CLOSING ARGUMENT:

In this case, the government is asking the Court to engage in the worst form of judicial activism. They are asking you to decide this case in direct opposition to Congressional intent. They invite the judiciary to ignore the legislature.

The government claims the RaPower sale of lenses lacks economic substance. That claim is untrue. They have provided no proof of this apart from the opinion of Dr. Mancini. Dr. Mancini admitted he was wrong about the Stirling Engine's economic viability. (TR 178:2-22.)

All the other government witnesses testified they believed their investment was and is economically viable. For example, Preston Olsen testified: "the technology seems borderland revolutionary. I think it is going to be incredibly profitable unless they're put out of business by the government." (TR P. **1154**.) There is no proof the lens sales lack economic viability.

But even if they do, it does not matter.

Congress has explained what it intended. Congress published the "*Technical Explanation Of The Revenue Provisions Of 'The Reconciliation Act Of 2010,' As Amended, In Combination With The 'Patient Protection And Affordable Care Act'*".[1]
Congress explained what both Houses of Congress intended. They explained specifically that § 48 was intended to stimulate investment in solar energy

[1] The Joint Committee on Taxation is a nonpartisan committee of the United States Congress, originally established under the Revenue Act of 1926. The purpose of the document is intended to discuss aspects of the legislation enacted by the Affordable Care Act—one of those aspects are tax credits (Sec 36B and 45R). The Congressional experienced professional staff of the Joint Committee of Taxation (Ph.D economists, attorneys, and accountants, who assist Members of the majority and minority parties in both houses of Congress on tax legislation) wrote the analysis to explain amendments to the Affordable Care Act and declared that the economic substance doctrine doesn't apply to energy credit transactions.

without any requirement that the investment be profitable apart from the tax benefits.
A profit motive or any other economic substance to the investment is NOT required. The Joint Committee on Taxation's summary of the Act explains that § 7701(o) is not intended to target tax credits for §48 investments. Congress explained:

> **If the realization of the tax benefits of a transaction is consistent with the Congressional purpose or plan that the tax benefits were designed by Congress to effectuate, it is not intended that such tax benefits be disallowed. … Thus, for example, it is not intended that a tax credit (e.g., section 42 (low-income housing credit), section 45 (production tax credit), section 45D (new markets tax credit), section 47 (rehabilitation credit), section 48 (energy credit), etc.) be disallowed in a transaction pursuant to which, in form and substance, a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage.**[2]

Consistent with this Congressional intent, the 9th Circuit Court reversed a decision denying tax benefits for investment in solar energy that lacked economic substance. In *Sacks v. Commissioner*, T.C. Memo. 1992-596, rev'd, 69 F.3d 982 (9th Cir. 1995), the Tax Court disallowed energy credits attributable to an investment in solar water heaters due to a lack of economic substance. The Ninth Circuit reversed that holding and **explained:**

> **"Absence of pre-tax profitability does not show whether the transaction had economic substance beyond the creation of tax benefits…where Congress has purposely used tax incentives to change investors' conduct. Where a transaction has economic**

[2] Page 152, Footnote 344.

> **substance, it does not become a sham merely because it is likely to be unprofitable on a pre-tax basis.… If the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative. A tax advantage such as Congress awarded for alternative energy investments is intended to induce investments which otherwise would not have been made."**

The **REASON** for § 48 was explained by Dr. Mancini:

> Q. Have ***any*** of the solar energy technologies that you're aware of beat coal in efficiency?
>
> A. I don't think so. I'd be surprised if they had. (TR. **188**:16-18.)

Because coal is far more efficient at producing energy, solar energy will NEVER be developed *without tax incentives*. **This** is the reason Congress decided to utilize the Tax Code to add economic incentives so as to drive solar energy experimentation.

Without such tax incentives, the Congressional policy to drive investment money into the presently non-commercially viable solar energy development would not be achieved. Witness Birrell said the Tax Code sections at issue here were intended to result in investment in solar energy. (TR P. **702**.)

When the government rested its case we moved to dismiss the case as a matter of law under Rule 52c, and later moved again to dismiss under Rule 52 (ECF Doc **401**) as a matter of law.

You deferred ruling on both of these motions until the conclusion of all the evidence. You now have all the evidence. We ask that you now grant both of those motions. We incorporate the arguments in those prior motions into this closing argument, and will not repeat them because they are already in the record.

Defendants have no obligation to disprove there is a "tax scheme." The government has the burden to prove there is one. They have not met that

burden. They hurl accusations and insults at Defendants, but have not proven a case:

During discovery Defendants attempted to have the government explain their theory of a tax code violation. Defendants were not allowed to take a deposition of an IRS representative. The government asked for a protective order, to prevent that discovery. (ECF 170.) Defendants did not want to depose trial counsel or invade any privilege, but this Court granted a Protective Order to prevent discovery of the government's "evidence". (ECF 195, 196). If we had been permitted discovery, this case may never have reached trial.

Throughout the trial, the government's counsel objected under Rule 37(c). (See Trial Tr. pp. **1183**:17-18, **1825**:14-15, 1835:24, **1842**:8, 1866:10-11, **1925**:9, **1974**:11, **1989**:1, **1992**:14, **2036**:7-8, **2066**:17-18, among other places). The government's objection was based on excluding evidence not disclosed in discovery or initial disclosures. (See Trial Tr. P. **1836**:1-3.) The Court sustained this objection.

Defendants also objected to the government's witnesses who were not disclosed in discovery or initial disclosures, nor identified until the pretrial witness list. (ECF 296). The Court denied Defendants' objection and the government was allowed to call these witnesses, despite the failure to comply with Rule 37. (ECF 342; see also TR p. 823-851 (testimony of Jo Anna Perez and Amanda Reinken).)

Defendants have been required to respond to surprise testimony and exhibits throughout the trial, even though Defendants attempted to obtain this information during discovery, and despite all these surprises and tactical

disadvantages imposed on them, nothing in the government's case in chief has clarified the alleged "scheme".

The surprise government witness Roulhac was not disclosed in the Initial Disclosures, nor identified in response to any discovery request, nor made available during discovery. He testified over our objections. But he added nothing to the case:
-He could not explain and did not understand the numbers he put into a spreadsheet.
-He did not compare the spreadsheet numbers to any bank records. (TR 800: 17-24)
-He did not explain how the spreadsheet related in any way to banking information or income to any Defendant.
-He did not verify any of the numbers represented actual receipts. (TR 806:15-17; 812:24-813:1)
-He could not verify any quantity of lenses actually sold. (TR 813:2-4)
-He did not verify there were any actual lens purchases. (TR 806:18-20)
-He could not verify any number represented an actual receipt of payment for a lens purchase. (TR 811:10-12; 22-24; 813:5-7)
-He could not explain how terms were used in the database. (TR 822:6-8)
-The government did not call another witness to fix any of these deficiencies.

