IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1,LLC, R. GREGORY SHEPARD, NELDON JOHNSON and ROGER FREEBORN, Defendants,	)	Case No: 2:15-CV-828DN

BEFORE THE HONORABLE DAVID NUFFER

JUNE 22, 2018

BENCH TRIAL

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SALT LAKE CITY, UTAH, FRIDAY, JUNE 22, 2018

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THE COURT: Good morning, counsel.

MS. HEALY-GALLAGHER: Good morning.

08:58:47 THE COURT: We're convened in United States vs. RaPower for closing arguments.

Do we have any concern further about Exhibit 360, or were you able to look at the transcript and verify that our exhibit records are correct? And honestly, I forgot entirely

08:59:06 to look at your concerns about exhibits. If you e-mailed that to us I just failed to look at it.

MS. HEALY-GALLAGHER: We actually did not, so we will get that to you promptly.

THE COURT: Okay.

08:59:16 MR. GARRIOTT: Your Honor, I think the record was clear, the transcript was clear that it was not admitted.

THE COURT: And that's how I read the transcript pages, too. So thank you.

All right. Well, anything else before we proceed

08:59:28 with closings?

MS. HEALY-GALLAGHER: Nothing from us, Your Honor.

THE COURT: Okay.

MR. SNUFFER: We're ready, Your Honor.

THE COURT: All right. Then we're at 9 o'clock.

08:59:37 Do you want a warning before 10:30?

MS. HEALY-GALLAGHER: I would appreciate that, Your Honor. And I was also wondering with the two-hour total if I go a little bit less or a little bit more than the hour and a half, would you mind if I tacked it on or took it off from the rebuttal?

08:59:56

THE COURT: Sure. We'll just take it from your budget. All right. So we'll give you a warning, what, 10 minutes, 10:20? Something like that?

MS. HEALY-GALLAGHER: Sure.

09:00:03

THE COURT: Ms. Shiraldi, that is your job.

Go ahead, counsel.

MS. HEALY-GALLAGHER: Thank you, Your Honor. May it please the Court.

In or around 2005 defendants decided to enrich themselves at the expense of the US Treasury by selling useless so-called solar lenses to customers. Now, why would someone buy a useless solar lens? That's because defendants promoted unlawful tax benefits to customers along with their purchase. Defendants knew or had reason to know that their customers were not allowed these tax benefits. They grossly overvalued the lenses to pump up the dollar amounts that customers could claim for these unlawful benefits. All of this violated the Internal Revenue Code and caused serious harm to the United States.

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Defendants will not stop, not without an injunction

from this Court. Disgorgement of their gross receipts from their unlawful conduct and the other equitable relief we seek in our complaint.

Defendants have been promoting the solar energy scheme for years. When they can ignore people who would challenge them, they claim that their cause is just and righteous and that they're not doing anything wrong. Yesterday they had the chance to defend themselves in this court to offer this court reasons why their actions and their statements were lawful, and instead, they ran away, just like they did every single time that a credible professional told them that their interpretation of the tax code was wrong.

For all of these reasons, the United States has shown that the defendants have violated and should be enjoined under 26 USC Section 7408 and Section 7402. In part because they violated the penalty provisions in 26 USC 6700 an injunction is appropriate to stop them from continuing to do so.

And throughout this presentation, of course, Your Honor, I would refer the Court back to our proposed findings and conclusions, which is ECF Number 334.

And that's especially because as Mr. Snuffer noted in resting defendants' case without putting on a single witness, he noted that there are a great deal of facts, a number of facts that are simply not at issue. There are a lot

of facts that are not in dispute. There is just the question of, what does it all mean?

So for any number of factual issues in the course of my presentation today, I'm going to move right along over the facts that appear to not be in dispute, though, again, we've covered all of these things in our proposed findings and conclusions and our response to the defendants' 52(c) motion, which is at ECF Number 395. Further, if I didn't see a question about it in the Court's e-mail, e-mails that you sent yesterday, I'll also move it along to make sure to hit what Your Honor was interested in. And, of course, we can also submit the slide deck to the Court as we did with the 52(c).

THE COURT: Thank you.

MS. HEALY-GALLAGHER: So as for the first provision of Section 6700 that the defendants organized, promoted and sold solar lenses pursuant to the solar tax scheme a plan or arrangement involving taxes, there appears to be no dispute. And, in fact, the record is replete with evidence on this point.

Instead Your Honor did have some questions about the remaining, for some of the remaining provisions of 6700. The rest of the statute which defendants violated -- well, we showed, the evidence has shown that while promoting the solar energy tax scheme defendants made or furnished and caused others to make or furnish statements about the allowability of

both the depreciation deduction and the solar energy tax credit as a result of buying solar lenses which the defendants knew or had reason to know were false or fraudulent as to material matters.

