportunity to be heard in a meaningful manner.

The Glenda Opposition's due process argument regarding the right to a predeprivation hearing entirely misses the mark.[16] It rehashes prior objections to the initial asset freeze. The issue before the Court is not the propriety of the asset freeze. It is whether or not these affiliates have assets that were proceeds from activities of the Receivership Defendants and, thus, should be included in the Receivership Estate. All relevant entities had an opportunity to address the Receiver's position on this, and an opportunity to be heard. The Affiliated Entities now have had an opportunity to object to inclusion of the Affiliated Entities in the Receivership Estate.

II. The Receiver has Justified Including the Affiliated Entities in the Receivership Estate.[17]

[14] *See, e.g.*, *Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (upholding a state statute allowing prehearing suspension of a driver's license against challengers requesting a predeprivation hearing).
[15] *See* Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate, Docket No. 581.
[16] *See* Docket No. 596 at 2–6.
[17] The Glenda Opposition repeatedly characterizes the Receiver's Motion as being filed on behalf of the Plaintiff. *E.g.* Docket No. 596 at 4, 6, 7, 8. This unfairly impugns the motive and integrity of the Receiver. The Receiver's Motion is directly a product of the Court's mandate to the Receiver to investigate affiliated entities and make a recommendation "as to whether the receivership should be extended to any of the investigated subsidiaries and affiliated entities or specific properties of those entities." Order ¶ 6. The Receiver's investigation was to "determine whether the assets, property, property rights, or interests of the subsidiaries and affiliated entities derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity." Order. ¶ 5. In so investigating, and in filing the Motion, the Receiver is fulfilling a Court mandate, not acting as a front for Plaintiff.

As set forth in the Motion, there are six primary reasons to add the Affiliated Entities to the Receivership Estate. The oppositions do not adequately address any.

First, many of the Affiliated Entities have close associations with the original Receivership Entities. These associations are detailed in the Receiver's Report.[18] The Glenda Opposition concedes that there were close associations between Neldon Johnson and Solco, Starlite, RaPower, IAS, XSun, and the family limited partnership.[19] Accordingly, this factor strongly supports expanding the Receivership Estate to include these entities which may have shared purposes and interdependence with the Receivership Defendants.

Second, significant assets belonging to the Receivership Estate have been transferred to or are being held by the Affiliated Entities. Neither the Glenda Opposition nor the Neldon Opposition dispute that these transfers occurred or that Affiliated Entities hold assets belonging to the Receivership Estate. To avoid dissipation or expenditure of these assets, the Receivership Estate should be expanded to protect them.

The Court's prior decision to craft a narrower receivership is irrelevant. At the time, the Court did not have all the evidence that has since been gathered by the Receiver. The Receiver has now discovered that $1.498 million belonging to RaPower was deposited into XSun's bank account, that a Cessna twin-engine airplane is held by U-Check yet benefits Neldon Johnson, that patents owned by Neldon Johnson were transferred to NPJFLP and possibly for no consideration, that significant ownership interests in IAS were transferred to NPJFLP, that NPJFLP's assets were later transferred to the foreign entities Black Night and Starlite, and that consideration for these

[18] *See* Docket No. 581, at §§ B, D.
[19] Docket No. 596 at 9–10.

transfers went to the owners of NPJFLP and not NPJFLP itself. In light of this new evidence, expanding the estate is appropriate.

Neither opposition addresses the fourth through sixth reasons to expand the Receivership Estate. Expansion is appropriate to prevent fraudulent dissipation of assets, to prevent assets from escaping to foreign entities, to prevent future fraud, and because Neldon Johnson exercised de facto control over the Affiliated Entities regardless of their official ownership structures.

III. Specific Entities and Funds Addressed in the Glenda Opposition Should Nonetheless Be Brought Into Receivership.

The Glenda Opposition opposes inclusion of several specific entities in the Receivership Estate, including Solco, XSun, and the N.P. Johnson Family Limited Partnership (NPJFLP), as well as funds deposited on retainer with Nelson Snuffer. It attaches no evidence in support of its claims and should be disregarded on that basis alone. In any event, these arguments fail on their merits.

First, the opposition's arguments regarding these specific entities largely repeat previously-rejected arguments regarding jurisdiction and due process. The Court should disregard these theories.

Second, the Glenda Opposition cherry-picks facts to paint a misleading financial picture regarding XSun and the legal services retainer. Though XSun may have had "more than $650,000"[20] in its bank accounts, the only evidence in the record is that these funds were provided by RaPower and not by XSun's legitimate business operations. The Receiver's Report laid out in

[20] *See* Glenda Opposition, Docket No. 596, at 8.

detail how $1.498 million was moved from RaPower's bank account to XSun's account.[21] At the time of the deposit, XSun's account balance was $600.15.[22] Though XSun did have revenue during 2012, the records available to the Receiver indicate that the remaining sums in XSun's bank account either came from or were commingled with tainted money provided by RaPower.

The Receiver also expects the evidence will prove the $735,202.22 retainer held by Nelson Snuffer was funded by the tainted money XSun received from RaPower.[23] Neither Nelson Snuffer nor XSun has offered any alternative explanation for this money, and both have impeded the Receiver's attempts to investigate.

Third, the Glenda Opposition does not dispute the string of sham transactions regarding the NPJFLP. For example, Neldon Johnson transferred patents and shares and warrants of IAS into the partnership for no apparent consideration, thus diminishing his assets. NPJFLP also acquired two Texas real properties despite having no funds to pay for the properties. NPJFLP then transferred assets to Black Night and Starlite, with consideration going to Roger Hamblin, LaGrand Johnson, and Randale Johnson, and not to NPJFLP. But NPJFLP continued to act as if it owned certain transferred assets—for instance, by not recording deeds to Black Night and Starlite and by signing public records granting easements on the real property. All this evidence demonstrates that NPJFLP was used in Neldon Johnson's various frauds. It needs to be brought into the Receivership Estate to prevent further dissipation of assets.

Finally, the Glenda Opposition objects to the "inclusion of . . . Glenda Johnson" as "well beyond the asset freeze."[24] To be clear, the Motion does not seek to seize control of Glenda

[21] Docket No. 581 at 8–9 & 32.
[22] *Id.*
[23] *See* Docket No. 581 at 32 & n.169.
[24] Docket No. 596 at 5.

Johnson's assets. It seeks inclusion of only the Affiliated Entities as set out in the Motion. If the Receiver discovers Glenda Johnson has assets belonging in the Receivership Estate, the Receiver will bring a separate action against Glenda to recover those assets.

IV. Discovery Issues Taint Defendants, Solco, XSun, and Glenda Johnson.

The Glenda Opposition attempts to justify Glenda Johnson, Solstice, Solco, XSun, and Nelson Snuffer's failure to fully and forthrightly provide information to the Receiver by seeking to shift the burden to the Receiver to (1) attempt to obtain records from the Department of Justice, (2) spend billable time reviewing all records from the Department of Justice to find relevant documents, and (3) describe all documents in the Receiver's possession.[25] The burden, however, is on these parties to comply with the Receiver's requests for information and documents.

The Order requires Receivership Defendants as well as others to provide records to the Receiver and file a report detailing Defendants' assets, expenditures, and transfers.[26] The burden is on these parties to cooperate with the Receiver. However, the Receivership Defendants and their employees and family members, and affiliated entities, have provided little information to the Receiver.[27] Claims that files were "disorganized" and that it would take "time" to "reorganize" files are no excuse. The Receiver was entitled to all files in these parties' possession. Their refusal to provide documents, or to only provide selected documents which support their story, has significantly impeded the Receiver and required additional expenditures of time and funds.[28]

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[25] Docket No. 596 at 13–14.
[26] *See e.g.*, Docket No. 491, ¶ 26.
[27] *See* Report, Docket No. 581, § D.
[28] *See id.* Defendants repeatedly claim that they do not have documents or that "[e]verything that could be located within the scope of what has been requested has been produced". If true, they should provide a certification under oath to that effect which—as the Receiver has previously pointed out—is required under the Order. *See* Docket No. 579 at 6; Docket No. 580 at 6.

CONCLUSION

For the foregoing reasons, the Court should grant the Motion and expand the Receivership Estate to include the Affiliated Entities.

DATED this 29th day of March, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr
Jonathan O. Hafen
Michael Lehr
Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S REPLY IN SUPPORT OF ITS MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN THE RECEIVERSHIP ESTATE** was filed with the Court on this 29th day of March, 2019, and served via ECF on all parties who have requested notice in this case.

I also certify that, on the same date, by U.S. Mail, first-class, postage pre-paid, I caused to be served the same documents upon the following persons:

Neldon Johnson
2730 W 4000 South
Oasis, UT 84624

R. Gregory Shepard
858 Clover Meadow Dr.
Murray, Utah 84123

Pro se Defendants

/s/ Michael S. Lehr

SOLCO I, LLC
OPERATING AGREEMENT

This SOLCO I, LLC, Operating Agreement (the "Agreement") is made and entered by the Members of SOLCO I, LLC, (the "Company"), as the term "Member" is defined in Section 2.1.P below, as of the 18th day of August, 2017.

RECITALS

A. The Company is a Utah limited liability company formed in accordance with the Utah Revised Uniform Limited Liability Company Act (the "Act").

B. All of the ownership and membership of the Company is held by the parties to this Agreement.

C. The Members have each reviewed this Agreement, in its entirety, and desire to cause the same to be adopted as and for the operating agreement of the Company, in accordance with the Act, and to replace and supersede any and all prior operating agreements of the Company, if any prior operating agreements have been entered into by the Members.

AGREEMENT

Pursuant to the Act, and all other pertinent laws of the State of Utah and its political subdivisions, and in exchange for good and valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the undersigned Members mutually agree and covenant as follows:

ARTICLE 1
ORGANIZATION

1.1 Company Status. The Members hereby acknowledge that the Company has been formed previously under the laws of the State of Utah and is currently an active Utah Limited Liability Company.

1.2 Name. The business of the Company shall continue to be conducted under the name of SOLCO I, LLC.

1.3 Principal Place of Business. The principal place of business for the Company shall be 2730 West 4000 South, Oasis, Utah 84624, unless changed by the Manager by giving written notice to all the Members of any change in location not less than ten (10) days preceding such change.

1.4 Continuation of Business. The Company shall continue to operate until dissolved: (1) by written consent of members holding a majority of the ownership interest in the company; or (2) upon the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member, unless the business of the company is, within 90 days of such event, continued by consent of remaining members holding a majority of the remaining ownership interest in the company.

ARTICLE 2
DEFINITIONS

2.1 Definitions. The terms used in this Agreement shall have the following meanings:

A. ***Act*** means the Utah Revised Uniform Limited Liability Company Act, Title 48, Chapter 3a, Utah Code Annotated.

B. ***Additional Capital Contributions*** means contributions of cash or other properties to the Company, in addition to the Initial Capital Contributions by the Present Members as set forth in Section 6.2 below.

C. ***Capital Accounts*** means the Capital Account of each Member as described in Section 7.1 below.

D. ***Code*** means the Internal Revenue Code of 1986, as amended.

E. ***Company*** means SOLCO I, LLC, a Utah limited liability company.

F. ***Capital Contributions*** means collectively all Initial Capital Contributions of the Present Members and all Additional Capital Contributions.