The surprise government witness Ms. Perez was not disclosed in the Initial Disclosures, nor identified in response to any discovery request, nor made available during discovery. She testified over our objections. But she added nothing to the case:
-She did not understand and could not explain the term “solar tax credit” used in her exhibit. (TR 840:18-21)
-She did not understand and could not explain the term “depreciation expense” used in her exhibit. (TR 840:22-25)
-She did not understand and could not explain the term “harm to the treasury” used in her exhibit. (TR 841:5-10
-She could not tell whether the depreciation numbers she used in her exhibit were related to solar lenses, or a computer, or any other depreciable item. (TR 842:20-843:10)
-She could not demonstrate that the claimed tax losses on her exhibit benefitted or added to any account of any of the Defendants. (TR 844:14-17; 845:15-19)

- She confirmed that none of the Defendants prepared any of the tax returns involved in her review. (TR 846:2-15)
-She could not point to any evidence that any of the taxpayers purchased RaPower3 lenses. (TR 847:1-5)

The surprise government witness Ms. Reinken was not disclosed in the Initial Disclosures, nor identified in response to any discovery request, nor made available during discovery. She testified over our objections. But she added nothing to the case:
-She was not a CPA. (TR 877:8-9)
-She had no training in tax law. (TR 877:10-11)
-She used a term "gross receipts" but included in that category anything and everything on bank statements, without tying amounts to lens sales. (TR 877:16-878:22)
-She did not use any available information on checks or deposit slips to attempt to identify lens sales. (TR 879:1-14)
-Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR 880:3-25)
-Her exhibits for RaPower and all the other Defendants may be titled "gross receipts" but none of them limit her total to lens sales. (Ex. 735-TR 881:11-16;Ex. 737-TR 881:25-882:6; Ex. 738-TR882:8-14; Ex. 739-TR 882:21-883:1; Ex. 740-TR 883:2-7.)
-She made no effort to isolate the total number by avoiding re-deposits or inter-account transfers. (TR 883:25-884:16)

The Court's emails yesterday show justified concerns about the evidence regarding "disgorgement." The government IS double-counting.

None of these witnesses, Rouhac, Perez and Reinken, should have been permitted to testify if the Court consistently applied the same standard *for* the Defendants as it did *against* the Defendants.

The government has provided a voluminous documentary case that primarily proves that Defendants have made public statements of their honest and justifiable beliefs about available tax benefits.

The fact Defendants made statements does not prove a claim. Defendants do not dispute making these statements.

They believe *there are* tax benefits available for purchasing RaPower-3 lenses, and have also consistently told purchasers to check with their own tax preparer to decide if they qualify. (See PLEX **5** at pg. 2; PLEX **14** at pg. 2; PLEX **20** at pg. 3; PLEX **27** at 1-3; PLEX **94**, at pg. 5; PLEX **95** at pg. 5; PLEX **119** at pgs. 1-2; PLEX **174** at pgs. 1-2; PLEX **511** at 1-2; PLEX **533** at pgs. 5-6; PLEX **620** at pg. 6, among others.)

We have set out in our prior motions the testimony and law related to "placed in service" requirements. Solar equipment can be placed in service by using it in research and development. (Mr. Birrell, TR P. **702**.) Technology does not have to be "operational or commercially viable before the taxpayer can apply for or receive the solar tax credit or depreciation." (TR **702**.)

The IRS has defined the term "placed in service" in Treasury Reg. 1.46-3(d)(1)(ii) to mean when it is "placed in a condition or state of readiness and availability for a specifically assigned function." (K&M letter, Exhibit **362** at page 12.) The threshold to qualify for "placed in service" is extremely low deliberately.

If equipment is "placed in service" it qualifies for depreciation. We have previously cited the testimony of Ms. Anderson (TR. P. **657**), Mr. Oveson (TR p. **344-345**), Mr. Jameson (TR P. **1315; 1321-1322**) and do not repeat that here.

Ms. Anderson testified: "[O]nce the equipment is placed in service, the member can then take advantage of the Section 179 deduction." (TR P. **656**.)

According to Ms. Anderson's testimony this does not mean the property must be in use, but only that it is available for use. (Ms. Anderson, TR P. **674**; Ex. **570**, Ex. **23**.)

Numerous copies of the "placed in service" letters are in evidence (PLEXs 103, 104, 105, 313, 321, 322, 327, 466, 534, etc). There is no evidence the representation is false, and certainly no evidence any Defendant knew or should have known the statements were false.

Witness Oveson said "placed in service" only required the equipment to be available and on site, like the lenses in this case, to qualify. (TR 344-345, 394). Witness Anderson similarly found the Code definition of "placed in service" only required the equipment be available for use. (TR 657). Witness Birrell testified equipment qualified as "placed in service" if used in research and development or marketing. (TR 702). Witness Jameson cited the Internal Revenue Code and explained if the lenses were available for use or used in research and development or used in marketing they qualify as "placed in service." (TR 1315, 1320-1321). Jameson visited the site and saw the lenses were indeed available for use and therefore "placed in service." (TR 1321-1322).

Defendants made no false statements about the lenses being placed in service.

The words “solar process heat” are used in §48 but not defined, nor clarified by any regulation. But “solar process heat” is not the same thing as “solar heat used in a process.” If solar energy is processed to concentrate heat, it is solar process heat. If it must be used thereafter in some other process, then the words used in the statute do not state that. The IRS needs to go back to Congress and change the law, if they want to change the requirement. These lenses concentrate “solar process heat.” They qualify.

The interplay between producing “solar process heat” and a tax credit under § 48 has been covered in the following testimony:

Dr. Mancini explained on direct examination:

> Q. Are you familiar, Dr. Mancini, with the concept called solar process heat?
> A. Yes.
> Q. Would you please describe it for the Court.
> A. **Solar process heat is basically a way of taking thermal energy that you collect and applying it to some other application, other than generating power**, **using the heat**. For example, a couple of the examples I'm familiar with are heat provided to a laundry, for example, to heat water up so that they wouldn't have to burn natural gas to do it. Or I actually worked on a project, when I was a professor, to heat some potash out in eastern New Mexico as part of a processing step.
> It's fairly low-grade energy. It's a difficult thing to do to find area to put collectors where they are going to be used, and of course you don't have thermal storage, so you're only operating when the sun shines. So process heat turned out to be not a very -- not a very useful way to use solar energy. (TR P. **105-106**.)

Then on cross-examination he added:

> Q. You gave me a definition of solar process heat. And I took notes. This was what I got from your testimony. Let's see if I got you right. **Solar process heat is using collected solar heat for some purpose other than power**. Is that how you understand the words solar process heat?
> A. Yeah. It's fundamentally for some process or some other use to do a useful activity.
> Q. **Would you agree with me that if you collect solar heat through Frensel lenses in order to do research and development that that is solar process heat**?
> …
> THE WITNESS: I don't know.
> …
> THE WITNESS: **I don't know the answer to that. I suppose if you were doing research and development and as part of the process**

> **were heating water for a site that could be considered process heat**. (TR P. **199-200**.)