09:04:43 As I mentioned, on this point there are a number of undisputed facts. Defendants have not disputed that they made or furnished or caused others to make or furnish statements about material matters that go to tax benefits. The point of contention, one of the points of contention is whether they 09:05:03 knew or had reason to know that those statements were false or fraudulent. And the Court highlighted questions about Mr. Shepard's scienter in particular, so I will be largely addressing the scienter provisions.

I do also want to flag that the statements that 09:05:21 we're talking about go to material matters. A material matter can go to either the legal requirements for eligibility for a tax benefit or the factual underpinning that would allow a taxpayer to make a certain claim on his tax return.

So you had asked in particular about Mr. Shepard's 09:05:46 knowledge or reason to know about legal matters, whether his statements were false or fraudulent as to legal matters, but, of course, we also have the false and fraudulent statements as to factual matters with respect to Mr. Shepard and all defendants.

09:06:03 Also going to the Court's question about

Mr. Shepard and his knowledge or reason to know the, law under 6700 is that defendants are charged with knowledge of the law applicable to the tax benefits that they promote. These two examples, United States vs. Campbell and United States vs. Music Masters are good illustrations of that point.

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THE COURT: Were these two cases cited in your draft?

MS. HEALY-GALLAGHER: In the --

THE COURT: Do you remember?

09:06:50

MR. HEALY-GALLAGHER: -- proposed findings and conclusions?

THE COURT: Right.

MS. HEALY-GALLAGHER: Yes.

THE COURT: Okay.

09:07:06

MS. HEALY-GALLAGHER: If you give me just one moment, please. Would you mind muting the screen, please? I'm having a technical glitch.

THE COURT: We've had some issues with this system lately. During our last trial, a couple weeks ago we had

09:07:29

issues.

MS. HEALY-GALLAGHER: I think it might have been user error. I'll be back up in one second.

THE COURT: Okay.

MS. HEALY-GALLAGHER: Okay. Go ahead and un-mute

09:07:37

the screen, please.

THE COURT: There we go. Is that what you were expecting?

MS. HEALY-GALLAGHER: Thank you. Yes.

All right. So, nonetheless, as a promoter of tax benefits, Mr. Shepard and all defendants are charged with knowledge of the law applicable to the tax benefits that they promote. But we also have evidence, which I'll discuss in a moment, that he actually knew the law on all of the points that we've covered, and so did the rest of the defendants.

Another important point is that the defendants subjective beliefs about what the tax law is do not matter. That comes from the 10th Circuit in United States vs. Hartshorn. Without marching through them and all of the evidence on these points the evidence is clear. The defendants made statements about black letter tax law. Those included customers were in a trade or business and could therefore depreciate their solar lenses because the solar lenses were placed in service; second, the solar lenses qualified for solar energy credit; customers lens leasing business was active, not passive; and customers were at risk with respect to the full purchase price of their solar lenses when they paid only a minimal amount upfront.

These statements, particularly Mr. Shepard's, show that they knew the black letter law that applied to the tax benefits that they promote. And they knew that their

statements were false or fraudulent.

For example, in Plaintiff's Exhibit 1 Mr. Shepard runs the RaPower3 website. On that website he tells customers, lenses must be used in their business or income producing activity in order to qualify for depreciation.

But Mr. Shepard and all of the rest of the defendants knew that, in fact, their customers were buying tax benefits rather than creating an actual trade or business. And that's because of classic red flags of evidence of an abusive tax schemes that courts have identified for decades. Again, because this law applies to the tax benefits that the defendants promote defendants are charged with knowledge.

Moreover, Mr. Shepard knew facts to demonstrate that all of these things were true. First, the goal of the solar energy scheme was to eliminate a customer's tax liability; second, customers did not and would not earn income from the solar lenses; third, Neldon Johnson retained control over any purported lens leasing business that defendants told customers they had. You heard throughout trial from customers who had no idea about anything to do with their purported business. That's because Neldon Johnson held the reigns. Last, all defendants knew and had reason to know that the contract documents underlying the solar energy scheme were totally illusory and would not be enforced.

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Taking the first point, Mr. Shepard unequivocally

knew that the goal of the solar energy scheme was to eliminate a customer's tax liability as we see in Plaintiff's Exhibit 40. Mr. Shepard sent this out to customers. It's a little hard to see on the slide, but as you see when you look at the exhibit that Mr. Shepard's handwriting throughout is all about zeroing out the customer's tax. So the refund that he's identified for the customer, the goal is all tax that's been withheld.