G. ***Division*** means the Division of Corporations and Commercial Code of the Department of Commerce, State of Utah.

H. ***Initial Capital Contributions*** means the initial contribution of cash of other properties to the Company by the Present Members as set forth in Section 6.1 below.

I. ***Interest*** or ***Member's Interest*** means an individual Member's share of the Company assets, profits, surplus or losses as shown in Section 4.1 below, and all rights of a Member of a limited liability company under the Act and under this Agreement.

J. ***Manager*** means the Manager of the Company as set forth in Section 8.1 below.

K. ***Member*** or ***Members*** means the Members identifed below and such other Members admitted by the unanimous vote of all of the Members in accordance with this Agreement, but shall not mean the husband, wife, child or parent of any Member unless such husband, wife, child or parent is expressly named herein as a Member.

L. ***Net Capital Contributions*** means the difference between each Member's Capital Contributions and the sum of all distributions to such Member of the Extraordinary Cash Receipts of the Company in reduction of capital in accordance with Section 7.3 below.

M. ***Net Extraordinary Cash Receipts*** has the meaning set forth in Section 7.4 below.

N. ***Net Operating Cash Receipts*** has the meaning set forth in Section 7.3 below.

O. ***Net profits or losses*** means the net profits or losses of the Company for federal income tax purposes as determined by the accountants employed by the Company; provided, however, that in the event the profits or losses of the Company are later adjusted in any manner, as the result of an audit by the Internal Revenue Service, or otherwise, then the net profits or losses of the Company shall be adjusted to the same extent.

P. ***Present Members*** means the Members of the Company as set forth in Section 4.1 below.

Q. ***Substitute Member*** means a person who acquires an Interest in the Company from a Member pursuant to the terms and conditions of this Agreement. Upon the satisfaction of all terms and conditions to the acquisition of a Member's Interest, specifically including, but without limitation, all conditions set forth in Sections 10.5 and 10.6 below, the person acquiring such Interest will become a Member.

ARTICLE 3
PURPOSES

3.1 Primary Purpose. The principal purpose of the Company shall be to own, operate and manage communal restaurant facilities and other types of retail businesses.

3.2 Secondary Purposes. The secondary purposes of the Company shall be to engage and transact any and all business for which limited liability companies may be lawfully engaged in the State of Utah under the Utah Revised Limited Liability Company Act.

ARTICLE 4
MEMBERS OF THE COMPANY

4.1 Members. The names, addresses and percentage interests of the Members of the Company are as follows:

NAME	ADDRESS	INTEREST
Randale P. Johnson	2730 West 4000 South Oasis, Utah 84624	One Third (33-1/3%)
LaGrand T. Johnson	2730 West 4000 South Oasis, Utah 84624	One Third (33-1/3%)
Glenda E. Johnson	2730 West 4000 South Oasis, Utah 84624	One Third (33-1/3%)

4.2 Classes of Members. There shall be one class of Members. There shall be no distinction between the rights and liabilities of Members except as noted herein.

ARTICLE 5
LIABILITY OF MEMBERS AND EMPLOYEES

5.1 Except as set forth in Article 7.1, neither the Members, the Manager nor the Employees of the Company are personally liable under a judgment, decree, or order of a court, or in any other manner, for a debt, obligation, or liability of the Company.

ARTICLE 6
CAPITAL CONTRIBUTIONS; LOANS

6.1 Initial Capital Contributions. The property and assets identified on the attached Exhibit A, which is incorporated herein by this reference, shall constitute the Initial Capital Contribution of the Present Members to the Company.

6.2 Additional Capital Contributions. From time to time, upon written consent of the Manager, each of the Members may contribute additional cash and other properties into the Company which shall constitute Additional Capital Contributions.

6.3 Withdrawal of Capital Contributions. Except as otherwise expressly provided in this Agreement, only upon the winding up of the affairs of the Company and dissolution of the business of the Company by the sale or other disposition of the Company's assets, and the

collection of all proceeds therefrom, may any of the Capital Contributions be withdrawn. No Member shall have priority over any other Member, either as to the return of Capital Contributions or as to profits, losses, or distributions. No Member shall be personally liable to any other Member for the return of any part of the Members' Capital Contributions. Capital Contributions shall not bear interest.

6.4 Loans. Any Member may, with the consent of the Manager, make loans to the Company. The amount of any such loan or advance shall not increase the Capital Account of the lending Member nor entitle such lending Member to any increase in his or her share of distributions of the Company or subject him or her to any greater portion of the losses which the Company may sustain. The amount of any such loan or advance shall be a debt due from the Company to such lending Member and shall be repayable on such terms and conditions, and bear interest at such rate as shall be mutually agreed upon between the lending Member and the Company. The loan may be secured, if required by the lending Member and consented to by the Manager, by a mortgage on any or all of the properties of the Company. Such loans shall be repaid, together with interest, prior to the time any distributions are made to the Members.

ARTICLE 7
CAPITAL ACCOUNTS;
ALLOCATIONS OF PROFITS AND LOSSES;
CASH DISTRIBUTIONS

7.1 Capital Accounts. A separate Capital Account shall be maintained for each Member. Each Member's Capital Account shall be credited with each Member's Initial Capital Contribution. Each Member's Capital Account shall be increased by the Additional Capital Contributions made by such Member and by such Member's share of gains and profits of the Company as allocated under Section 7.2 below. Such account shall be decreased by any distributions to such Member under Sections 7.3 and 7.4, and by such Member's share of losses and deductions of the Company as allocated under Section 7.2 below. Solely for accounting purposes among the Members, a Member may have a minus or debit balance in his or her Capital Account, but any such minus or debit balance shall not represent a liability of such Member to the Company unless the Company is being terminated, in which event any Member with a negative Capital Account shall be required to restore his Capital Account to zero.

7.2 Allocation of Net Profits or Losses. The net profits or losses of the Company shall be determined for each calendar year of the Company. Each item of income, gain, loss, deduction, or credit thereof shall be allocated among the Members in accordance with their percentage interest in the Company as shown in Section 4.1 above unless a different arrangement is agreed to in writing.

In the event a Member has contributed appreciated property to the Company, as a Capital Contribution, in kind, and the property is later transferred by the Company (including but not

limited to sales or distributions in kind to Members other than the contributing Member), to the extent required by Section 704(c) of the Code, income, gain, loss or other deductions shall be allocated to the contributing Member.

7.3 A. Determination of Distributions of Net Operating Cash Receipts. The Net Operating Cash Receipts of the Company is defined to mean the net profits or losses of the Company, determined in accordance with Section 7.2 above, excluding therefrom net profits or losses resulting from transactions described in Section 7.4 below, with the following adjustments:

(a) depreciation and other non-cash charges deducted in the computation of the net profits or losses of the Company shall be added thereto; and

(b) principal payments on any Company indebtedness, conditional sales contracts, payments to property replacement or improvement reserves, any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and any amounts determined by the Members to be required to maintain reasonable working capital, to repay advances by Members to the Company, or for any contingency relating to the conduct of the Company's business, shall be deducted therefrom.

B. Distribution of Net Operating Cash Receipts. The Net Operating Cash Receipts shall be determined for each calendar year of the Company and to the extent not required for Company operations as determined by the Manager, shall be distributed among the Members at such time as the Manager shall determine.

7.4 A. Determination of Net Extraordinary Cash Receipts. The Net Extraordinary Cash Receipts of the Company shall be defined to mean all cash received by the Company, less any and all expenses relating thereto, from the following sources:

(a) The net proceeds of any financing or refinancing of the Company's assets after satisfaction of any prior encumbrances, if required or appropriate, and after satisfaction of all costs and expenses relating to such financing or refinancing.

(b) The net proceeds of any sale or condemnation of all or any portion of the Company's assets, except in the ordinary course of business, after satisfaction of any related encumbrance and any costs and expenses relating to such sale or condemnation; and

(c) Any other receipts of cash by the Company that are not included within the definition of Net Operating Cash Receipts under Section 7.3 above.

B. Distribution of Net Extraordinary Cash Receipts. Net Extraordinary Cash Receipts may be distributed among the Members during the term of the Company and upon termination, from time to time, as the Manager may determine and in accordance with the following priority:

(a) To the payment of any taxes, debts and liabilities of the Company as the Manager deems necessary or advisable, and in this regard to such reasonable reserves as may be set aside as the Manager deems necessary to maintain reasonable working capital or for any contingency relating to the conduct of the Company's business;

(b) To the payment of all debts and liabilities of the Company owing to any Member, but in the event the amount available for such payment is insufficient to satisfy all such debts and liabilities, then to such Members in the proportion that their respective claims bear to the aggregate claims of all such Members;

(c) To the return to each Member of his net Capital Contributions to the Company.

(d) The balance shall be distributed in accordance with each Member's percentage of ownership in the Company as shown in Section 4.1 above.

C. Reinvestment of Net Extraordinary Cash Receipts. The Manager may reinvest all or any portion of the Net Extraordinary Cash Receipts as Additional Capital Contributions. To the extent not reinvested or committed for reinvestment within twelve (12) months from the date of the event giving rise to such Net Extraordinary Cash Receipts, such cash may be distributed in accordance with this Section 7.4 to those Members entitled to such distributions at the close of the Company fiscal year during which such cash first became available.

ARTICLE 8
MANAGEMENT OF THE COMPANY

8.1 Management. The business, operations and properties of the Company shall be managed by the Manager except as noted hereinafter. If a Manager should fail or cease to serve, then a replacement Manager shall be elected by a majority vote of the Members at a regular or special meeting of the Members, called for that purpose.

8.2 General Powers and Rights of the Manager. The Manager shall be solely responsible for the management of the Company's business and activities with all rights

and powers generally conferred by law or necessary, advisable or consistent in connection therewith.

8.3 Specific Powers of the Manager. In addition to any other rights and powers which he or she may possess, the Manager shall have all specific rights and powers required or appropriate to his management of the Company business, conferred by this Agreement, by the Act or otherwise, including by way of illustration and not by way of limitation the following:

A. To acquire, hold and dispose of any real property, interest therein, or appurtenance thereto, as well as personal or mixed property connected therewith, including the purchase, lease development, improvement, maintenance, exchange, trade or sale of such properties, at such price, rental or amounts, for cash, securities or other property, and upon such terms, as it deems, in its absolute discretion, to be in the best interest of the Company;

B. To borrow money and, if security is required therefore, to mortgage or lien any portion of the property of the Company, to obtain replacements of any mortgage or other security device, and to prepay, in whole or in part, refinance, increase, modify, consolidate, or extend any mortgage or other security device, all of the foregoing at such terms and in such amounts as it deems, in its absolute discretion, to be in the best interests of the Company;

C. To place record title to, or the right to use, Company assets in the name or names of a nominee or nominees for any purpose convenient or beneficial to the Company;

D. To acquire and enter into any contract or insurance which the Company deems necessary and proper for the protection of the Company, for the conservation of its assets, or for any purpose convenient, or beneficial to the Company;

E. To employ from time to time persons, firms or corporations for the operation and management of the Company business, including but not limited to, supervisory and managing agents, brokers, attorneys, accountants and other professionals, on such terms and for such compensation as the Manager shall determine; provided, however, that any compensation paid by the Company to any Member or to any affiliate of any Member must be approved by the unanimous vote of the Members;

F. To pay any and all organizational expenses incurred in the creation of the Company;

G. To compromise, arbitrate, or otherwise adjust claims in favor of or against the Company and to commence or defend litigation with respect to the Company or any assets of the Company as the Manager may deem advisable, all or any of the above matters being at the expense of the Company;