The Court asked witness Richard Jameson about solar process heat and his testimony confirmed that because the lenses produce heat, they are clearly eligible for the energy credit under Internal Revenue Code §48. (TR P. **1314-1315**.)

The lenses do produce solar process heat as stated in §48. Dirty lenses on an array missing some panels at the Research and Development site produced 750° according to Dr. Mancini's testimony.

We have already argued the passive-vs-active issue and will not repeat it here.

Government bears burden to prove five elements: "The government must prove five elements to obtain an injunction under these statutes: (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct." ." *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at *6, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (citing I.R.C. § 7408(b)).

In the government's case in chief, they offered no evidence to identify what makes the energy tax program promoted by Defendants false or fraudulent as to any material matter.

The government only implies the "false or fraudulent" statements arise from telling customers they were in a trade or business; could deduct expenses against active income; and, were "at risk" for the full purchase price of each lens. (Doc. 334, p. 73).

The government has not shown that the energy tax credits promoted by Defendants are not available to qualifying taxpayers. There can be no doubt that a tax credit under 26 U.S.C.S §§ 46 or 48 is available to a qualifying taxpayer, or that one who qualifies for a tax credit under §48 can also claim a depreciation expense under 26 U.S.C.S. § 167. There is no evidence Defendants misrepresented the application or interpretation of those provisions. There is no rule or law that prevents Defendants from alerting the public to the existence of these tax code provisions. It is not a "scheme" for Defendants to consistently recommend purchasers consult with their own tax professional to determine if they qualify for the tax benefits.

The solar lenses purchased from RaPower by taxpayers exist. A solar lens is in evidence (DEX **1522**); a video of the solar lens field is in evidence (DEX **1500**). There is a warehouse full of lenses (TR. 1082 (Preston Olsen testimony); TR. 1321 (R. Jameson testimony); TR. 1549 (M. Shepard testimony) TR. 1049 (Lynette Williams).)

Because the representations by Defendants that the lenses (1) existed and (2) were placed in service at the time of sale, are true, there was no false or fraudulent statement and no tax scheme. The government has not shown any contrary evidence that the lenses do not exist nor are available for use; therefore, the Court must find **against** the government.

There is evidence the solar lenses qualify as solar energy property under Section 48 as "equipment which uses solar … **to provide solar process heat.**" (Emphasis added.) Dr. Mancini stated that the lenses concentrated solar energy to

produce at least 750°. (TR. 199). There is no place on earth where sunlight naturally generates 750°. To accomplish that requires significant solar energy concentration, which the Fresnel lenses RaPower sells have accomplished. This concentrated solar energy was then used in research and development of patented new concentrators, patented new heat exchangers, and in connection with a turbine engine. All of this meets the government expert witness' description of "solar process heat" –the term used in §48.

Other witnesses testified to their observations of the concentrated solar heat, including Lynette Williams (TR 1009:10-20), Preston Olsen (TR 1161:16 – 1162:13), Richard Jameson (TR 1234:11-20), Matt Shepard (TR 1545:20-25), and Greg Shepard (TR 1666:7-1667:5; 1750:13-1752:1). This Court has stated that "the record is pretty clear that there has been some experimental generation of process heat." (TR **2195**:12-14).

The tax code does not require electricity to be generated. The government is inviting you to make an error by focusing on electrical generation. Lenses produce heat, not electricity. Even if electricity were produced, it would NOT be RaPower doing it. The government argument about electricity is a complete misdirection, and cannot be used against the lens seller. The lens seller was NEVER going to make electricity. The lens buyers were buying lenses, NOT electricity! Their lenses were to concentrate solar heat. They do! The government arguing that lenses do not produce electricity is like complaining that a lettuce grower does not produce hamburgers. It's not the lettuce grower that uses their produce on a burger. It's Inn-n-Out!

The argument that Defendants were misrepresenting a fact when they projected success in the future is NOT a false statement. Statements about the future are not FACTS. They are plans and hopes. They honestly do expect to produce power. But they encountered hurdles and did more problem-solving. Even now the prototype exists, more research and development is required to mass produce the prototype. Mr. Johnson testified: "R&D is never finished." (TR 17719-20.) He explained how difficult the process is to take a functioning solar energy system (as he has developed) into mass-production. He explained getting them produced involves bottlenecks, and once they are produced they have to be installed, and changes are required to adapt each component for low cost field installation. (TR 2027:10-2028:3.) Production is now underway for rods, steel, clamps, U-bolts, frames and metal plates in China. (TR 2047:7-15.) The hydraulic systems, valves and valve bodies are being fabricated in India. (TR 2047:16-19.) These require six to eight month lead times. (TR 2407:20-2408:1.) One manufacturer's proposed product to glue lenses to frames alone caused a nine month delay. (TR 1656:4-9.) Defendants have, are and will continue developing solar energy. The government has no right to complain it is taking too long. If lens purchasers are satisfied, and have no problem with understandable delays, then the government has no right to complain.

The government contends it is "false or fraudulent statement" to say customers were in a "trade or business" (Doc. 334, page 73). Defendants saying purchasers are in a trade or business cannot be the basis for a tax scheme for at least three reasons: first, that is a true statement of the law; second, the

statement was at all times supported by advice from counsel; and third, **each** taxpayer's circumstances alone uniquely determine whether they qualify—and **all** purchasers are told to consult with their own tax preparer about their unique circumstances.

The government has not called all the purchasers.

Nor has the government called an expert who made a statistical analysis to prove which, if any, purchasers do not qualify.

Nor has the government called as witnesses purchasers who do not qualify. Witnesses Shepherd, Olsen and Williams called in this case DO qualify and explained their work pursuing their business involving their lenses.

As clearly explained in both the Anderson letters (PLEXs **23A** and **570**) and the Birrell memorandum (PLEX **362**) taxpayers qualify for the solar energy tax credit if they can meet the requirements of taking depreciation for the asset. There is no evidence that Defendants misrepresented the tax provisions or deceived any lens purchaser when Defendants advocated that, upon buying a RaPower-3 Fresnel solar lens, the purchaser was involved in a trade or business.

That qualification was explained in great detail by Ms. Anderson on the third day of trial, April 4, 2018. Ms. Anderson scrutinized the question of "material participation" (TR. 578), one of the main requirements of whether the energy property is depreciable. Ms. Anderson's testimony is at TR. 591 to 595.