09:11:25

And Mr. Shepard helped customers figure out how to zero out their tax liability by buying the, quote-unquote, right number of lenses. Customers didn't want to buy too few because then they would still owe some taxes. And they didn't want to buy too many or the tax benefits that they would accrue would be wasted because they would not get additional money back. The number of lenses the customer purchased had nothing to do with anything except eliminating their tax liability, and Mr. Shepard knew that.

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09:12:11

Now, defendants also knew, both Mr. Johnson and Mr. Shepard, all defendants knew that to be in a trade or business a customer had to expect to make money. And we see this here in these two exhibits. Particularly with respect to Mr. Shepard at least as of 2013 he knew that the IRS was disallowing tax benefits at least in part because customers had not made any income.

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Here's another example from Mr. Shepard in 2016 at

09:13:04

Government's Exhibit 279. So Mr. Shepard and the rest --

THE COURT: Can you go back to that exhibit for just a minute?

MS. HEALY-GALLAGHER: Yes, Your Honor.

09:13:18 THE COURT: 279. Just a second.

MS. HEALY-GALLAGHER: Sure.

(Time lapse.)

THE COURT: Okay. Go ahead.

MS. HEALY-GALLAGHER: So the defendants told their

09:13:34 customers to expect income in the form of rental payments from LTB and bonus payments, although bonuses were only involved in the solar energy scheme through 2014.

The contracts the defendants offer promised this rental income, but of course none has come. And as you heard

09:14:04 from the customers, Your Honor, they may have professed an expectation of profit or making income, but all of that information came directly from defendants. They had no independent source for any idea that they would actually make money by buying these lenses.

09:14:23 So while defendants told customers to expect rental income soon, they constantly made excuses for never delivering, just as we see here in Plaintiff's Exhibit 437 document, with all of the excuses -- well, not all -- many of the excuses that the defendants used over the course of time

09:14:47 for the reasons that customers were not earning any income.

And the defendants knew that customers have never been and would never be paid rental income. That's because the defendants knew they had no contracts to generate income for solar lens owners in the form of a power purchase agreement, for example. Defendants knew that they had no operational technology that would make such a contract even remotely possible. And all defendants knew that as they promoted the solar energy scheme for the past 10 years, no customer has ever been paid rental income for the use of his lenses.

09:15:08 09:15:31

THE COURT: Why do you confine that to 10 years? Didn't this start in 2005?

MS. HEALY-GALLAGHER: I usually say more than 10 years.

09:15:40

THE COURT: Okay.

MS. HEALY-GALLAGHER: Which it is.

THE COURT: Okay.

MS. HEALY-GALLAGHER: Mr. Shepard fully well acknowledged that none of these things had ever happened in his "what if" e-mail of December 2013, Plaintiff's Exhibit 602. Here he's trying to bolster customers who are being audited by the IRS, which is challenging and has disallowed the tax benefit that defendants promote. He asked, what if we do produce electricity? Because they never have. What if we gain revenue from power produced? Which has never

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happened. What if rental fees or bonuses start being paid? They never were, and they never will be, and Mr. Shepard knows it.

In part the evidence has shown that Mr. Shepard knows it because he knows there's no possibility of acquiring a power purchase agreement. As he -- and a power purchase agreement, of course, would actually start generating revenue from the so-called electricity that defendants claim will be produced by their lenses.

09:16:59 Now as an initial matter, Your Honor, you've read the deposition of PacifiCorp, the company through which defendants would have to interconnect in order to acquire a power purchase agreement from someone outside of their immediate area. And PacifiCorp, which runs Rocky Mountain 09:17:19 Power, has never even heard of defendants.

Moreover, Mr. Shepard testified in his deposition that since 2010 he had been trying to put together his own projects to acquire power purchase agreement. But he never gets very far because every time he raises the idea with some 09:17:39 entity or person they wanted to see a power project up and running, and we didn't have that running yet. He knows. It's never happened, and it's never going to happen.

That's because nothing has ever been up and running. Your Honor noted at the beginning of Neldon 09:18:04 Johnson's testimony that you were focused on the fact that you

had not seen any evidence of feasibility of this project that is reliable. The project as a whole, you said, you are not nearly as concerned about components, about which we heard a lot of testimony, as you were about the front to back connected feasibility.

09:18:21

Defendants have never shown you what you were looking for, reliable evidence that this project is feasible. Instead, the only credible evidence before the Court about the operation or rather lack thereof of defendants' purported solar energy technology came from our expert in solar energy technology, Dr. Thomas Mancini. Dr. Mancini testified that after all of his work reviewing the defendants' documents, visiting the site at least twice, only twice, he saw no indication that the purported solar energy technology at issue here has ever produced electricity or other usable energy from the sun. He also testified credibly to his conclusion that it never would become a commercialized system that would provide electricity or other usable energy from the sun.