H. To enter into and execute agreements and any and all documents and instruments customarily employed in the real estate industry in connection with the acquisition, sale, lease (whether as lessee or lessor), development, and operation of real estate properties; agreements, commitments and any and all documents and instruments customarily employed in real estate financing; and all other instruments deemed by the Manager to be necessary or appropriate to the proper operation of such real estate properties and investments or to perform effectively and properly his duties or exercise his powers hereunder;

I. To borrow money from banks, other lending institutions, and other lenders for any Company purpose including the maintenance of a margin account with any securities broker (except as specifically prohibited by this Agreement), and in connection therewith issue notes, debentures and other debt securities and hypothecate the assets of the Company to secure repayment of borrowed sums; and no bank, other lending institution, or other lender to which application is made for loan by the Manager shall be required to inquire as to the purposes for which such loan is sought, and as between this Company and such bank, other lending institution, or other lender, it shall be conclusively presumed that the proceeds of such loan are to be and will be used for the purposes authorized under this Agreement;

J. To maintain, at the expense of the Company, accurate records and accounts of all operations and expenditures and furnish the Members with annual statements of account as of the end of each Company fiscal year, together with tax reporting information, and quarterly reports on the operations of the Company;

K. To purchase, at the expense of the Company, liability and other insurance to protect the Company's properties and business and to protect the Manager, his or her agents and employees, and the Members;

L. To execute instruments, enter into agreements and contracts with parties, and give receipts, releases and discharges with respect to all of the foregoing matters set forth in subsections 8.3.A through 8.3.K above, and any matters incident thereto as the Manager may deem advisable or appropriate;

M. To make certain elections under the tax laws of the United States, the State of Utah, and other relevant jurisdictions as to the treatment of items of Company income, gain, loss, deduction and credit, and as to all other relevant matters (including without

limitation elections under Section 754 of the Code) as the Manager believes necessary or desirable.

8.4 Limitations on Manager. The Manager shall have all the rights and powers and be subject to all the restrictions and liabilities of a Member of the Company, except that the Manager has no authority to:

A. Do any act in contravention of this Agreement;

B. Do any act which would make it impossible to carry on the ordinary business of the Company;

C. Confess a judgment against the Company;

D. Possess Company property or assign the rights of the Company in specific Company property for other than a Company purpose; or

E. Admit a person as a Member, except as otherwise provided in this Agreement.

8.5 Manager's Time. The Manager shall devote such of his time to the business of the Company as he or she may, in his or her sole discretion, deem to be necessary to conduct the Company's business. The Manager shall not be required to devote his or her full time to the Company's business.

8.6 Compensation for Manager. The Manager shall receive no compensation for their management and supervision of the Company business except as agreed to by all the Members and reduced to writing.

8.7 Reimbursement. The Manager shall be reimbursed for all out-of-pocket expenses incurred in organizing the Company, including all legal and accounting fees incurred. Thereafter the Manager shall be reimbursed for all goods and materials used for or by the Company. All expenses of the Company shall be billed directly to and paid by the Company. The Manager shall be reimbursed for any administrative expenses including salaries, rent, travel expenses, and other items generally within the purview of furthering the Company business.

8.8 Establishment of Reserves. The Manager shall establish an operating reserve for the Company to provide for contingency expenses, repairs and other matters as may be required to maintain, protect and preserve the Company's property.

8.9 Exculpation. The Manager shall not be liable to the Company or to any of its Members for honest mistakes of judgment or for losses due to such mistakes or to the negligence, dishonesty or bad faith of any employee or agent of the Company; provided that such

employee or agent was selected, engaged or retained by the Manager as authorized by the Company with reasonable care. The Manager may rely upon the advice of legal counsel to the Company in determining what acts or omissions are within the scope of authority conferred by this Agreement. The Company shall indemnify and hold harmless the Manager and his or her agents from and against any loss, expense, damage or injury suffered or sustained by them by reason of or in furtherance of the interest of the Company, including, but not limited to any judgment, award, settlement, reasonable attorneys' fees and other costs or expenses incurred in connection with the defense of any action or threatened action, proceeding or claim, provided that the acts, omissions, or alleged acts or omissions upon which such action or threatened action, proceedings or claims are based were performed or omitted in good faith and not fraudulently, in bad faith, as a result of wanton and willful misconduct or gross negligence.

8.10 Conflict of Interest. Any Member or the Manager may be a party to, or be directly or indirectly connected with any person, corporation or partnership with which the Company may have dealings including, but not limited to, any contract or transaction with the Company, and in the absence of fraud, no contract or other transaction shall be thereby affected or invalidated. Neither the Company nor any of the other Members or the Manager shall have any rights in or to such dealings or any profits derived therefrom.

8.11 Initial Manager. The Initial Manager of the Company shall be Neldon P. Johnson.

ARTICLE 9
MEMBERS

9.1 Regular Meetings. The Company may hold regular meetings as from time to time designated by a majority of the Members or by the Manager. Such regular meetings shall be held at such time and place as designated by the Members or the Manager, designating such meetings, as the case may be.

9.2 Special Meetings. Special meetings of Members may be called at any time by the Manager and must be called by the Manager upon written request of Members holding twenty percent (20%) or more of the Company's Interests. Written notice of such meeting stating the place, the date and hour of the meeting, the purpose or purposes for which it is called, and the name of the person by whom or at whose direction the meeting is called shall be given. The notice shall be given to each Member. No business other than that specified in the notice of the meeting shall be transacted at any such special meeting.

9.3 Voting. Except as otherwise expressly provided in this Agreement, all matters which call for a vote or consent of the Members shall be by the concurrence of Members owning at least fifty percent (50%) of the Interests then outstanding. A formal meeting of the Company shall not be required. In the event, however, that a meeting of the Members is called, written

notice of the time and place thereof shall be given to each Member at least ten (10) days prior thereto. At such meeting, a Member may be represented in person or by written proxy.

9.4 Notice of Members Meetings. The Manager shall give written notice stating the place, day, and hour of both regular and special meetings, and in the case of a special meeting, the purpose or purposes for which the meeting is called, which shall be delivered not less than (5) nor more than thirty (30) days before the date of the meeting, either personally, by facsimile transmission or by first class mail (postage prepaid) to each Member of record entitled to vote at such meeting. Notice of any meeting of Members, annual or special, shall be given addressed to the Member at the telephone number, facsimile number or address of such Member appearing on the books of the Company or given by the Member to the Company for the purpose of notice. If no address for a Member appears on the Company's books or is given by such Member, notice shall be deemed to have been given if sent by mail to the Company's principal executive office or the last address for such Member, known to the Company. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail, addressed to the Member at his address as it appears on the books of the Company, with postage thereon prepaid. If transmitted by facsimile transmission, the notice shall be considered delivered upon completion of the transmission by the sender.

If any notice addressed to a Member at the address of such Member appearing on the books of the Company is returned to the Company by the United States Postal Service marked to indicate that the United States Postal Service is unable to deliver the notice to the Member at such address, all future notices or reports shall be deemed to have been duly given without further mailing if the same shall be available to the Member upon written demand of the Member at the principal executive office of the Company for a period of one (1) year from the date of the giving of such notice. A certificate or an affidavit of the mailing, transmission or other means of giving any notice of any Members' meeting shall be executed by the Manager or any transfer agent of the Company giving such notice, and shall be filed and maintained in the minute book of the Company.

9.5 Waiver of Notice. If, under the provisions of the Act, the Articles of Organization, or this Agreement, notice is required to be given to a Member or to the Manager, a waiver in writing signed by the person or persons entitled to the notice, whether made before or after the time for notice to be given, is equivalent to the giving of notice.

9.6 Quorum. A majority of the Member's Interests of the Company entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of Members. If less than a majority of the Member's Interests are represented at a meeting, a majority of the Member's Interests so represented may adjourn the meeting from time to time without further notice. At a meeting resumed after any such adjournment at which a quorum shall be present or represented, any business may be transacted which might have been transacted at the meeting as originally noticed. The Members present at a duly organized meeting may continue to transact

business until adjournment, notwithstanding the withdrawal of Members in such number that less than a quorum remain.

9.7 Voting. A holder of an Interest, entitled to vote at a meeting, may vote at such meeting in person or by proxy. Except as may otherwise be provided in the Articles of Organization, every Member shall be entitled to a vote equal to the Member's Interest standing in his name on the records of the Company. Except as herein or in the Articles of Organization otherwise provided, all Company action shall be determined by a majority of the votes cast at a meeting of Members by the holder of Member's Interests entitled to vote thereon.

9.8 Proxies/Power of Attorney. At all meetings of Members, a Member may vote in person or by proxy executed in writing by the Member or by his duly authorized attorney in fact. Such proxy shall be filed with the Company before or at the time of the meeting. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

9.9 Deadlock. Should the Members become deadlocked as to issue requiring a vote or any issue of management then the issue shall be submitted for resolution to the American Arbittration Association for resolution by binding arbitration.

9.10 Assignment of Voting Rights. For a period of twenty (20) years from the date of this Agreement, the voting rights derived from the membership interests of certain of the Members are assigned as follows.

A. Present Membership. The Members hereby acknowledge and agree that Randale P. Johnson, LaGrand T. Johnson and Glenda E. Johnson, constitute all of the Members of the Company, and that Randale P. Johnson and LaGrand T. Johnson, and Glenda E. Johnson each hold an equal one-third (33-1/3 %) interest in the Company, as of the Effective Date of this Agreement.

B. Voting Rights Assigned. The Voting Rights for the one-third (33-1/3%) membership interest of Randale P. Johnson in the Company, the Voting Rights for the one-third (33-1/3%) membership interest of LaGrand T. Johnson in the Company, and the Voting Rights for the one-third (33-1/3%) membership interest of Glenda E. Johnson in the Company are hereby assigned to Neldon P. Johnson, as of the Effective Date of this Agreement. Randale P. Johnson, LaGrand T. Johnson and Glenda E. Johnson are hereby referred to individually as an "Assigning Member" and collectively as the "Assigning Members." The foregoing Voting Rights assignments shall survive the death or incapacity of the Assigning Member, and shall survive the voluntary or involuntary transfer of the Membership Interest of the Assigning Member.

C. Term of the Assignments. The Term of each of the foregoing Voting

Rights Assignments shall be twenty (20) years from the Effective Date unless this Agreement is sooner terminated due to one of the following events:

(1) If the Term of the Voting Rights Assignments is deemed to have a statutory limit to a shorter term, then the Voting Rights Assignments shall be deemed terminated at the expiration of any statutorily limited period.

(2) The Voting Rights Assignments shall be immediately terminated upon the resignation, death, or judicial declaration of mental incapacity of Neldon P. Johnson, or Neldon P. Johnson is otherwise unable to continue to serve as the Manager of the Company.

(3) The Voting Rights Assignments shall be immediately terminated upon the transfer, whether voluntary or involuntary, of any of the membership interest of Neldon P. Johnson in the Company, or any interest or voting rights therein, to any other person or entity.

D. Manager of the Company. The Assigning Members agree that Neldon P. Johnson is hereby appointed as the Manager of the Company as of the date of this Agreement, and that for the entire Term of the Assignments, Neldon P. Johnson shall continue to serve as the sole Manager of the Company, notwithstanding any provisions of the Articles of Organization or any prior Operating Agreement, if any, of the Company to the contrary.