The conclusion elicited by Ms. Healy-Gallagher in her examination of Ms. Anderson is "material participation is based on the facts applicable to the individual taxpayer." (TR. **595**). That is the same statement made by Defendants

to purchasers of solar lenses. Defendants always advised purchasers to obtain the advice of their own tax advisor or attorney about the solar energy tax credit and depreciation.

The Anderson letter RaPower provided to lens purchasers states it was provided to help the taxpayer "understand the possible tax saving benefits of purchasing energy equipment through RaPower-3 . . . so that you can consult with your own tax professional about the potential tax advantages." (TR. 669-670, PLEX **23A**).

The Birrell memorandum included similar language Mr. Birrell stated in his memorandum it was not intended to avoid paying federal tax penalties that may be imposed on a taxpayer, and that each taxpayer should seek advice from its own tax advisor based on his or her individual circumstances. (TR. 701, PLEX **362**, page 16).

The RaPower3.com website includes a statement that each taxpayer should obtain his own advice on tax matters. (TR. 1465, EX **832A** "It is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer.")

Defendants advocated and promoted the potential tax benefits of buying RaPower Fresnel lenses and leasing the lens for use in research, testing, demonstrations and development. There is no evidence Defendants said anything false or fraudulent. The tax benefits of §48 are available to purchasers of RaPower Fresnel lenses who qualify. There is no tax fraud or illegal tax scheme.

The government has not met its burden in this case to prove that there was an illegal tax scheme:

In my earlier Motion to Dismiss I argued that record in this case shows that although the IRS may disagree, six separate tax professionals including lawyers, CPAs and Enrolled Agents have concluded the Internal Revenue Code allow the solar lenses tax credits and depreciation. I was wrong. There were seven. I omitted the Mantyla McReynolds accounting firm that prepared Mr. Robotham's taxes. They also determined the lenses qualified. (TR 944:25-945:9.) The government may disagree. But disagreement has nothing to do with meeting its burden of proof. This case ought to be dismissed.

Knew or should have known:

Even if the Court disagrees with the meaning of the Internal Revenue Code, the government is not entitled to any relief because the issue that the Defendants "knew or should have known" that the lenses do not qualify for favorable tax treatment has not been proven for the six reasons raised in our original motion to dismiss. And in addition, we have the following testimony from Mr. Neldon Johnson on that specific issue:

Q. Did you rely upon people with expert capabilities?

A. I always have.

Q. What expert capabilities did you search for regarding the tax effect of selling these lenses?

A. Well, first of all, what I do is I try to get a comprehension of the law itself and so I purchase books. I call CPA's. I joined the National Tax Preparers Association, where I could use them to look up various items quicker than I could, so I could ask them questions and they could respond to those questions. (TR 2161: 14-24)

Q. All right. So, after you purchased books – and I assume you read them?

A. I did.

Q. Called CPA's, joined the National Association Of Tax Preparers, what else did you do to investigate the tax consequences of selling lenses?

A. I'm not sure I'm following you.

Q. Oh. I'm asking about any other steps you took. You purchased books. You called CPA's. You joined the association. Did you hire anyone?

A. Right. I did. I hired -- I hired an accountant and three attorneys -- or two attorneys.

Q. What was the purpose in getting input from three attorneys and accountants if you had already purchased books and called CPA's and joined that association?

A. Well, the purpose of the books wasn't to put me in a position of being a tax expert. Okay?

Q. Do you consider yourself a tax expert?

A. No, I don't.

Q. Do you prepare your own taxes?

A. No, I don't. But that wasn't the purpose of the books. The purpose of the books was to get an understanding of the laws involved, and so there's always a language barrier when you go from one -- I don't know what you call it -- but, anyway, from one learning area to another. CPA's and attorneys have a different

language that they speak, and so for me it would be difficult for me then to understand. When they were speaking to me, I wouldn't be prepared to get a clear picture on that particular subject, so I spent a lot of time learning the laws and reading, reading about the laws, reading what the law was purported to do, the reason why they passed the law. (TR 2161:13-2163:20.)

Q. Okay. So, when you went and got information from the three lawyers and the CPA, after you had done all of your background and your study, did you rely on your opinion or on the information you got from the people you hired?

A. No. I never drew a conclusion at that point in time.

Q. You didn't draw your own conclusion?

A. No. I would never do that.

Q. What did you rely upon then?

A. I brought that information to the attorneys so that I wouldn't be in a position to argue my positions. (TR 2165:1-12.)

Q. Were you satisfied, after you had done your investigation, and after you got the input from Anderson and Kirton, McConkie, that the lens sales to the public qualified under the tax law?

A. I did.

Q. Do you today consider yourself expert in this area of tax law?

A. I do not.

Q. Despite all of that, you do not claim that your -- your background gives you any expertise?

A. No. No, I do not.

Q. Okay. To the best of your understanding, have you followed the advice that you got?

A. Yes. (TR 2166:1-14.)

Mr. Greg Shepherd likewise relied on tax advice from tax professionals, did his own research, and arrived at his good-faith understanding after making reasonable inquiries. There are 9 pages of testimony from TR 1612:11-1621:6 on that subject.

The government's case defies common sense: No person operating a "scam"

-advises purchasers to check with tax preparers,

-spends eight years and over $14 million in development of new Fresnel lens technology,

-secures 7 patents on unique improvements to manufacturing Fresnel lenses,

-obtains 26 solar related patents on a system that required more than $40 million in development costs,

-does the kind of manufacturing and assembly work shown in Ex. 1500

IF all they were doing was a tax scam. No "scammer" has produced as much or made so many patentable innovations along the way. Defendants have never behaved as if they knew or should have known they were involved in anything other than a legitimate and valuable research and development project. They worked for years before any tax benefits became available. The taxes were a nice incentive from the government to continue the development. But tax benefits had NOTHING to do with beginning or pursuing this effort.

There was no scam, and Defendants have never acted as if they knew or suspected they were involved in a scam.

DAMAGES have not been proven:

Harm to the Treasury is NOT a basis to award anything. All that exhibit does is invite the Court to make an error.

Court's Order on March 29th Docket No. 359 reflects the law governing any monetary award in this case:

> This Order finds:
> -A party is **not unjustly enriched if the gains he acquired flow from any legitimate business activity**.
> -A **claimant bears the burden of showing the disgorgement amount is a reasonable approximation of defendants' unjust enrichment**.

The government has failed to distinguish between revenues from lens sales and from other sources. None of the witnesses, Roulhac, Perez and Reinken, should have been permitted to testify. No other government witness testified on damages.

Exhibits 735, 736, 737, 738, 739, 740 and 741 do not have an adequate foundation to have been admitted. They are summaries based on conjecture, speculation and things the witnesses did not understand.
Exhibit 739 involves a non-party Solco and should be stricken.
Exhibit 740 involves a non-party XSun and should be stricken.
Exhibit 741 involves a non-party Cobblestone and should be stricken.