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All Dr. Mancini saw and as the Court saw, as well, in Plaintiff's Exhibit 509 was a group of disconnected component parts that were not assembled into any system. And even if they were connected together according to Dr. Mancini's expert opinion they would not and will not work to convert solar radiation into electricity. Neither Neldon Johnson nor anyone associated with him has the technical

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ability and expertise to build a viable solar energy technology.

But importantly, Your Honor, you actually don't need to be an expert like Dr. Mancini to see that this is true. Robert Freeborn, a former defendant in this case now deceased, who was a high school teacher and a coach who had no special expertise in solar energy technology testified that getting the individual parts of Mr. Johnson's purported technology to work in concert seemed to be the hurdle.

09:20:27 On the third point, Mr. Shepard and all defendants knew that Mr. Johnson retained control of the entire transaction, not the customers. Customers testified that they did not negotiate the terms of any contract including the price of their purchase. They just swallowed the defendants' 09:20:51 representation and transaction documents wholesale.

Defendants knew that customers did not take possession of their lenses in any fashion. Instead, they just leased them to an entity they knew nothing about and conducted no research on. Further, defendants, particularly including 09:21:10 Greg Shepard, tell customers how little effort they will need to expend in their so-called solar lens leasing business. Defendant do not track where the lenses are for each customers, and customers don't know which lenses are theirs.

Further, Neldon Johnson has control, makes all 09:21:30 decisions for all entities in these transactions. Both

Neldon Johnson and Greg Shepard and their entities know these things as the evidence has shown. Further, both Neldon Johnson and Greg Shepard, all defendants know that the contract documents in support of the solar lens scheme are illusory.

09:21:54

Customers pay just a tiny amount upfront when they purportedly purchase their lenses. They're expected to make the remaining down payment only after they get their tax refund based on the tax benefits defendants promote. But not all customers make that payment. When they don't the defendants do not enforce the contract terms for those that don't pay. And, in fact, Neldon Johnson offers a refund to anyone who does not get the tax benefits the defendants promote. And the remaining purchase price is financed on a nonrecourse basis with a lens as the only security. They don't check prospective customers' credit, and here again we see the refunds that they offered. Mr. Shepard and Mr. Johnson, all defendants, know that the contract documents are meaningless.

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Now that I've walked through the reasons the defendants particularly Mr. Shepard knew or had reason to know that their statements that their customers were in a trade or business were false or fraudulent I'll take a minute to address the Court's question about the Economic Substance Doctrine. The Economic Substance Doctrine is intended to deal

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with transactions that comply with the technical requirements of the Internal Revenue Code but produce results that are not intended by the code. It is a theory that we identified in our complaint and explored in discovery.

09:23:33 But in this case, we need not reach the Economic Substance Doctrine because the evidence in this case shows that these transactions are factual shams. These transactions do not comply with the technical requirements of the Internal Revenue laws. For the reasons I've already stated and what 09:23:59 I'll describe in a moment, all defendants knew or had reason to know it.

As for Plaintiff's Exhibit 575, the document about the Economic Substance Doctrine that Neldon Johnson gave Jessica Anderson, that simply shows that Mr. Johnson was 09:24:16 savvy. He knew that what he was proposing with a tax shelter. And as we see in that document, he knew or had reasons to know how the IRS would view such a shelter.

THE COURT: Doesn't the concept of economic substance play, though, into the factual inaccuracy of the 09:24:40 representations made by defendants and their knowledge of those inaccuracies?

MS. HEALY-GALLAGHER: It certainly can, Your Honor. It's not like -- the principles underlying the economic substance doctrine would certainly apply here.

09:24:55 THE COURT: It's the same facts but a different

application?

MS. HEALY-GALLAGHER: Exactly.

THE COURT: Okay.

MS. HEALY-GALLAGHER: And it may surprise you to know that we actually walked back on an argument that we have in this case. But, in fact, we did because the factual sham is so clear.

So among the other false or fraudulent statements that defendants made they told customers that their lenses were placed in service. And, of course, in order to depreciate property property must be placed in service.

Now, in addition to our writing in the proposed findings and conclusions at ECF Number 334, Your Honor requested and we also submitted briefing on depreciation but also the trade or business issue and placed in service at ECF Number 387. Defendants told customers that their lenses were placed in service. But defendants knew or had reason to know that their lenses were not, in fact, placed in service.