ARTICLE 10
TRANSFER OF COMPANY INTERESTS

10.1 Permissible Transfers by Members. Subject to Section 12.3 below, a Member may, with the consent of all of the Members, through an inter vivos or testamentary transaction, transfer, sell or convey his Interest or any income, profits or gains derived or to be derived from the Company to any other Member or to any member of the immediate family of such transferring Member over the age of twenty-one (21) years or to a trust in which such Member or any member of his family is a beneficiary. Such assignee or transferee shall not become a Substitute Member, unless and until the conditions of Section 10.5 below, have been satisfied. Until such time as such conditions have been satisfied, such assignee or transferee shall be entitled only to the rights and benefits as presently provided in Section 48-2b-131(1) of the Act. Any Interests so transferred shall remain subject to this Agreement.

10.2 Prohibition on Hypothecation by Members. No Member shall mortgage or grant a security interest in his Interest in the Company.

10.3 Other Transfers by a Member. Except as may be permitted by Section 10.1 above, and except with the consent by all of the Members, no Member may transfer, convey or assign his Interest or any Interest in the Company without complying with the provisions of this Article. If a Member (the "Selling Member") desires to sell, transfer or assign his Interest, he may do so only upon complying with the following:

A. The Selling Member shall first offer in writing to sell such Interest to the other Members on the same terms and conditions as proposed by the prospective purchaser. The Selling Member shall also inform the Members in writing of the name and address of the prospective purchaser and shall provide the Members with such information with respect to the proposed purchaser as will enable the Members to make a determination as to the character and financial responsibility of the proposed purchaser.

B. Each non-selling Member shall have the right to subscribe for such Interest in the proportion that his holdings of Interest bear to the then total Interests owned by all of the non-selling Members. Each non-selling Member shall have a period of sixty (60) days following receipt of such written offer within which to purchase his proportionate share of such Interest on such terms and conditions; provided, however, that in the event any of the non-selling Members fail to subscribe for all of their proportionate share of such Interest, then the remaining non-selling Members who purchased their full share shall, within ten (10) days thereafter have the right to purchase proportionately such Interest until each non-selling Member has the opportunity to purchase all of such Interest offered by the Selling Member.

C. If the Selling Member's Interest is fully subscribed for by the non-selling Members in the manner provided above, the transaction shall be consummated within ten (10) days thereafter. As to such Interest of the Selling Member not so subscribed for and purchased, the Selling Member shall have the right, subject to Section 10.6 below, to sell his remaining interest to the person whose name is stated in the offer at the price and upon the terms stated therein; provided, however, that if such sale is not completed within ninety (90) days after the Selling Member first offered his remaining Interest for sale to the other Members, then such Interest shall again be subject to this Agreement in all respects.

10.4 Invalid Transfer. Any sale or transfer or purported sale or transfer of any interest shall be null and void unless made strictly in accordance with the provisions of this Agreement.

10.5 Substitute Member. No person taking or acquiring by whatever means, including by purchase, the Interest of a Member in the Company shall be admitted as a Substitute Member in the Company unless and until:

A. all the Members approve in writing the admission of such person as a Substitute Member;

B. such transferee or assignee agrees in writing to be bound by the terms and conditions of this Agreement; and

C. all Members execute and acknowledge such documents as are necessary to comply with the requirements of the Act. Until such time as such conditions have been satisfied, such assignee or transferee shall be entitled only to the rights and benefits as are presently provided in Section 48-26-131(1) of the Act. Such assignee or transferee shall pay all costs and expenses incurred by the Company in connection with such admission or substitution including, but not limited to, all legal and accounting fees, and the costs of preparing, filing and recording any amendments to the Articles of Organization.

10.6 Additional Restrictions. Notwithstanding the provisions of Article 10 above, a Member may only sell, assign, or otherwise transfer any Interest in the Company if:

A. the proposed transfer will not result in the termination of the Company as provided in Section 708(b) of the Code, or otherwise adversely affect the Company's status as a Company thereunder. The Members are expressly authorized to enforce this provision by notifying the Selling Members that all transfers or assignments will be suspended for a period of up to twelve (12) months whenever Company Interests representing aggregate Interests of thirty five percent (35%) or more in Company capital or revenues shall have been effectively transferred in any twelve (12) month period;

B. such Selling Member and his purchaser, transferee or assignee execute such instruments of transfer and assignment with respect to such transactions as are in form and substance satisfactory to the non-selling Members; and

C. the assignor or transferor delivers to the Company an opinion of counsel, in form acceptable to counsel to the Company; that:

(a) the proposed transfer or assignment of the Interest complies with all federal and state laws and regulations, including the Securities Act of 1933, and

(b) the proposed transfer or assignment will not affect the availability to the Company of the exemption from registration of the interest provided by the Securities Act of 1933 or any Rule or Regulation promulgated by the Securities and Exchange Commission or the similar exemption from registration under the securities laws of any applicable state.

In the event of a transfer of a Member's Interest, if it is in the best interest of the Company to do so, the Company may make an election, as provided for in Section 754 of the Code, to adjust the basis of the Company assets.

ARTICLE 11
CESSATION OF A MEMBER

11.1 Death, Incompetency or Dissolution of a Member. Upon the death or legal incompetency of a Member or upon the filing of a bankruptcy by a Member, his guardian, trustee, or personal representative (as the case may be) shall have all of the rights of a Member, as the case may be, for the limited purpose of settling or managing his estate, and such power as the decedent or incompetent possessed to constitute a successor as an assignee of his Interest in the Company and to join with such assignee in making application to substitute such assignee as a Member. However, neither the guardian, trustee or personal representative nor his assignee shall have the right to become a Substitute Member without the written consent of all of the Members.

11.2 Bankruptcy, Dissolutions or Cessation of Member. Upon the bankruptcy, insolvency, dissolution or other cessation to exist as a legal entity of a Member, not an individual, the authorized representative of such entity shall have all of the rights of a Member for the limited purpose of such entity and such power as such entity possessed to constitute a successor as an assignee of its Interest in the Company and to join with such assignee in making application for such assignee to become a Substitute Member. However, neither the authorized representative nor his assignee shall have the right to become a Substitute Member without the written consent of all of the Members.

ARTICLE 12
DISSOLUTION AND WINDING-UP

12.1 Dissolution and Termination of the Company. The Company shall be dissolved and terminated upon the happening of any of the following:

A. At the time specified in this Agreement;

B. By written agreement of all of the Members;

C. Subject to paragraph 12.6, upon the withdrawal of a Member; or

D. When the Company is not the successor or survivor entity in any merger or consolidation between the Company and any one (1) or more other entities.

12.2 Event of Withdrawal. A Member will cease to be a Member and will be deemed to have withdrawn from the Company upon the happening of any of the following events:

A. Upon the retirement, resignation or expulsion of a Member or upon the occurrence of any other event that terminates the continued eligibility for membership of

a Member. Resignation will occur upon giving sixty (60) days advance written notice in writing to all the remaining Members of his intent to resign as a Member of the Company.

B. In the case of a Member who is a natural person:

(a) his death; or

(b) the entry of an order by a court of competent jurisdiction adjudicating him incompetent to manage his person or his estate.

C. In the case of a Member partner who is acting as a Member by virtue of being a trustee of a trust, the termination of the trust, but not merely the substitution of a new trustee.

D. In the case of a Member that is a separate partnership or limited liability company, the dissolution and commencement of winding up of the separate partnership or limited liability company.

E. In the case of a Member that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter.

F. In the case of an estate, the distribution by the fiduciary of the estate's entire interest in the Company.

G. The Member:

(a) makes an assignment for the benefit of creditors;

(b) files a voluntary petition in bankruptcy;

(c) is adjudicated as bankrupt or insolvent;

(d) files a petition or answer seeking for himself readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation;

(e) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding described in Subsection G(d); or

(f) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the Member or of all or any substantial part of his properties.

H. One hundred twenty (120) days after the commencement of any proceeding against a Member seeking reorganization, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within ninety (90) days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the Member or of all or any substantial part of his properties, the appointment is not vacated or stayed or within ninety (90) days after the expiration of any such stay, the appointment is not vacated.

12.3 First Right of Refusal. Upon the withdrawal of a Member, the remaining Members shall have the option to purchase the Interest of the withdrawing Member in the Company. All such purchases shall be on terms and conditions as follows:

A. The Interest shall be appraised by the Members. The selling Member(s), within fifteen (15) days after receipt of such appraisal may object to the appraisal. In such an event, the Interest shall be appraised by two (2) competent appraisers, one (1) of whom shall be selected by the Member wishing to sell or assign his or her interest, and one (1) by the remaining Members of the Company.

B. The appointed appraisers will appraise the Company Interest and affix thereto a dollar value. In the event that the appraisers are unable to arrive at the same appraisal figure, then in that event the average between the two (2) appraisal figures shall be used to arrive at the appraisal value upon which the purchase price is fixed.

C. Each non-withdrawing Member shall have the right to subscribe for such Interest in the proportion that his holdings of Interest bear to the then total Interests owned by all of the non-withdrawing Members. In the event any of the non-withdrawing Members fail to subscribe for all of their proportionate share of such Interest, then the remaining non-withdrawing Members who purchased their full share shall, within ten (10) days thereafter have the right to purchase proportionately such interest until each non-withdrawing Member has the opportunity to purchase all of such Interest of the withdrawing Member.

D. The appraised sum so determined shall be paid to the withdrawing Member over a period of time and in such amounts as determined by the Members by mutual agreement. If no agreement can be reached, then the sale shall be for a term of ten (10) years at an interest rate equal to the applicable federal rate in effect at the date of sale.

E. No such transfer by a withdrawing Member shall of itself effect dissolution of this Company. Any such transferee prior to any transfer of an Interest in the Company shall have full right to inspect the Company books and records and to obtain access to any information or account of the Company's transactions. Any such transfer of an Interest shall be reflected by a properly amended Agreement of Company.

F. No person who obtains the Interest of any Member in the Company shall have the right to become a Substitute Member without the written consent of all of the Members and without complying with the terms and provisions of Sections 10.5 and 10.6 above.

12.4 Settlement Upon Dissolution. Upon the dissolution of the Company, the profits, losses and capital of the Company shall be distributed as follows:

A. First, liabilities to creditors, in order of priority as provided by law, including liabilities to Members, or their affiliates, other than liabilities to Members in respect to their Capital Accounts;

B. Second, liability to Members in respect to their Capital Accounts; and

C. Third, liability to Members in respect to their respective interests of profits by way of income from Company operations.

12.5 Return of Capital. Each Member shall look solely to the assets of the Company and to the Company property remaining after the payment or discharge of the debts and liabilities of the Company to the Member. If such assets and property are insufficient to return the Capital Contributions of each Member, the Members shall have no recourse against the Manager or any other Member irrespective of such Manager's or Member's capital balance, be it a debit or credit balance. All distributions of Company property upon liquidation of the Company shall be made in strict accordance with the balances of individual Members' Capital Accounts. However, any Member with a debit or negative balance in his Capital Account, upon the dissolution and winding up of the Company, shall not be entitled to a distribution as to capital or his share of profits.

12.6 Continuation of Company in the Event of Withdrawal. Upon the withdrawal of a Member, the remaining Members shall have the right to continue the business of the Company by the affirmative vote of all of the Members of the Company within ninety (90) days following the event. In the absence of a an affirmative vote, the Company's business shall be terminated, the affairs of the Company shall be wound up and the Company's assets or proceeds thereof shall be distributed and applied in the manner and priority set forth in Section 12.4 above.