The government did not offer Exhibit 736 and it was not admitted into evidence. Your emails and decision in ECF 407 all refer to Exhibit 736. It is in the record. The reason it was not offered is because the government knew it was overstated and unreliable.
Exhibit 736 claims Greg Shepherd's "gross receipts" were $2,214,729.
Their argument summary slide filed as ECF 395-1 on slide #180 changes the number to $702,001.
The method used to calculate "gross receipts" for ***all*** the Defendants is the same unreliable method used to calculate Exhibit 736.
It overstates the claim by more than three times and was not offered by the government. They knew it was embarrassingly exuberant.

As to Exhibit 738:

There is NOTHING to show IAS sold any lens after 2009. The record shows that once RaPower began to sell lenses, IAS stopped. (TR 2181:7-8)
IAS has never received a royalty payment from RaPower. (TR 1807:19-21.)
IAS is a publicly trading company. (TR 1779:15-18.)
Their 10Ks were audited. (TR 298:13-14.)
Exhibit 371 is the IAS 10K for 2010. On page 63, Note 9 to the financial statement identifies ALL of the lens sales revenues ever received by IAS when they sold lenses in 2008 and 2009.
None of the amounts for years 2010 through 2016 have anything to do with selling lenses.
IAS is a public company and sells its stock to raise revenues. (Ex. 371, p. 4, Item 1: "Description of Business".)
It would be an outrage to the stockholders of IAS for stock purchases in 2010, 2011, 2012, 2013, 2014, 2015 and 2016 to be regarded as "gross receipts" from lens sales. There is nothing in the record to show any revenues during those years had anything to do with lens sales.
The amount for lens sales in Exhibit 738 is $1,045,319 for 2008 and $1,369,718 for 2009.
However, Exhibit 371 (the audited financial statement of a publicly trading company) explains: "the energy output has not been verified. Therefore, for all these agreements, the customers may request a return of their deposits since the Company has not verified the output of the energy." (Ex. 371, p. 63, Note 9.)
Government witness Kenneth Oveson testified: "That means to me that the company would be obligated to refund all of those amounts since they had not verified the output of the energy." (TR 260:19-21.)
All those lenses were repurchased by IAS. (TR 2181:3-6; 2288:20-2289:17.)
IAS should not be a party to this case.
IAS ceased selling lenses 6 years before this case was brought.
IAS refunded the purchase money they received.
IAS revenues from selling stock between 2010 and 2016 should not have been admitted into evidence.
No evidence in this case shows that IAS has been unjustly enriched in any amount.
The entire claim amount against IAS is embarrassingly exuberant, but the government feels no sense of shame.

The other exhibits are equally unsupported and amount to guesses and assignments of deposits from any and every source as lens sale revenues, even

when we and the government know that is speculation. Even this Court could do nothing more in your recent Order (DOC 407) than say the "evidence received to date indicates" the revenues "may exceed…" In other words, your Order reflects the conjectural, speculative, inconclusive and imprecise nature of the government's inadequate proof. Your emails yesterday about the issues you want addressed likewise betray the Court's recognition that the proof of an amount for disgorgement is insufficient.

During trial the Court had substantial doubts about what, if anything, the government used the three witnesses Roulhac, Perez and Reinken to prove. Their testimony is embodied in DEX 735-741. When asked by the Court about the accounting summaries, the government explained on Thursday April 5TH:

> when we're trying to arrive at a reasonable approximation of the defendant's gross receipts because of the way the defendants promoted the scheme they told people it was $105 as a down payment for each lens.
> THE COURT: Right.
> MS. HEALY-GALLAGHER: So if we take the total number of lenses sold and multiply it by $105 that's the bottom end or a potential bottom end of the disgorgement that the defendants could be liable for…
> (TR p. **892**)

The government has not made a "reasonable approximation" but admitted it is a low of $5,188,575.

When an attorney represents a fact to the Court, as done in the transcript of this case, that becomes a judicial admission. Quoting from the case, *Boyington v. Percheron Field Servs., LLC*, No. 3:14-cv-90, 2017 U.S. Dist. LEXIS 184991, at *6-7 (W.D. Pa. Nov. 8, 2017):

> **Case law on this issue from the U.S. Court of Appeals for the Third Circuit and other Circuits is clear that an admission of counsel is binding on his or her client as long as such admissions are unequivocal. *See Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972); *accord McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) (holding that counsel's verbal admission at oral argument as to the enforceability of an agreement was a binding judicial admission just like any other formal concession [*7] made during the course of proceedings); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1170 n.3 (9th Cir. 2001) (holding that counsel's verbal admission at oral argument that the the government failed to meet her burden of establishing diversity jurisdiction was a binding admission on the the government); *Halifax Paving, Inc. v. United States Fire Ins. Co.*, 481 F. Supp. 2d 1331, 1336 (M.D. Fla. 2007) ("Statements made by an attorney during oral argument are binding judicial admissions and may form the basis for deciding summary judgment.").**

When the government admitted that the bottom end of damages is $5,188,575 that was a judicial admission. As the government's attorney explained: "So if we take the total number of lenses sold and multiply it by $105 that's the bottom end or a potential bottom end of the disgorgement that the defendants could be liable for." Accordingly, no more than that amount can be awarded without imposing an unjust penalty.

Defendants are entitled to the benefit of the judicial admission that the amount is as low as $5.1 million.

But even that rough estimate is based on multiplying $105 times an inflated number of 49,415 lenses being sold. That number is taken from Ex. 742B. It includes within the total tests, and lenses assigned for sale that were never sold, and lenses sold but never paid for. It is grossly inaccurate and unreliable.

If the Court awards $1 over this, it is an unjust award, not an equitable disgorgement.

Damages are NOT equitable and require a jury to decide the question in a case like this.
Defendants were entitled to a jury, but the Court removed that right because this was an "equitable disgorgement" case for which a jury was not needed.
It would be an error to now award any damages.
Any award must be confined to disgorgement.

The Court is not in a position to know if any amount awarded includes damages and not merely equitable disgorgement of unjust enrichment. The government has given you no basis to determine such an amount.
Defendants have no burden to establish damages. The burden is on the government to first establish a reasonable amount before Defendants have any duty to prove it is unreasonable. Here the government has not carried its burden and therefore Defendants have no burden to prove anything.[3] Nonetheless, Defendants have shown the government estimates are unreliable.

The Defendants must be "unjustly enriched" before the government is entitled to any disgorgement. The record in this case includes the following statement of undisputed fact:

> 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. In January 2015, Johnson, via Shepard, reiterated this offer to customers who were being audited for having claimed the tax benefits that Defendants promote. He said, "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."