Now let's recall the defendants' proposed transaction. This is how they promoted the solar energy scheme, and this is what the contract documents purport to support. The whole purpose of any lease was to use lenses in a system that generates electricity. But this never happened as the facts have shown that all defendants including Greg Shepard knew that none of this had occurred. There's never

been a third party power purchaser, and there isn't one now. There has never been electricity sold to a third party purchaser. It follows and the evidence has shown that there has never been any income paid to a customer for such electricity. There have never been any payments for steam. LTB does not exist. It's never done anything and it never will. There's been no steam generated for anything much less steam that was converted to electricity. So all that we're left with is that defendants sold lenses. That's it.

09:27:47 Could I ask you again to mute the screen?

THE COURT: Mute it to?

MS. HEALY-GALLAGHER: I apologize what's happening with this.

THE COURT: Okay.

09:28:24 (Time lapse.)

MS. HEALY-GALLAGHER: Okay. Thank you.

Defendants knew or had reason to know that no lens has been placed in service to generate electricity or solar process heat. The black letter law the defendants are charged

09:29:15 with knowing is that an individual component incapable of contributing to a 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.

09:29:33 For facilities that are intended to generate power,

the factors that go to whether a system as a whole has been placed in service are things like whether the plant has been synchronized with the transmission grid and whether daily or regular operation has begun.

09:29:54 Here the evidence is clear. The customer lenses are a component part of a larger solar energy system, purported solar energy system. The lenses are not installed -- the vast majority of lenses are not installed as part of any solar system that works, and there's no evidence 09:30:14 that defendants' solar lenses ever by itself used heat from the sun to accomplish any kind of useful function or application.

The evidence instead has shown that defendants purported solar energy technology does not work and never 09:30:33 will. It is a collection of mismatched components that do not work together as a system. There's no daily or regular operation and nothing has been synchronized with the grid. In fact, the defendant themselves continually assert the need for additional research and development before they will be 09:30:49 operational.

And all defendants knew or had reason to know this. In fact, in August of 2009 we heard from Ken Oveson, a CPA in a respectable firm here in Salt Lake City. He told Greg Shepard in response to Mr. Shepard's own questions that the 09:31:19 lens were not placed in service because they were not

installed and did not work. In Mr. Shepard's deposition designation he testified that he knew that Ken Oveson did not agree with the defendants' position that the lenses were placed in service, but he said, that doesn't mean I have to
09:31:37 accept it, and I didn't.

Further, we also heard testimony from Jessica Anderson. She expressed concerns to Neldon Johnson about equipment not having been placed in service because it was not producing any electricity.

09:32:06 In June 2012, Mr. Shepard was again challenged on the placed in service question, this time from a CPA who was asking hard questions. Instead of responding to the CPA, Mr. Shepard did what defendants did yesterday, he ran away. Rather than answering the questions, he said, I'm not
09:32:25 interested in doing business with your clients.

Further, in September 2013, Mr. Shepard learned that the IRS had a different opinion on what placed in service meant than the defendants did. In fact, just like the black letter law, the IRS was asking for things to demonstrate
09:32:51 placed in service like the lenses are hooked up to the grid. Licenses were obtained. But Mr. Shepard stated that that does not apply to the lenses according to him.

For all of these reasons, no lens was placed in service at any time and the defendants knew or had reason to
09:33:15 know it.

Further, moving on to the solar energy credit aspect of defendants' statements, they knew or had reason to know that the lenses did not qualify for the solar energy credit although they told customers that they did.

09:33:37 Now the reasons for this include to qualify for the solar energy credit, depreciation must be allowed for the property. But as I've already discussed, customers were not allowed a depreciation deduction for these solar lenses. Now with that the analysis is over. But assuming that were true, 09:33:57 the energy property would have to be placed in service in the tax year for which the taxpayer is claiming benefits. That didn't happen, either.

Again, if a property is not placed in service, that's enough to disqualify it from the solar energy credit. 09:34:15 But still further, defendants knew or had reason to know that the lenses did not use solar energy to generate electricity or solar process heat.

Now, it is clear that these lenses have never generated electricity and all defendants knew or had reason to 09:34:41 know that. The defendants have claimed that the lenses generate solar process heat. But solar process heat has a very specific definition. It is not just concentrated heat from the sun. It is heat from the sun used in a specific application like heating water for a laundry or drying 09:35:17 material to make fertilizer, as Dr. Mancini testified.

Defendants testified that they believe that their lenses create solar process heat because they have the ability to concentrate sunlight. But they omit the necessity of doing something with the heat. They've never identified what the heat actually does other than catching wood and grass on fire, singeing Greg Shepard's shoes and killing a poor bunny. There is no application that the defendants used the heat for much less an application for which someone has or would pay them to generate this so-called solar process heat.