12.7 Winding Up of the Company. Upon a dissolution of the Company, the winding up of the affairs of the Company and the distribution of its assets shall be conducted exclusively by the Manager who is hereby authorized to do any and all acts and things reasonably necessary to accomplish the foregoing. In this regard, the Manager may delegate his obligation to a receiver or a trustee.

A reasonable time shall be allowed for the orderly liquidation of the assets of the Company and the discharge of liabilities to creditors so as to enable the Manager to minimize the losses customarily attendant to distressed dispositions of property. In liquidating the assets of the Company, all assets of a saleable value which the Manager determines are not suitable for an equitable distribution shall be sold at public or private sale as the Manager deems advisable. Any Member may purchase such assets at any such sale.

12.8 Final Accounting. Each of the Members shall be furnished with a statement prepared by the Manager or the Company's accountant which shall set forth the assets and liabilities of the Company as of the date of termination and which shall disclose the sources and applications of Company assets and proceeds thereof during the course of winding up the Company affairs and dissolution. Upon completion of the winding up and termination of the Company, the Manager shall execute, acknowledge and cause to be filed Articles of Dissolution of the Company.

12.9 Method of Distribution of Assets. To the extent feasible, all distributions in liquidations shall be made pro rata to the Members in kind. Distribution of specific assets shall be solely determined by the Manager.

ARTICLE 13
BOOKS OF ACCOUNT AND RECORDS

13.1 Accounting Year and Method. The Company shall adopt a calendar year for its financial reporting and federal income tax purposes. The Company shall prepare all financial statements and federal and state income tax reports on a cash basis.

13.2 Maintenance of Books and Records. At all times during the existence of the Company, the Members shall keep or cause to be kept by an agent full and true books of account, in which shall be entered fully and accurately each transaction of the Company. Such books of account, together with a certified copy of the Articles of Organization and any amendments thereto, shall at all time be maintained at the principal office of the Company and shall be open to the reasonable inspection and examination of the Members or their duly authorized representatives.

13.3 Tax Returns. The Manager shall have the books and records of the Company reviewed and income tax returns prepared for the Company. A report indicating the respective

Member's share of net profits or losses and capital gains or losses, all as defined and reflected on the Company income tax return, shall be available to the Members within a reasonable period of time after the close of the taxable year of the Company for which such return was prepared.

13.4 Bank Accounts. Funds and monies received by the Company shall be deposited in such bank account or accounts as the Manager shall determine. Checks or other withdrawals from any such bank account or accounts shall be made upon such signature or signatures as the Manager may designate.

ARTICLE 14
AMENDMENT

14.1 Amendment of Agreement. The Company's Articles of Organization shall be amended whenever:

A. There is a change in the name of the Company;

B. There is a change in the character of the business of the Company from that specified in the Company's Articles of Organization;

C. There is a false or erroneous statement in the Articles of Organization;

D. There is a change in the time, as stated in the Articles of Organization, for the dissolution of the Company;

E. There is a change in the name and street address of the Manager of the Company of the if Company is managed by its Members, there is a change in the names and addresses of the Company's Members;

F. The Members determine to fix a time not previously specified in the Articles of Organization for the dissolution of the Company; or

G. The Members desire to make change in any of the provisions of the Articles of Organization in order for the Articles of Organization to accurately represent the agreement among them.

ARTICLE 15
INDEMNIFICATION

15.1 A. Agents, Proceedings and Expenses. For the purposes of this Section 15.1, "agent" means any person who is or was a Member, officer, employee, or other agent of this Company, or is or was serving at the request of this Company as a Manager, employee, or agent of another foreign or domestic corporation, Company, joint

venture, trust or other enterprise, or was a Manager, employee, or agent of foreign or domestic corporation which was a Member of this Company. The term "proceeding" means any threatened, pending or completed action or proceeding, whether civil, criminal, administrative, or investigative. The term "expenses" includes, without limitation, attorney's fees and any expenses of establishing a right to indemnification under Subsection 15.1.D, or Subsection 15.1.E of this Section 15.1.

B. Actions Other Than By The Company. The Company shall indemnify any person who was or is a party, or is threatened to be made party, to any proceeding (other than an action by or in the right of this Company) by reason of the fact that such person is or was an agent of this Company, against expenses, judgments, fines, settlements and other amounts actually and reasonably incurred in connection with such proceeding if that person acted in good faith and in a manner that person reasonably believed to not be contrary to the best Interests of this Company and, in the case of a criminal proceeding, had no reasonable cause to believe the conduct of that person was unlawful. The termination of any proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did not act in good faith and in a manner which the person reasonably believed to be in the best interests of this Company or that the person had reasonable cause to believe that the person's conduct was unlawful.

C. Actions By The Company. The Company shall indemnify any person who was or is a party, or is threatened to be made a party, to any threatened, pending or completed action by or in the right of this Company to procure a judgment in its favor by reason of the fact that person is or was an agent of this Company, against expenses actually and reasonably incurred by that person in connection with the defense or settlement of that action if that person acted in good faith, in a manner that person believed to not be contrary to the best interests of this Company and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. No indemnification shall be made under this Subsection 15.1.C:

(a) In respect of any claim, issue or matter as to which that person shall have been adjudged to be liable to the Company in the performance of that person's duty to the Company, unless and only to the extent that the court in which that action was brought shall determine upon application that, in view of all the circumstances of the case, that person is fairly and reasonably entitled to indemnity for the expenses which the court shall determine;

(b) Of amounts paid in settling or otherwise disposing of a threatened or pending action, with or without court approval; or

(c) Of expenses incurred in defending a threatened or pending action which is settled or otherwise disposed of without court approval.

D. Successful Defense By Agent. To the extent that an agent of this Company has been successful on the merits in defense of any proceeding referred to in Subsection 15.1.B or 15.1.C, or in the defense of any claim, issue, or matter therein, the agent shall be indemnified against expenses actually and reasonably incurred by the agent in connection therewith.

E. Advance of Expenses. Expenses incurred in defending any proceeding shall be advanced by this Company before the final disposition of the proceeding on receipt of an agreement by or on behalf of the agent to repay the amount of the advance unless it shall be determined ultimately that the agent is not entitled to be indemnified as authorized in this Article 15.

F. Other Contractual Rights. Nothing contained in this Article 15 shall affect any right to indemnification to which persons other than Members, the Manager, or agents of this Company or any subsidiary hereof may be entitled by contract or otherwise.

15.2 Other Indemnification. The indemnification herein provided shall not be deemed exclusive of any rights to which those seeking indemnification may be entitled under any agreement, vote of Members (whether disinterested or not), or otherwise, both as to action in his official capacity and as to action in another capacity while holding such position, and shall continue as to a person who has ceased to be a Member or employee, and shall inure to the benefit of the heirs, executors and administrators of such person.

15.3 Insurance. The Company may purchase and maintain insurance on behalf of any person who is or was a Member, Manager, or employee of the Company, or is or was serving at the request of the Company as a member, Manager, employee or agent of another company, joint venture, trustor other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Company would have the power to indemnify him against liability.

15.4 Settlement by Company. The right of any person to be indemnified shall be subject always to the right of the Company by the Manager, in lieu of such indemnity, to settle any such claim, action, suit or proceeding at the sole expense of the Company by the payment of the amount of such settlement and the costs and expenses incurred in connection therewith.

ARTICLE 16
MISCELLANEOUS

16.1 Notices. Except as otherwise expressly set forth herein, all notices under this Agreement shall be in writing and shall be given to the Member entitled thereto by personal service or by certified or registered mail, return receipt requested, to the address set forth in this Agreement for such Member or at such other address as he may specify in writing.

16.2 Title and Captions. Article and Section titles or captions contained in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provision hereof.

16.3 Gender. Whenever the singular number is used in this Agreement and when required by the context, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders and the word "person" shall include corporation, firm, company, or other form of association.

16.4 Counterparts. This Agreement may be executed in several counterparts, and all so executed shall constitute one agreement binding on all parties hereto, notwithstanding that all the parties are not signatory to the original or the same counterpart.

16.5 Governing Law. This Agreement and all amendments hereto shall be governed by the laws of the State of Utah.

16.6 Survival of Terms and Provisions. The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective Members.

16.7 Severability. The invalidity or unenforceability of any part of this Agreement shall not invalidate or affect the validity or enforceability of any other provision of this Agreement, which shall continue to govern the rights and obligations of the parties hereto as though the invalid or unenforceable provisions(s) were not a part hereof.

16.8 Further Instruments. The Members agree that they will execute any and all other documents or legal instruments that may be necessary or required to carry out and effectuate all of the provisions hereof.

16.9 Preparation of Agreement. The Members acknowledge that they have all participated in the preparation of this Agreement and, in the event that any question arises regarding its interpretation, no presumption shall be drawn in favor of or against any Member with respect to the drafting hereof.

16.10 Insurance. The Manager shall have the right to obtain, on behalf of and at the expense of the Company, a life insurance policy or policies on the life of the Manager, one or more Members or any other persons which the Manager deems necessary or desirable for the Company business. The Company shall be the owner of each such policy. For each policy:

A. The named beneficiary under the policy may not be changed without the consent of the Manager.

B. The insurance policy may not be used, assigned or controlled in any manner for the economic benefit of the insured except as it may benefit the insured, together with all other Members, derivatively through his/her ownership interest in the Company.16.11 Manager as Fiduciary. The Manager shall account to the Company and the Members and shall hold as their trustee any profits derived from any transaction connected with the formation, conduct or liquidation of the Company or from any use by the Manager of Company property. Such duty extends to the personal representatives of any deceased Manager or Member involved in the liquidation of the Company. All management, investments, accountings and distributions shall be conducted by the Manager subject to

the obligations, duties and liabilities of fiduciaries in general. However, nothing contained herein shall prevent the Manager from entering into or conducting any business in competition with the Company.

16.12 Entire Agreement; Amendments. This Agreement constitutes and represents the entire agreement of the Members with respect to the subject matter hereof, and all other prior agreements, covenants, promises and conditions, verbal or written, between the Members are incorporated herein. No Member hereto has relied upon any other promise, representation or warranty, other than those contained herein, in executing this Agreement. This Agreement may be amended in writing signed by all Members.

16.13 Waiver of Lis Pendens and Partition. The Members recognize that no Member has any direct right in any Company property, but only an interest in the Company which is deemed to be personal property. Accordingly, because the Company may suffer irreparable financial loss if a lis pendens were filed or an action for partition were brought with respect to Company property by a Member arising out of a Company dispute, each Member does hereby waive any such right to file a lis pendens against any property of the Company or bring an action for partition thereof.

16.14 Contracts. All contracts for goods and services entered into by the Manager for the benefit of the Company for a price in excess of $1,000.00 shall be in writing and signed by Manager and the providers of the goods or services. Any contracts which are not in writing for any amount in excess of $1,000.00 shall not be binding upon the Company. Every contract entered into by the Manager shall contain a pre-established clause in which the third party acknowledges that he is aware that he is dealing with a limited liability company formed under the laws of Utah and agrees that in any subsequent action against the Company, the third party will proceed only against the Company.