[3] United States v. Mesadieu, 180 F. Supp. 3d 1113, 1121 (M.D. Fla. 2016): "A court's power to order disgorgement is not unlimited. It extends only to the amount the defendant profited from his wrongdoing. *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005). Any additional sum is impermissible as it would constitute a penalty. *Id.* Some cases awarding a plaintiff the sum of a defendant's total profits or gross revenue reason that this amount is a reasonable approximation because uncertainty or impracticality prohibits a more precise calculation. *Lauer*, 478 F. App'x at 557; *Calvo*, 378 F.3d at 1217 ('Any further apportionment would have been impractical in light of the inadequate documentation and the complex and heavily-disguised transactions employed in this scheme.')."

There can be no "unjust enrichment" when Defendant Neldon Johnson has offered on multiple occasions to refund all of the lens purchase payments if tax benefits are not available.

Significantly, even after knowing that the IRS was disallowing the benefits in multiple audits, purchasers determined to keep their lenses rather than seeking refunds.

They want to be involved.

As Preston Olsen testified: "the technology seems borderland revolutionary. I think it is going to be incredibly profitable unless they're put out of business by the government." (TR P. **1154**.)

Despite all the risks involved Preston Olsen put his dollars behind this project:

> Q. And why did you go forward with additional purchases if you were aware of those risks?
> A. I still really believe in the company. I think they're going to figure it out. I think their technology is very interesting. (TR P. **1172**.)

Similarly witness Lynette Williams rejected the offer to return her lenses and get a refund. She wanted to keep her lenses, even after the IRS audit and rejection of her deduction. (TR P. **1000-1001**.)

Robert Rowbotham testified that he believed it was possible to make a profit from owning the lenses, even with market risks. (TR P. **952.**)

Matt Shepherd purchased lenses because he wanted to profit from owning, and did not claim any tax benefits. This sale (because it involved NO tax issue) is by any measure a "legitimate business activity" and therefore cannot be subject to disgorgement.

THESE ARE GOVERNMENT WITNESSES! We must assume they are the best the government can offer. But none of them show any regret for purchasing or complained about treatment or information from RaPower3.

Before trial, you ordered: "A party is **not unjustly enriched if the gains he acquired flow from any legitimate business activity**."
Purchasing in a promising solar energy project, as the witnesses in this case have testified *motivated them,* separate from any tax effects, is a "legitimate business activity." Therefore the gains, if there have been any, are from a "legitimate business activity" and cannot be unjust. There should be no disgorgement.

Peter Gregg testified that he purchased because of the "groundbreaking" bladeless turbine technology, not tax benefits. (Gregg Depo. P. 163, lines 7-13, 22-P. 164, line 9.) He is in it to "make money." (Gregg Depo. P. 87, lines 9-13.)[4]

Because there is no "reasonable approximation" offered as proof in this case, only a widely speculative range of numbers amounting to dubious guesses, and because the purchasers were motivated by the enthusiastic desire to purchase the technology being developed by Defendants, there has been no "unjust enrichment."
Therefore disgorgement should not be ordered in this case.

The government has provided no expert testimony to establish:
-revenues related to lens sales
-showing which taxpayers, if there are any, relied on the tax effect to motivate their purchase
[HOWEVER, even if they had done this Congress intended for the tax effect TO MOTIVATE the transaction]

DAMAGES have not been established by competent proof.

A solar project does not need to succeed to qualify.

[4] Gregg does not expect to realize any return until after the company recovers its development costs. (Gregg Depo. P. 61, lines 5-12.)

A solar project does not need to be commercially viable to qualify. Because, as Dr. Mancini testified, there is no solar energy production that can compete with coal in efficiency, there really is NO solar energy project that exists today that does not rely on tax incentives to attract investment capital. From the Ivanpah plant in California to the Tesla motor company, ALL solar energy today exists because of favorable tax support to persuade and encourage investment.

The technology does not need to work to qualify.

The tax purpose was to stimulate innovation—and it has worked!

The best evidence of stimulating innovation is the numerous solar energy related patents that have been granted.

NOTHING suggests that taxpayers CANNOT qualify for tax benefits.
Several of the government's slides show purchasers can qualify if they meet conditions.
-EVEN UNDER THE MOST NARROW VIEW, SOME PURCHASERS WILL MEET THE CONDITIONS AND WILL QUALIFY.
-If SOME will qualify, and ALL are told to get tax advice from a qualified tax advisor about their circumstances, there cannot be "an illegal tax scheme".

Research and development qualifies as a "useful function" employing solar process heat.

The government focuses on producing "electrical power" when the tax code only requires solar process heat to be used for a useful function. The government is wrong.

Through the use of the patented Fresnel lenses the research and development has developed:

A process to create significant solar heat that could be used for generating electricity.

New patents.

A process to purify water.

A process to eliminate waste.
A process to concentrate Sulfuric Acid.
Photovoltaic system.
Hydroponics system.

I should mention the single witness whose deposition testimony claimed he only bought lenses for tax benefits:
Michael Penn testified he never paid:
"Q. In fact, you didn't pay anything, not even the amount you were supposed to pay?
A. Right." (Depo. P. 75:22-24; ECF 305; DEX 448.)
Therefore, no revenues were generated from that witness and there would be no unjust enrichment and nothing to disgorge.
That witness only relevant to proving the government has overstated its disgorgement claim.

This case does not involve any sale of the patented Johnson Turbine.
Nor does it involve any sale of the patented heat exchangers.
Nor does it involve any sale of the patented solar collectors.
Nor does it involve any sale of the solar towers, lens frames, braces, framing fasteners, or structural innovations accomplished by the Defendants.
Nor does it involve any sale of the hydraulic alignment mechanism.
This case only involves the sale of patented Fresnel lenses.
The Johnson Turbine pre-existed the Fresnel Lenses by years.
All the other items; collectors, exchangers, towers, lens frames, braces, fasteners and hydraulic alignment mechanism, were developed by using the Fresnel Lenses in research and development.

Only the Fresnel Lenses were sold. Therefore ONLY the Fresnel Lenses need to qualify as solar energy equipment. To qualify they must create solar process heat. They do!

If this case truly involves equity, the government does not have clean hands:
-They have engaged in shabby conduct throughout this matter
-They raided Defendants in 2012, but delayed taking any action until 2015
-They threatened a criminal case against Neldon Johnson, then abandoned it

-They raided and threatened Mr. Shepherd's employer Bigger, Faster, Stronger
-They caused Greg Shepherd's departure from Bigger, Faster, Stronger because of their intimidation
-They intimidated Mr. Birrell, sending an agent to his law firm and insisting he write a cease and desist letter. They intimidated Anderson, Robotham, Birrell, Lynette Williams and Bigger, Faster Stronger.
-They damaged or destroyed records and computer files
-They have attempted to interfere with arms-length transactions between willing buyers and a seller and
-Have acted inconsistent with Congressional intent in adopting the tax incentives to prop up solar energy experimentation and development.