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So like many of defendants' subjective beliefs about the tax code or solar process heat, their beliefs are not relevant here. Further, they have learned in the course of this litigation at the very least that what they believe is solar process heat, in fact, is not.

09:36:18

Further, defendants told customers that losses and credits that were generated by the solar energy scheme could be used to offset the taxpayers' active income like wages from a W-2 source. But defendants actually knew that that was not permissible. In fact, losses and credits in a passive activity may not be used to offset such active income.

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Here in Plaintiff's Exhibit 181 we see that Neldon Johnson was signing a contract telling Patty Lambrecht that her lenses would be installed and operational in time to meet the IRS standards of an active investment. He knew this requirement. Mr. Shepard knew it, too.

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As we see in Plaintiff's Exhibit 135, Preston Olsen had some questions about which he was a little nervous. He asked, do you know how this investment gets around the passive loss rules? Well, Mr. Shepard responded, and he simply told Mr. Preston that he would be an active participant. That's it. If the defendants say it, it must be true according to them.

09:37:48

Mr. Shepard had Ken Oveson -- or he asked Ken Oveson questions about active participation in August of 2009 as we see in Plaintiff's Exhibit 136 and 374. In fact, Mr. Shepard was so concerned about active participation he asked Neldon Johnson to ask Jessica Anderson to address the issue, which we see in Plaintiff's Exhibit 574. And Jessica Anderson did address the issue, in particular in Plaintiff's Exhibit 570 in a letter to Mr. Johnson.

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Now the black letter law that defendants are charged with knowing as promoters is that a business involving the rental of tangible personal property is per se passive. Jessica Anderson told Neldon Johnson this in October of 2010. Richard Jameson, the defendants' purported expert, actually acknowledged this on the stand which he did not do in his deposition. But Neldon Johnson did not want to hear what Jessica Anderson had to say about active or passive status. He had decided before he walked in her door that his customers would have active status and he would not be deterred.

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No later than January 2011 Jessica Anderson told Neldon Johnson that even if one of the exceptions applied to the per se passive nature of equipment leasing his customers would not meet the standard for material participation. This was after she had learned all of the facts that Neldon Johnson proposed in his transactions, facts that were already under way.

09:40:04

Neldon Johnson refused to accept her opinion and kept trying to change her mind getting more and more aggressive each time. So after fully explaining her position to him on material participation and the active/passive issue, she fired him as a client.

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Now, the black letter law is that the allowable amount of any deduction with respect to any activity is limited to the amount that the customer has at risk in the activity.

09:40:47

Now, defendants have never analyzed the solar energy scheme under this legal standard. This provision was actually enacted because of the proliferation of tax shelters in the 1970s. Before Section 465 was enacted investors could take advantage of quick depreciation rules and other financial transactions to generate large losses in order to offset personal income like W-2 wages. But Section 465 prohibits that practice.

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A taxpayer is considered at risk with respect to

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money and property that the taxpayer actually contributes to the activity, and that's out of pocket. The taxpayer must actually have skin in the game to be at risk. A taxpayer is not at risk with respect to amounts protected against loss through non-recourse financing and guarantees. The defendants knew this. The Kirton McConkie memorandum put them on notice of the at risk rules.

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But they knew and certainly had reason to know that customers were not at risk with respect to any money that they put into the solar energy scheme. As the defendants stipulated in pretrial, Mr. Johnson would refund customers money if they did not receive the tax benefit the defendants promote. By definition, this is the very guarantee that Section 465 is designed to eliminate.

09:42:20

Moreover, the defendant also knew -- as if that were not enough the defendants also knew that they used non-recourse financing for the amounts that the customers purportedly borrowed from IAS and RaPower3 at zero interest.

09:42:42

The defendants including Greg Shepard also knew that the defendants never enforced contracts on which customers did not pay. For all of these reasons customers were never at risk for any amount that they contributed to the solar energy scheme, much less the full purchase price of $3500, which is the dollar amount that defendants told them to use when calculating their tax benefits.

09:43:06

09:43:29

THE COURT: When you say they used non-recourse financing, you mean non-recourse in fact? Don't the agreements provide for an obligation?

MS. HEALY-GALLAGHER: Actually no. No customer is personally liable except to the extent of a repossession of the lens. And that by definition under 465 means the taxpayer was not at risk.

09:43:43

THE COURT: You're going to have to give me a minute to look at this exhibit, then. Just a moment. Are you saying that there's a limitation on remedies in the later part of the document?

09:43:59

MS. HEALY-GALLAGHER: I would have to double check the contracts, Your Honor. But as I've reviewed them over the course of the case, all I've seen is that the remedy, the sole remedy is against the property itself.