16.15 Litigation. In the event any Member or the Company finds it necessary to bring an action at law or other proceeding against any Member to enforce any of the terms, covenants or conditions hereof, or by reason of any breach or difficulty hereunder, the party prevailing in any such action or other proceeding shall be entitled to recover against the other party a reasonable attorney's fee. In the event any judgment is secured by such prevailing party, all such attorneys' fees shall be determined by the court and not a jury and shall be included in any judgment.

16.16 Qualification in Other States. In the event that the business of the Company is conducted in states in addition to the State of Utah, then the Members agree that this Company shall exist under the laws of each state in which such business is actually conducted to the extent that it is necessary in order to do business in such state but that otherwise the laws of the State of Utah shall govern this Company and each Member agrees to execute such other and further documents as may be required in order to qualify the Company to conduct its business in other

states. To the extent that business of the Company shall be conducted in another state, the Manager may, in his or her discretion, designate a principal place of business and other offices in such state or states.

DATED this 18 day of August, 2017.

MEMBER

Randale P. Johnson

LaGrand T. Johnson

Glenda E. Johnson

Glenda E. Johnson

MANAGER

Neldon P. Johnson

EXHIBIT A

MEMBERS	INITIAL CAPITAL CONTRIBUTIONS
Randale P. Johnson	$1,000.00
LaGrand T. Johnson	$1,000.00
Glenda E. Johnson	$1,000.00

LIMITED LIABILITY COMPANY OPERATING AGREEMENT

FOR

XSUN ENERGY, LLC

A Manager-Managed Utah Limited Liability Company

THIS LIMITED LIABILITY COMPANY AGREEMENT (the Agreement) is made and entered into effective this 18TH day of April, 2011, by SOLSTICE ENTERPRISES, INC., a Nevis Corporation, #6 Solomon's Arcade, Main Street, Charleston, Nevis, the sole member as of the date of this Agreement, hereinafter referred to as "Member", of XSun Energy, LLC, hereinafter referred to as the "Company", and NELDON P. JOHNSON, 4000 West 4035 South, Deseret, UT 84624, hereinafter referred to as "Manager", and each individual or business entity later subsequently admitted to the Company as a Member, these individuals and/or business entities being hereinafter referred to as "Members" and individually as a "Member."

As of this date, the Member has formed the Utah Limited Liability Company named above under the laws of the State of Utah. Accordingly, in consideration of the conditions contained herein, Member and Manager agree as follows:

ARTICLE I
Company Formation and Registered Agent

1.1 **FORMATION.** The Members hereby form a Limited Liability Company ("Company") subject to the provisions of the Limited Liability Company Act as currently in effect as of this date. Articles of Organization shall be filed with the Secretary of State of the State of Utah.

1.2 **NAME.** The name of the Company shall be: XSun Energy, LLC.

1.3 **REGISTERED OFFICE AND AGENT.** The location of the registered office of the Company shall be: 4000 West 4035 South, Deseret UT 84624.

1.4 **TERM.** The Company shall continue for a period of 99 years unless sooner dissolved by:

(a) Members whose capital interest as defined in Article 2.2 exceeds 50 percent vote for dissolution; or (b) Any event which makes it unlawful for the business of the Company to be carried on by the Members; or
(c) The death, resignation, expulsion, bankruptcy, retirement of a Member or the occurrence of any other event that terminates the continued membership of a Member of the Company; or
(d) Any other event causing a dissolution of a Limited Liability Company under the laws of the State of Utah.

1.5 **CONTINUANCE OF COMPANY.** Notwithstanding the provisions of ARTICLE 1.4, in the event of an occurrence described in ARTICLE 1.4(c), if there are at least two remaining Members, said remaining Members shall have the right to continue the business of the Company. Such right can be exercised only by the unanimous vote of the remaining Members within ninety (90) days after the occurrence of an event described in ARTICLE 1.4(c). If not so exercised, the right of the Members to continue the business of the Company shall expire.

1.6 **BUSINESS PURPOSE.** The purpose of the Company is to engage in any lawful act or activity for which a Limited Liability Company may be formed under the Limited Liability statutes of the State of Utah.

1.7 **PRINCIPAL PLACE OF BUSINESS.** The location of the principal place of business of the Company shall be: 4000 West 4035 South, Deseret, UT 84624 or at such other place as the Managers from time to time select.

1.8 **THE MEMBERS.** The name and place of residence of the initial sole member is stated above.

1.9 **ADMISSION OF ADDITIONAL MEMBERS.** Except as otherwise expressly provided in the Agreement, no additional members may be admitted to the Company through issuance by the company of a new interest in the Company without the prior unanimous written consent of the Members.

ARTICLE 2
Capital Contributions

2.1 **INITIAL CONTRIBUTIONS.** The Member initially shall contribute to the Company capital in the amount of $1,000.00 in cash.

2.2 **ADDITIONAL CONTRIBUTIONS.** Except as provided in ARTICLE 6.2, no Member shall be obligated to make any additional contribution to the Company's capital.

ARTICLE 3
Profits, Losses and Distributions

3.1 **PROFITS/LOSSES.** For financial accounting and tax purposes the Company's net profits or net losses shall be determined on an annual basis and shall be allocated to the Members in proportion to each Member's relative capital interest in the Company as set forth in Exhibit 2 as amended from time to time in accordance with Treasury Regulation 1.704-1.

3.2 **DISTRIBUTIONS.** The Members shall determine and distribute available funds annually or at more frequent intervals as they see fit. Available funds, as referred to herein, shall mean the net cash of the Company available after appropriate provision for expenses and liabilities, as determined by the Managers. Distributions in liquidation of the Company or in liquidation of a Member's interest shall be made in accordance with the positive capital account balances pursuant to Treasury Regulation 1.704-l(b)(2)(ii)(b)(2). To the extent a Member shall have a negative capital account balance, there shall be a qualified income offset, as set forth in Treasury Regulation 1.704-l(b)(2)(ii)(d).

ARTICLE 4
Management

4.1 **MANAGEMENT OF THE BUSINESS.** The name and place of residence of the initial Manager is stated above. By a vote of the Members holding a majority of the capital interests in the Company, The Members shall elect so many Managers as the Members determine, from time to time, but no fewer than one, with one Manager elected by the Members as Chief Executive Manager. The initial Manager hereby acknowledges and agrees that his election and appointment as Manager by the Member or Members, is at the will of the Member or Members and that his election and appointment may be terminated at any time, by a majority vote of the Members, with or without cause and without prior notice. The Member also hereby acknowledges that the Manager may likewise terminate his election and appointment as Manager at any time, with or without cause, and without prior notice.

4.2 **MEMBERS.** The liability of the Members shall be limited as provided under the laws of the Utah Limited Liability statutes. Members that are not Managers shall take no part whatever in the control, management, direction, or operation of the Company's affairs and shall have no power to bind the Company. The Managers may from time to time seek advice from the Members, but they need not accept such advice, and at all times the Managers shall have the exclusive right to control and manage the Company. No Member shall be an agent of any other Member of the Company solely by reason of being a Member.

4.3 **POWERS OF MANAGERS.** The Managers are authorized on the Company's behalf to make all decisions as to (a) the sale, development lease or other disposition of the Company's assets; (b) the purchase or other acquisition of other assets of all kinds; (c) the management of all or any part of the Company's assets; (d) the borrowing of money and the granting of security interests in the Company's assets; (e) the pre-payment, refinancing or extension of any loan affecting the Company's assets; (f) the compromise or release of any of the Company's claims or debts; and, (g) the employment of persons, firms or corporations for the operation and management of the company's business. In the exercise of their management powers, the Managers are authorized to execute and deliver (a) all contracts, conveyances,

assignments leases, sub-leases, franchise agreements, licensing agreements, management contracts and maintenance contracts covering or affecting the Company's assets; (b) all checks, drafts and other orders for the payment of the Company's funds; (c) all promissory notes, loans, security agreements and other similar documents; and, (d) all other instruments of any other kind relating to the Company's affairs, whether like or unlike the foregoing.

4.4 **CHIEF EXECUTIVE MANAGER.** The Chief Executive Manager shall have primary responsibility for managing the operations of the Company and for effectuating the decisions of the Managers.

4.5 **NOMINEE.** Title to the Company's assets shall be held in the Company's name or in the name of any nominee that the Managers may designate. The Managers shall have power to enter into a nominee agreement with any such person, and such agreement may contain provisions indemnifying the nominee, except for his willful misconduct.

4.6 **COMPANY INFORMATION.** Upon request, the Managers shall supply to any member information regarding the Company or its activities. Each Member or his authorized representative shall have access to and may inspect and copy all books, records and materials in the Manager's possession regarding the Company or its activities. The exercise of the rights contained in this ARTICLE 4.6 shall be at the requesting Member's expense.

4.7 **EXCULPATION.** Any act or omission of the Managers, the effect of which may cause or result in loss or damage to the Company or the Members if done in good faith to promote the best interests of the Company, shall not subject the Managers to any liability to the Members.

4.8 **INDEMNIFICATION.** The Company shall indemnify any person who was or is a party defendant or is threatened to be made a party defendant, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative (other than an action by or in the right of the Company) by reason of the fact that he is or was a Member of the Company, Manager, employee or agent of the Company, or is or was serving at the request of the Company, for instant expenses (including attorney's fees), judgments, fines, and amounts paid in settlement actually and reasonably incurred in connection with such action, suit or proceeding if the Members determine that he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interest of the Company, and with respect to any criminal action proceeding, has no reasonable cause to believe his/her conduct was unlawful. The termination of any action, suit, or proceeding by judgment, order, settlement, conviction, or upon a plea of "no lo Contendere" or its equivalent, shall not in itself create a presumption that the person did or did not act in good faith and in a manner which he reasonably believed to be in the best interest of the Company, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his/her conduct was lawful.

4.9 **RECORDS.** The Managers shall cause the Company to keep at its principal place of business the following:

(a) a current list in alphabetical order of the full name and the last known street address of each Member;
(b) a copy of the Certificate of Formation and the Company Operating Agreement and all amendments;
(c) copies of the Company's federal, state and local income tax
returns and reports, if any, for the three most recent years;
(d) copies of any financial statements of the limited liability company for the three most recent years.

ARTICLE 5
Compensation

5.1 **MANAGEMENT FEE.** Any Manager rendering services to the Company may receive compensation commensurate with the value of such services as the Member or Members and the Manager may agree from time to time in writing.

5.2 **REIMBURSEMENT.** The Company shall reimburse the Managers or Members for all direct out-of-pocket expenses incurred by them in managing the Company.

ARTICLE 6
Bookkeeping

6.1 **BOOKS.** The Managers shall maintain complete and accurate books of account of the Company's affairs at the Company's principal place of business. Such books shall be kept on such method of accounting as the Managers shall select. The company's accounting period shall be the calendar year.

6.2 **MEMBER'S ACCOUNTS.** The Managers shall maintain separate capital and distribution accounts for each member. Each member's capital account shall be determined and maintained in the manner set forth in Treasury Regulation 1.704-l(b)(2)(iv) and shall consist of his initial capital contribution increased by:

(a) any additional capital contribution made by him/her;
(b) credit balances transferred from his distribution account to his capital account;
and decreased by:
(a) distributions to him/her in reduction of Company capital;
(b) the Member's share of Company losses if charged to his/her capital account.

6.3 **REPORTS.** The Managers shall close the books of account after the close of each calendar year, and shall prepare and send to each member a statement of such Member's distributive share of income and expense for income tax reporting purposes.