The case against Defendants should be dismissed. This is NOT a tax scam. This is an example of exactly what Congress intended to cause by offering tax incentives:

Innovation.

Invention.

Development.

Risk taking.

Capital investment.

Progress.

New answers to potentially solve energy needs.

New uses for abundant, but still non-commercially viable, solar energy.

The government wants to interrupt the development Defendants have undertaken. This Court should not allow that. Neldon Johnson explained how working to solve problems and inventing new solutions drives him. He finds it exhilarating. He is confident he can now move into production. As he put it: "All I have to do now is get it into production. That is it. I mean, that is so exciting. I can't tell you how excited I am." (TR 2210:24-2211:1.) Those who have invested,

and those who have worked on this, are all committed to seeing this through to completion.

the testimony from those who were asked about this issue was that they followed and were excited by the progress that was made. That they had been patient and were willing to continue to be patient because the technology was “cutting edge” or “interesting. They even continued to purchase lenses despite the failure to put power on the grid.

Lynette Williams:

p. 982:21-24

Q. Miss Williams, you purchased these lenses which from International Automated Systems we'll refer to as alternative energy systems, on December 17th, 2008; correct?

A. It was in December of 2008, yes.

p. 984:18-25

THE WITNESS: I like my investment. I mean, I like solar. I purchased it because I was interested in solar. And I knew I was taking a risk of what would happen. But, yeah. I'm interested to see where it goes.

THE COURT: Do you feel you've been dealt with fairly by them?

THE WITNESS: I think that they told me up front what it was. And like I said, I knew I was taking a risk.

p. 990:8-12

Q. So you bought lenses from RaPower3 in 2010;

correct?

A. Yes.

Q. And you purchased 33 lenses?

A. I think that's the number. I'm not exactly sure.

p.1002:13-23

Q. International Automated Systems has, however, offered to buy back the alternate energy systems that you bought from them; correct?

A. They did offer to buy back.

Q. In fact, you received a letter from International Automated Systems, wherein, IAS -- I'm sorry, International Automated Systems offered to buy back those alternate energy systems; correct?

A. Yes, I did.

Q. But you kept your systems; right?

A. I did.

p. 1046:24-1048:19

Q. When you purchased the lens, did you think that it would immediately be producing electricity, or did you expect

1047

that to take sometime?

A. The lens or the towers? Either one are the same. No, I expected it to take time.

Q. Why did you expect it would take a while before it would be producing electricity?

A. There was full disclosure that it was in the process of being built, all the technology was in the process of being built, and so I knew it would take some time.

Q. You mentioned that you went down and you visited the site and that you saw progress being made. Can you describe what you mean by seeing progress or

advancement? I think you used both words, progress and advancement. Can you describe what progress or advancement you saw being made as you visited the site?

A. Yes. So the first time that I remember going down the site, we went to the manufacturing -- or the building on that main drag in Delta, whatever it's called, I apologize, I don't know. And we saw the machinery that was being used to do something, I'm not sure what. But there was a roller there that was designed to work with the lenses and to create the grooves in the lenses, so that's what we saw the first time. The second time I went down we saw that same building. There was still more stuff going on. But outside there was a trailer, and it had a frame on the back of it with a couple of the lenses so we could actually see the lenses

1048

going through -- oh, let me go back to the first time I was down there. We went to the site, and all of the -- she calls them circles. I always call them flying saucers, they look like that. So all of them were on the ground. There was not anything up. All of them were down. The second time we went to the building we saw the roller, we saw whatever's in that building. And then they had this trailer with like a frame on the back of it so we could actually see the lenses. I actually took pictures of the lenses. And then they had a trailer that was there, so more things. And if I remember right, it was the starting of the biomass, I think that's what it was. We were able to go up in the trailer and see what was happening with that. And then we went out to the site. This time the flying saucers are way up high, and it had the concentrator on it. And if I remember right there was a little house kind of thing on the side. And then the next time that we were down, these are

the significant ones so I can -- you know, because I was there a few times there in-between.

p. 1051:4-1052:19

Q. BY MR. SNUFFER: At the time that you purchased the first lens, did you know whether any solar power generated electricity had been sold by IAS?

A. At the time that I bought the first lens, did I know if it had been sold? I knew it had not been sold.

Q. Okay. And when you made subsequent purchases, were you aware that they had not sold electricity?

A. Yes, I was aware.

Q. And did it appear to you throughout the time period that they were working on that goal?

A. Oh, absolutely. There was always advances and --yes.

Q. And did you, in your own mind, form an opinion as to how long it was going to take before there would be electricity generated?

MS. HEALY-GALLAGHER: Objection. Inappropriate

opinion testimony under 702.

THE COURT: Overruled.

Q. BY MR. SNUFFER: How long did you think it would take?

A. I did not know. I'm a techie girl. Like I testified earlier, I'm writing some software, and I know

1051

it always takes longer than you think it's going to take.

Q. Okay. Why did you not ask about getting paid for the generation of electricity? You mentioned that you didn't ask. I want to ask why you didn't ask.

A. I -- rephrase that question again.

Q. Yeah. Why did you not ask or confront the RaPower people about the electricity not being sold at one of these conventions? It seems to me that it's a natural question to ask: Why haven't you sold power yet? Why were you patient with them?

A. My understanding was that they were working on the technology, and I have, at points in time, asked, you know, where are we with this? And they are making the advances, so I guess, I mean, as long as I knew that they were making advances, then we just have to wait until it's done.

Q. You were content to wait?

A. Yes.

p. 1053:18-1054:12

Q. Before you made any purchases, had you seen the Kirton, McConkie memorandum about tax benefits?

A. No. That came later.

Q. At the time that you purchased, had you seen the Anderson Law Firm letter regarding tax benefits?

A. I have never seen the Anderson Law Firm letter.

Q. The first you heard of tax credits potentially being available for you was from the accountant, your

1053

discussion with Bill?

A. When Gregg told me about that, he said that there were potential tax credits, and so that's why -- one of the reasons why I asked Bill what the possibilities were and if that would be something that would apply to me, because I didn't know.

Q. Okay. You mentioned that IAS offered to buy back your lenses but you didn't want to resell, and you wanted to do keep them. Why were you unwilling to resell them?

A. Because I want to be a part of it, and if this goes, I wanted to be a part of it. That's why I bought it in the first place.

PRESTON OLSEN

p. 1102:16-19

Q. All right. The fourth reason that you purchased solar lenses was to be involved in cutting edge solar technology, correct?