09:44:16

THE COURT: Well, if purchaser -- I'm reading on Paragraph 6 of that Exhibit 119. If purchaser shall default the seller may terminate this agreement. Purchaser shall remain liable for all sums then due and unpaid --

09:44:39

MS. HEALY-GALLAGHER: And --

THE COURT: -- less the credit for the value of the repossessed alternative energy system.

MS. HEALY-GALLAGHER: Right. And the point with 465 is that the security for the debt needs to be something other than the property itself. And there is no security --

09:44:54

THE COURT: Okay.

MS. HEALY-GALLAGHER: -- that would actually require any customer to be personally liable on these contracts.

09:45:03 THE COURT: Okay. Give me a second to read the paragraph about repossession.

(Time lapse.)

THE COURT: Seller agrees not to report purchaser to any credit agencies after the repossession, and seller

09:45:18 shall receive an amount credited against the balance owed equal to the value of the alternative energy system as established by an independent qualified appraiser approved by purchaser and seller.

Okay.

09:45:39 MS. HEALY-GALLAGHER: And also, Your Honor, another feature of this contract is that no customer actually incurred any obligation to repay or to pay the remaining amount between their down payment and $3500 until their lens was installed and producing revenue. So there was no actual obligation

09:46:01 until something that's never happened and will never happen happened.

THE COURT: Right. Thank you.

MS. HEALY-GALLAGHER: And all defendants knew that because that was a feature of the contract terms.

09:46:18 Now, we've walked through more specific reasons

that defendants knew or had reason to know that their statements about tax benefits were false or fraudulent as to material matters on specific topics. But there are any number of occasions that defendants were told, told that their
09:46:40 interpretation of the tax code was not right or they had reason to know it from professionals and others.

Starting off with the Plaintiff's Exhibit 28, this is the Anderson working draft that defendants have claimed they relied upon in order to promote the solar energy tax
09:47:03 scheme. Well, first this letter postdates the beginning of the solar energy tax scheme, so that by definition cannot be true for 2005 through 2010. Further, there are no facts in Plaintiff's Exhibit 23 on which any opinion about tax benefits could be based. And that's clear from the face of the
09:47:27 document. So all defendants knew and certainly had reason to know that.

Further and specifically with respect to Neldon Johnson, he knew that Plaintiff's Exhibit 23 was not an opinion letter because once he received Plaintiff's Exhibit 23
09:47:43 he went back to Jessica Anderson's office and specifically asked her for a letter that would affirmatively state that clients that purchased RaPower3 energy equipment would be able to take all of the tax benefits that he was promoting.

That's when Jessica Anderson asked him for
09:48:02 specifics of the transaction, and he told her. Once she

learned those specifics, Miss Anderson told Mr. Johnson in no uncertain terms that his customers could not lawfully claim the tax benefits he wanted to sell. She told him her doubts about whether the lenses would qualify for the energy credit if they were not producing energy, whether they would qualify for depreciation because they were not placed in service and especially about whether the customers could offset active income with a passive activity for lack of material participation. He brushed off her concerns and refused to take no for an answer. Again he got more and more aggressive each time showing up unannounced to harangue her with his own interpretation of the tax code. He was convinced that he was right and she was wrong, but she held firm.

09:48:22 09:48:43 09:49:05 09:49:24 09:49:46

No later than January 2011 after telling him all of her concerns Jessica Anderson fired him as a client. She told him in person, and within a day she sent him an e-mail terminating the relationship. Mr. Johnson got the message. We know this because he stopped showing up at her office. He knew that she did not agree with his position, and he knew that he had been fired over it.

Then in -- actually. With respect to the Anderson letter, Your Honor, and Mr. Shepard's knowledge or reason to know that it could not be relied upon, in addition to the lack of facts that have anything to do with what Mr. Shepard knew or the facts of the solar energy scheme he got the Anderson

draft from Neldon Johnson who he knew was a self-interested promoter of the same scheme. And the law and precedent is that it is patently unreasonable for a person to claim reliance on an opinion that they receive from the very promoter of the same scheme.

09:50:10

Further, in June 2012 the evidence has shown that the IRS criminal investigation division executed a search warrant at Neldon Johnson's property and at the offices of Bigger, Faster, Stronger. Both Neldon Johnson and Greg Shepard clearly knew about this.

09:50:32

Then in October 2012 Neldon Johnson obtained the Kirton McConkie memorandum seen here in Plaintiff's Exhibit 367. He shared it with Greg Shepard who posted it on the RaPower3 website to sell lenses as he had done with the,

09:50:52

with Plaintiff's Exhibit 23. But this memorandum assumes facts provided by Neldon Johnson and his agents that bear no relationship to the facts that the defendants knew applied to the so-called solar energy technology and the RaPower3 sales transactions. The memo applies only to C corps, which

09:51:18

defendants customers were not. They were individuals with W-2 income, and all defendants knew it.