ARTICLE 7
Transfers

7.1 **ASSIGNMENT.** If at any time a Member proposes to sell, assign or otherwise dispose of all or any part of his interest in the Company, such Member shall first make a written offer to sell such interest to the other Members at a price determined by mutual agreement. If such other Members decline or fail to elect such interest within thirty (30) days, and if the sale or assignment is made and the Members fail to approve this sale or assignment unanimously then, pursuant to the Utah Limited Liability statutes, the purchaser or assignee shall have no right to participate in the management of the business and affairs of the Company. The purchaser or assignee shall only be entitled to receive the share of the profits or other compensation by way of income and the return of contributions to which that Member would otherwise be entitled.

This Agreement entered into effective the date stated above.

MEMBER

SOLSTICE ENTERPRISES, INC.

LaGrand T. Johnson, Director

MANAGER

NELDON P. JOHNSON

Neldon P. Johnson

SHAREHOLDER AGREEMENT FOR SOLSTICE ENTERPRISES INC.

This Shareholder Agreement, hereinafter after referred to as the AAgreement@, is entered into effective the 1 day of Feb, 2014, hereinafter referred to as the AEffective Date@, by and between Randale P. Johnson, an individual residing in Utah County, State of Utah; LaGrand T. Johnson, an individual residing in Utah County, State of Utah; Neldon P. Johnson, an individual residing in Millard County, State of Utah; Randale P. Johnson, LaGrand T. Johnson and Neldon P. Johnson being referred to hereafter collectively as the AShareholders@; and Solstice Enterprises Inc., a Nevis corporation, the address of which is #6 Solomon's Arcade, Main Street, Charleston, Nevis, hereinafter referred to as the ACompany@, the Shareholders and the Company being hereinafter referred to collectively as the AParties@.

BACKGROUND

1. The Company was incorporated under the Nevis Business Corporation Ordinance 1984 on or about the 8th day of March, 2011.

2. As of the Effective Date, the following Shareholders constitute all of the Shareholders of the Company:

	Shareholder	Number of Shares
a.	Randale P. Johnson	5,000
b.	LaGrand T. Johnson	5,000
d.	Neldon P. Johnson	5,000
	TOTAL NUMBER OF SHARES	15,000

3. LaGrand T. Johnson was the sole director of the Company immediately prior to the execution of this Agreement by the Parties.

4. The Shareholders now desire to enter into an agreement, with the acknowledgment and consent of the Company, pursuant to the Nevis Business Corporation Ordinance 1984 as amended, providing for the management, operation and control of the Company in the manner and in accordance with the terms agreed by the Shareholders as set forth in this Agreement.

AGREEMENT

Now, therefore, in consideration of the mutual promises, covenants, agreements and other consideration set forth herein, the Parties hereby agree as follows:

1. **Present Shareholders - Parties**. The Parties hereby acknowledge and agree that the outstanding fifteen thousand (15,000) shares of stock of the Company are owned by the Parties as stated above, and that the Parties constitute all of the persons and entities who are shareholders of the Company as of the Effective Date of this Agreement.

2. **General Scope of the Agreement**. The Shareholders agree that notwithstanding any provisions of the Articles of Incorporation or Bylaws of the Company which may be deemed to be inconsistent therewith one or more term or provision of this Agreement, pursuant to although Part VI, §72 of the Nevis Business Corporation Ordinance 1984 as amended, the Shareholders hereby agree that the management, operation, and control of the Company shall be as agreed by the Shareholders, and acknowledged by the Company, as set forth in this Agreement.

3. **Term of the Agreement.** The Term of this Agreement shall be twenty (20) years from the Effective Date unless this Agreement is sooner terminated due to one of the following events:

A. If the Term of this Agreement is deemed to have a limit to a term of less than twenty (20) years pursuant to the Nevis Business Corporation Ordinance 1984 as amended, then the term of this Agreement shall be deemed reduced to the applicable time limit from the Effective Date as provided by Nevis law.

B. This Agreement shall be immediately terminated upon the resignation, death, or judicial declaration of mental incapacity of Neldon P. Johnson, or Neldon P.

Johnson is otherwise unable to continue to serve as the sole director of the Company as provided by this Agreement.

C. This Agreement shall be immediately terminated upon the transfer, whether voluntary or involuntary, of any of the shares of Neldon P. Johnson in the Company, or any interest or voting rights therein, to any other person or entity.

4. **Sole Director of the Company.** The Shareholders acknowledge that LaGrand T. Johnson was the sole Director of the Company immediately prior to the execution of this Agreement. LaGrand T. Johnson does hereby resign his position as a Director, namely the sole Director, of the Company. The Shareholders agree that, for the Term of this Agreement, Neldon P. Johnson is hereby appointed the sole Director of the Company as of the Effective Date of this Agreement, and shall continue to serve as the sole Director of the Company through and including the Term of this Agreement, notwithstanding any provisions of the Articles of Incorporation or the Bylaws of the Company to the contrary. The Shareholders acknowledge and agree that although Part VI, §46 of the Nevis Business Corporation Ordinance 1984 as amended requires no less than three directors for a corporation having three or more shareholders, since all of the shares not owned by Neldon P. Johnson are being transferred to Neldon P. Johnson as the voting trustee for all of those shares, pursuant to Part VI, §71 of the Nevis Business Corporation Ordinance 1984 as amended, the Company is, therefore, required to have only one Director.

5. **Officers of the Company.** The Shareholders acknowledge that LaGrand T. Johnson was the sole Officer, namely the President, Secretary and Treasurer, of the Company immediately prior to the execution of this Agreement. LaGrand T. Johnson does hereby resign his position as President, Secretary and Treasurer of the Company. The Shareholders agree that, for

the entire Term of this Agreement, Neldon P. Johnson shall serve as the President, Secretary and Treasurer of the Company and shall have all of the authority, powers and responsibilities of the offices of President, Secretary and Treasurer, as set forth in the Bylaws of the Company or applicable Nevis law. All other officers shall be appointed or elected as provided by the Bylaws.

6. **Voting Trust Agreement.** The Shareholders and the Company acknowledge that the Shareholders have expressed an intent to enter into a Voting Trust Agreement subsequent to entering into this Agreement, whereby all of the shares of the Shareholders Randale P. Johnson and LaGrand T. Johnson, in the Company as identified above, will be conveyed to a trust, to be controlled by the trustee named in the Voting Trust Agreement, namely Neldon P. Johnson, in accordance with the terms and provisions of the Voting Trust Agreement, which Voting Trust Agreement shall be subject to the terms and provisions of this Agreement.

7. **Governing Law**. This Agreement shall be construed in accordance with the laws of Nevis.

8. **Entire Agreement**. This is the entire Agreement between the Parties and this Agreement shall not be amended except by a written amendment signed by each of the Parties.

9. **Further Assurances**. The Parties agree to execute whatever documents and to take whatever action may be required from time to time to effectuate the terms and provisions of this Agreement.

10. **Successors and Assigns**. This Agreement shall inure to the benefit of and be binding upon the successors, administrators, executors and assigns of the Parties hereto.

11. **Attorney=s Fees**. In the event of the breach of this Agreement by any of the Parties, the injured party shall be entitled to recover its costs and attorney fees incurred in enforcing

this Agreement and in pursuing appropriate remedies at law or equity.

12. **No Presumption Against Drafting Party**. This Agreement has been drafted by all Parties and is not to be construed in favor of or against any Party, regardless of which Party drafted or participated in the drafting of its terms.

13. **Counterparts**. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

14. **Severability**. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

SHAREHOLDERS

Randale P. Johnson

LaGrand T. Johnson

Neldon P. Johnson

The foregoing Agreement is acknowledged and consented to by Solstice Enterprises Inc.

Solstice Enterprises Inc.

By: LaGrand T. Johnson
Its: President and Sole Director

Neldon P. Johnson
Its: President Elect and Sole Director Elect

VOTING TRUST AGREEMENT FOR SOLSTICE ENTERPRISES INC.

This Voting Trust Agreement, hereinafter referred to as the AAgreement@, is hereby made and entered into, pursuant to Part VI, §71 of the Nevis Business Corporation Ordinance 1984 as amended, this 1 day of Feb, 2014, hereinafter referred to as the AEffective Date@, by and between Randale P. Johnson, an individual residing in Utah County, State of Utah; LaGrand T. Johnson, an individual residing in Utah County, State of Utah; Neldon P. Johnson, an individual residing in Millard County, State of Utah; Randale P. Johnson, LaGrand T. Johnson, and Neldon P. Johnson being referred to hereafter collectively as the AShareholders@; and Solstice Enterprises Inc., a Nevis corporation, the address of which is #6 Solomon's Arcade, Main Street, Charleston, Nevis, hereinafter referred to as the ACompany@; and Neldon P. Johnson, an individual residing at 4000 W 4035 S Deseret UT 84624, hereinafter referred to as the ATrustee@; the Shareholders, the Company, and the Trustee being hereinafter referred to collectively as the AParties@.

BACKGROUND

1. The Company was incorporated under the Nevis Business Corporation Ordinance 1984 on or about the 8th day of March, 2011.

2. As of the Effective Date, the following Shareholders constitute all of the Shareholders of the Company:

	Shareholder	Number of Shares
a.	Randale P. Johnson	5,000
c.	LaGrand T. Johnson	5,000
d.	Neldon P. Johnson	5,000
	TOTAL NUMBER OF SHARES	15,000

3. Although Shareholders have played an essential role in the creation and

development of the Company to date, Shareholders do not intend to take an active part in the Company=s management hereafter, and Shareholders desire that their interest in the Company be protected, which the Shareholders intend to accomplish by entering into this Agreement.

4. The Parties have previously entered into a Shareholders Agreement.

5. The Parties now desire to enter into this Agreement.

AGREEMENT

In consideration of the mutual promises, covenants and agreements set forth in this Agreement, the parties hereto agree as follows:

1. **Present Share Ownership.** Shareholders acknowledge and agree that as of the Effective Date of this Agreement the shares of stock of the Company held by them are as follows:

	Shareholder	Number of Shares
a.	Randale P. Johnson	5,000
c.	LaGrand T. Johnson	5,000
d.	Neldon P. Johnson	5,000
	TOTAL NUMBER OF SHARES	15,000

2. **Transfer of Stock to Trustees.** Shareholders shall assign and deliver their stock certificates to the Trustee who shall cause the stock represented by the certificates to be transferred to him as voting trustee on the books of the Company.

3. **Term of Trust.** The voting trust created by this Agreement shall continue for ten (10) years from the date of this Agreement.

4. **Trustee=s Powers.** During the term of this Agreement, Trustee shall have the exclusive right to vote the stock transferred pursuant to this Agreement, or to give written consents

in lieu of voting the stock for any purpose, in person or by proxy, at any and all meetings of Shareholders of the Company or any proceedings at which the vote or written consent of Shareholders may be required or authorized by law.

5. **Trust Certificate.** Trustee will issue and deliver to each of the Shareholders (or Shareholder nominee) certificates for the number of shares transferred by him to the Trustee, in form substantially as follows:

TRUST CERTIFICATE

NO. [cert. number]: [number of shares] SHARES

The undersigned, voting Trustee of the stock of Solstice Enterprises Inc., the ACompany@under an Agreement made [date], having received certain shares of the stock of the Company, pursuant to the Agreement, which Agreement the holder of this Certificate by accepting it, ratifies and adopts, certified that [name] will be entitled to receive the certificate for [number] fully paid shares of the Company on the expiration of the Voting Trust Agreement and, in the meantime, shall be entitled to receive payments equal to any dividends that may be collected by Trustee upon a like number of shares held by him under the terms of the trust agreement.