A. Yes.

P. 1159:7 – 1161:10

Q. Do you -- over the years that you have been touring the sites near Delta, have you seen progress?

A. Yes, substantial progress.

Q. What makes you think that they're making progress?

A. Well, I mean when I first went down there I – I was probably a little overly optimistic I thought they were quite a ways along. But, um, they have come along some different issues with manufacturing and they have resolved them and, you know, like, for example, the one thing just thinking about how it evolved overtime was just the framing of the lenses and I'm sure that Neldon or someone will be able to give much more detail, but they start out with some lens framing that I guess didn't work well when it was put into the -- into the outside environment overtime so they had to go back and reconfigure that. Then they built some super complicated auto-welding units to do this and then they found that was not

working well and it was too expensive. And then they went to what they have now which

1160

is some brackets they manufacture that seems to work perfectly. So that is just one thing. It's like but that's the type of thing that has been happening all the way along and they have been acquiring lots of manufacturing equipment, um, lots of plasma-cutter type things. Everything looks like it is being finalized over the last couple of years. I mean it is unfortunate it has taken this long but you know.

Q. Are there other advancements that you have seen besides the lens frames and the brackets? For example, have you seen different receivers?

A. Yeah, the first receivers look more like -- yeah, the current receivers look like they work really well, they're just simple. It looks like they've simplified things and now it is working better. It used to be like a round ball that would turn so that you didn't heat the oil too much and now it's more of a coil of copper that pushes the oil through, you know, like a box. It looks like it works really well as far as I can tell. But yeah, pieces of the -- pieces of the overall system have had to be unfortunately re-engineered over the years.

Q. And that brings up an interesting point. You have consistently gone down there on a regular basis. Is that a fair statement?

A. Yes.

1161

Q. Have you seen any stagnation of progress where it has just sat the same abandoned for a period of time?

A. No, it has always been -- I have always told everyone after because everyone asks that it always – there is always -- I mean it seems like two steps forward, one step back kind of stuff, but always progress.

Q. Thank you. Are you still willing, I mean this is now ten years later that you have been involved in this company, are you still willing to give them time?

A. Um, yes.

p.1171:12 - 1172:6

Q. Did you understand in 2009 or 2010 or even since that time that there was a risk associated with the RaPower-3 Solar Energy?

A. Yes.

Q. What sorts of risks?

A. I guess there was always a risk that they wouldn't complete the system and then I guess there is always a risk of being able to even if they could complete it be competitive pricing wise in the market so they could actually sell electricity. I guess those are two risks that come to my mind.

Q. Considering those risks, um, well, did you consider those risks in your purchase decisions for solar lenses?

1172

A. Yes.

Q. And why did you go forward with additional purchases if you were aware of those risks?

A. I still really believe in the company. I think they're going to figure it out. I think their technology is very interesting.

Why should this Court allow the government to prevent what those who are directly involved are willing to allow to develop?

To be sure I've answered the Court's questions from yesterday's email, I want to clarify: The Congressional intent to stimulate investment in solar energy development makes the "economic substance" rule irrelevant for § 48.

We do know the numbers on Exhibits 735-741 ARE double-counted.

Reconciling the many different numbers is not necessary because of the government counsel's judicial admission that $5.1 million is a reasonable estimate.

The expenditures in the record are:

DEX 542: IAS expense transfer 2011: $159,975

DEX 543: IAS expense transfer 2012: $228,410.70

DEX 520: Plaskolite lens payment: $1,145,930.18

DEX 371: 2009 IAS 10K-R&D expense for 2008: $760,798

DEX 371: 2009 IAS 10K-R&D expense for 2009: $704,889

DEX 571: 2009 IAS 10K-Cumulative loss through 2009: $35,334,671

DEX 570: 2016 IAS 10K-Cumulative loss through 2016: $40,156,398

Of the cumulative loss, there is testimony that $30 million was incurred in developing solar technology. That is the record.

Finally, the government request for an injunction should be denied because:

First, it is not necessary. If the Court finds against Defendants, and declares that these Fresnel Lenses do not, cannot, and will not qualify as solar energy equipment as a matter of law, my clients will voluntarily and willingly never say they do. At least during the time it takes to correct that on appeal.

Second, no injunction can be granted against non-parties (XSun, Solco, Cobblestone, Matt Shepherd)

Third, no injunction can interfere in commerce by prohibiting sales of patented Fresnel Lenses. You cannot enjoin selling, only what can be said when selling.

Fourth, the only parties who presently make any representation involving taxes and RaPower Fresnel Lenses are:

- RaPower and
- -Mr. Greg Shepherd. IAS has not sold lenses since 2009, and therefore there is no need to include them in an injunction because they make no sales/representations. Neldon Johnson has never sold lenses. The government's proof is that LTB1 has done no business. (Doc. **302-3**, pp. 3-4; which is also Ex. **673**, pp. 3-4.)

Fifth, if an injunction were seriously considered by the Court is must be narrowly tailored to direct RaPower and Greg Shepherd to stop making representations about taxes without preventing them from saying there "may be tax benefits available, and they should check with their tax preparer to see if they qualify." Or, in other words, the injunction should tell them to let the taxpayer decide if they are eligible. **Some people DO and WILL qualify.**

I have been asked by my clients to put two concluding thoughts on the record:

First, for the record: Mr. Neldon Johnson also wanted to act pro-se in this case and to be able to question witnesses, cross-examine and argue before the Court. He believes his rights were abridged by the Court's refusal to allow him to continue in that capacity during this case. He believes and hopes you will be fair in your decision about the issues in this case. He trusts there will be an outcome without any favoritism toward the government.

Second, for the Record:

The Court's Order, Doc. 407, refusing to continue the trial despite the medical emergency of a named Defendant has splintered the defense and made presenting a defense untenable, and so we rested.

One of the Defendants wanted us to ask you be removed from the case because of bias in favor of the government.

Defendants have been prejudiced by the Court's Order because, unlike the The government:

-your order placed strict time limits on the defense

-during the first ten days of the original trial schedule The governments were allowed to use ALL the trial time without limits

-in contrast, your order gave Defendants only seven for their defense

-The governments used over 60% of the time in the first ten days, your order allowed Defendants only 40% of the remaining seven days

-no structure or limit or timing was required of The governments during their case

-in contrast Defendants were ordered to provide a strict schedule and to maintain that schedule during their limited access to the court

-most obvious of all, one of the named Defendants was not going to be available throughout the presentation of the defense

-although that Defendant did not sit at counsel's table during the first 10 days, he observed the proceedings and gave valuable input to counsel during every break, during lunch recesses, and every evening

-Mr. Shepherd's continuing contributions to his defense would have been impossible under the Court's Order

-Mr. Shepherd missed only one day during the first ten days of the trial, because of illness

That Order caused internal disharmony between the Defendants and factored greatly in us resting our case.

When the government has not met its burden it is no more entitled to relief than any other party. They did not met their burden. They aren't entitled to relief.

If you favor the government and give deference to them, that is tyranny.

We all, including you, Judge, lose our freedom when the government gets its way without deserving it by fully meeting the same burden imposed on every other citizen litigant.

Thank you.