This Certificate is transferable only on the books of Trustee, by the registered holder in person or by his authorized attorney. By accepting this Certificate, the holder consents that Trustee may treat the registered holder as the true owner for all purposes, except the delivery of stock certificates, which delivery shall not be made without the surrender of this Certificate.

IN WITNESS WHEREOF, Trustee has caused this Certificate to be executed in his name and has affixed his hand and seal, this [date].

6. **Expiration of Term.** At the expiration of the term of the trust, Trustee will, upon surrender of the trust certificates, deliver to the holders of the certificates, shares of stock of the Company equivalent in an amount to the shares represented by the trust certificates surrendered.

7. **Limitation of Trustee=s Liability.** Trustee will use his best judgment in voting the stock held by him, but assumes no responsibility for the consequence of any vote cast, or consent given by him in good faith, and in the absence of gross negligence.

8. **Death, Resignation, Incapacity of Trustee.** Upon the death, resignation, or inability to act of Trustee, this Agreement and the Trust created thereby shall terminate. The Trustee shall not be required to give bond or other security for the faithful performance of his duties. The Trustee may resign by submitting his resignation in writing to the secretary of the Company and the Shareholders at the addresses stated above. The resignation shall become effective upon the date of receipt by the Company.

9. **Shareholders= Agreement**. The Parties to this Agreement acknowledge the existence of a Shareholders= Agreement which has been previously executed by the Parties, and the Parties hereby acknowledge and agree that this Agreement and the shares of stock of the Company which are subject to this Agreement are subject to the terms and provisions of the previously executed Shareholders= Agreement.

10. **Governing Law**. This Agreement shall be construed in accordance with the laws of Nevis.

11. **Entire Agreement**. This is the entire Agreement between the Parties and this

Agreement shall not be amended except by a written amendment signed by each of the Parties.

12. **Further Assurances**. The Parties agree to execute whatever documents and to take whatever action may be required from time to time to effectuate the terms and provisions of this Agreement.

13. **Successors and Assigns**. This Agreement shall inure to the benefit of and be binding upon the successors, administrators, executors and assigns of the Parties hereto.

14. **Attorney=s Fees**. In the event of the breach of this Agreement by any of the Parties, the injured party shall be entitled to recover its costs and attorney fees incurred in enforcing this Agreement and in pursuing appropriate remedies at law or equity.

15. **No Presumption Against Drafting Party**. This Agreement has been drafted by all Parties and is not to be construed in favor of or against any Party, regardless of which Party drafted or participated in the drafting of its terms.

16. **Counterparts**. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together will constitute one and the same instrument.

17. **Severability**. Any term or provision of this Agreement that is invalid or unenforceable in any situation in any jurisdiction shall not affect the validity or enforceability of the remaining terms and provisions hereof or the validity or enforceability of the offending term or provision in any other situation or in any other jurisdiction.

Executed the Effective Date stated above.

SHAREHOLDERS

Randale P. Johnson

LaGrand T. Johnson

Neldon P. Johnson

TRUSTEE

Neldon P. Johnson

ACKNOWLEDGMENT AND CONSENT

The Company, Solstice Enterprises Inc., hereby acknowledges receipt of a copy of the foregoing Voting and Trust Agreement and hereby acknowledges its consent to the foregoing Voting and Trust Agreement, to the extent that such consent is required.

Solstice Enterprises Inc.

By: LaGrand T. Johnson
Its: President and Sole Director

Neldon P. Johnson
Its: President Elect and Sole Director Elect

NOTICE OF RESIGNATION OF NELDON P. JOHNSON AS TRUSTEE OF THE VOTING TRUST OF SOLSTICE ENTERPRISES, INC. AND TERMINATION OF VOTING TRUST

Neldon P. Johnson hereby provides notice to Solstice Enterprises, Inc., a Nevis Corporation incorporated under the Nevis Business Corporation Ordinance 1984 on or about the 8th day of March, 2011, and to its shareholders, Randale P. Johnson, LaGrand T. Johnson, and Neldon P. Johnson, that, pursuant to paragraph 8 of the Voting Trust Agreement For Solstice Enterprises, Inc., entered into by the shareholders on or about February 1, 2014, he does hereby resign as the Trustee of the Voting Trust, and that, by virtue of his resignation, the Voting Trust is hereby terminated.

Dated this 16 day of July, 2018.

Neldon P. Johnson

NOTICE OF RESIGNATION OF NELDON P. JOHNSON AS SOLE DIRECTOR, PRESIDENT, SECRETARY AND TREASURER OF SOLSTICE ENTERPRISES, INC. AND TERMINATION OF SHAREHOLDER AGREEMENT

Neldon P. Johnson hereby provides notice to Solstice Enterprises, Inc., a Nevis Corporation incorporated under the Nevis Business Corporation Ordinance 1984 on or about the 8th day of March, 2011, and to its shareholders, Randale P. Johnson, LaGrand T. Johnson, and Neldon P. Johnson, that, pursuant to paragraph 3.B. of the Shareholder Agreement entered into on or about February 1, 2014, he does hereby resign as the Sole Director of Solstice Enterprises, Inc., and that, by virtue of his resignation as Sole Director, pursuant to paragraph 3.B. of the Shareholder Agreement, the Shareholder Agreement is hereby terminated. Neldon P. Johnson further hereby provides notice that he does hereby resign as President, Secretary and Treasurer of Solstice Enterprises, Inc.

Dated this 16 day of July, 2018.

Neldon P. Johnson

From: Mike Lehr
To: "Rog Ham"
Subject: RE: United States v. RaPower-3, IAS, et al. Subpoena Response
Date: Tuesday, March 12, 2019 9:35:00 AM
Attachments: motion to appoint Counsel 2 (JAJ0016).DOC.pdf

Mr. Hamblin:

Thank you for your responses. I have attached a motion to include affiliates and subsidiaries in the Receivership Estate which was filed on March 1, 2019. The motion requests that the N.P. Johnson Limited Partnership and DCL-16A be included in the Receivership Estate. If you have any objection to the motion it should be filed by March 21.

Thanks,
Mike

Mike Lehr | Attorney | **Parr Brown Gee & Loveless** | A Professional Corporation
101 South 200 East, Suite 700 | Salt Lake City, Utah 84111
T: 801.532.7840 | F: 801.532.7750 | mlehr@parrbrown.com | www.parrbrown.com

From: Rog Ham [mailto:4rogham@gmail.com]
Sent: Saturday, March 9, 2019 5:10 PM
To: Mike Lehr <mlehr@parrbrown.com>
Subject: Re: United States v. RaPower-3, IAS, et al. Subpoena Response

On Thu, Feb 28, 2019 at 5:24 PM Rog Ham <4rogham@gmail.com> wrote:

> I will send you your answers sometime next week before March 11th 2019
> Roger Hamblin

On Mon, Feb 25, 2019 at 7:32 AM Mike Lehr <mlehr@parrbrown.com> wrote:

> Mr. Hamblin:
>
> Please see the attached letter. Let me know if you have any questions.
>
> **Mike Lehr** | Attorney | **Parr Brown Gee & Loveless** | A Professional Corporation
> 101 South 200 East, Suite 700 | Salt Lake City, Utah 84111

T: 801.532.7840 | F: 801.532.7750 | mlehr@parrbrown.com | www.parrbrown.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; and NELDON JOHNSON, Defendants.	**NOTICE RE: COMPLIANCE AND ADVERSE INFERENCES** Case No. 2:15-cv-00828-DN District Judge David Nuffer

During the hearing on April 26, 2019, R. Wayne Klein, the court-appointed receiver ("Receiver") in this case, explained that the receivership process consists of five stages. The first stage involves finding and gathering information and records about receivership defendants and their finances. The second stage involves investigating transactions that may be related to receivership assets. The third stage involves commencing legal proceedings to recover receivership assets. The fourth stage involves converting receivership assets to cash. And the fifth stage involves distributing receivership assets to intended beneficiaries.

Currently, the receivership in this case is in the first stage of this process involving finding, gathering, and analyzing information, data, and records before investigating transactions related to receivership assets and commencing legal proceedings. The deadline for commencing legal proceedings is approaching.

The filing of the United States' motion to show cause against Defendants R. Gregory Shepard and Neldon Johnson and Respondents Glenda Johnson, LaGrand Johnson, and Randale

elm

Johnson[1] provoked efforts to resolve the disclosure and production issues that are impeding the receivership process. Accordingly, at this point, even after the extensive April 26 and May 3, 2019 evidentiary hearings, the receivership is still in the first stage of the receivership process, and the issue of contempt remains open.

The recent production of documents and the admission that more documents are forthcoming have resulted in orders requiring additional productions.[2] While there has been no adjudication, Defendants and Respondents appear to have failed to participate in the receivership process in good faith and have withheld relevant information, data, records, and property. If this continues, then Defendants and Respondents will incur unfavorable consequences, including the adoption of negative inferences and conclusions adverse to their positions.

Defendants and Respondents are reminded that Defendants' lack of financial data at trial had severe consequences. As stated in the Findings of Fact and Conclusions of Law:

> . . . Defendants bear the "risk of uncertainty in calculating net profit." "'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 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.'" 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."
>
> 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. . . .[3]

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[1] United States' Motion to Show Cause Why Neldon Johnson, R. Gregory Shepard, Glenda Johnson, LaGrand Johnson, and Randale Johnson Should Not Be Held in Civil Contempt of Court for Violating the Receivership Order, docket no. 559, filed January 29, 2019.

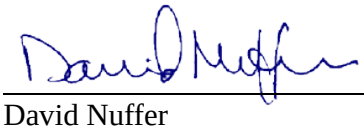
[2] Minute Entry, docket no. 634, filed May 3, 2019.

[3] Findings of Fact and Conclusions of Law, at 125-126 (citations omitted), docket no. 467, filed October 4, 2018.

Failure to produce corporate, financial, and transactional records requires inferences and conclusions adverse to Defendants and Respondents. Failure to produce the computer that held the QuickBooks datafile, or to produce the QuickBooks datafile, will also result in adverse inferences and conclusions. Further, Defendants need to recognize that *failure to protect* material information—including data, processing data, and equipment, such as the computer—is spoliation and punishable by various sanctions, including adverse inferences, striking defenses, and barring claims.

Signed May 6, 2019.

BY THE COURT:



David Nuffer
United States District Judge

CERTIFICATE OF SERVICE

I, Michael S. Lehr, hereby certify that on the 13th day of November, 2019, the foregoing was filed with the Court using its authorized electronic case filling portal and a copy of the foregoing was served to the following counsel of record via separate email:

Clint A. Carpenter clint.a.carpenter@usdoj.gov
Joan I. Oppenheimer joan.i.oppenheimer@usdoj.gov
Attorneys for USA

Denver C. Snuffer denversnuffer@gmail.com
Steven R. Paul spaul@nsdplaw.com
Attorneys for Appellants

I hereby certify that with respect to the following:

(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 electronic submission was scanned for viruses with the most recent version of Webroot scanning program (up to date version), and is free of viruses.

Date: November 13, 2019

/s/ Michael S. Lehr