The memorandum assumes that the solar energy technology actually works to generate electricity, which all defendants knew their technology did not. And it assumes that

09:51:37

the transactions to sell and lease the lenses are based on the

form documents that Ken Birrell provided along with the memo, which the defendants knew their transactions did not do.

As of June 2013, defendants knew or had reason to know that their statements about tax benefits were false or fraudulent because the IRS began auditing customers and disallowing all of the promoted tax benefits. In fact, we heard from Mr. Jameson that the IRS has never allowed any of the tax benefits the defendants promote.

09:52:04

Also in 2013, the Oregon Department of Revenue began auditing customers and disallowing tax benefits. Now the defendants knew about all of these audits, both Mr. Shepard and Mr. Johnson. Mr. Shepard helped Mr. Gregg out with some of his arguments before the Oregon Department of Revenue.

09:52:25

Then in July of 2013, Mr. Todd Anderson retained Tate Bennett to send a cease and desist letter to Neldon Johnson and RaPower3. Mr. Anderson had been contacted by the IRS about the Plaintiff's Exhibit 23, which was on the defendants' website. He saw it there, and he demanded that Mr. Johnson take it down.

09:52:46

09:53:10

In this cease and desist letter, Plaintiff's Exhibit 480, Mr. Bennett tells Mr. Johnson explicitly that Plaintiff's Exhibit 23 was a working draft. Now that's something Mr. Johnson knew already from his conversations with Ms. Anderson after she had delivered Plaintiff's Exhibit 23

09:53:33

and had demanded that he cease distribution of that draft letter.

THE COURT: I'm sorry. Can you go back to that exhibit?

09:53:44 MS. HEALY-GALLAGHER: Yes.

THE COURT: As I remember there's no date on this.

MS. HEALY-GALLAGHER: Your Honor, if you take a look at the second-to-the-last paragraph.

THE COURT: That's the only reference to a date.

09:53:51 MS. HEALY-GALLAGHER: Right, that's the only reference to a date.

THE COURT: Okay. Thanks.

MS. HEALY-GALLAGHER: But as the evidence has shown certainly at least through trial in our last setting,

09:54:03 defendants continued to use Plaintiff's Exhibit 23 from the Andersons to sell lenses on their website.

Then in December 2013 jumping back in time, Mr. Shepard learned that Ken Birrell was saying that he had rescinded the Kirton McConkie memorandum and was adamant that

09:54:28 RaPower3 members had no business using it, as we see in Plaintiff's Exhibit 231. But instead of backing off and refraining from using the Kirton McConkie memorandum to sell lenses, he went ahead and provided customers with a brief synopsis for easier reading, that he encouraged them to

09:54:50 continue to use.

Soon after on January 2014, Ken Birrell was sent a cease and desist letter to Neldon Johnson at Plaintiff's Exhibit 370. The cease and desist letter states things that were already clear from the face of the memorandum. It is not an opinion letter. It only applies to C corporations, not to individuals. It assumes that the solar energy technology actually works and that the transactions are conducted based on the form documents that Ken Birrell provided. Defendants already knew these things about the Kirton McConkie memorandum. But it was made abundantly clear in January 2014.

09:55:09 09:55:26

Nonetheless, defendants continue to use the Kirton McConkie memorandum to sell lenses, and this is including after they heard testimony from both of these professionals in this trial about all of the reasons that defendants could not and should not use those documents for the reliance materials.

09:55:49

Following that in October 2014, Peter Gregg lost his case against the Oregon Department of Revenue. All tax benefits that defendants promoted were disallowed, and Greg Shepard knew it. He also knew on December 2014 that the IRS was investigating tax return preparers who had done returns for RaPower3 customers because the IRS was saying that RaPower3 was a tax avoidance scheme.

09:56:13

In November 2015, the United States filed a complaint in this case. In our complaint we identified every single argument we are making today. We served Greg Shepard

09:56:41

and all defendants with it. This complaint informs the defendants that their interpretation of the tax -- informs defendants and at minimum gave them reason to know that all of their statements about taxes, about the law and facts
09:57:02 applicable to the tax benefits they promote are false or fraudulent. But instead of reconsidering, instead of thinking, hmm, maybe I should, you know, think about what Ken Oveson and Ken Birrell said about the tax law here, according to Greg Shepard's own testimony in his deposition he
09:57:26 bowed his back and started fighting harder.

November 2015 is the very last day or at least when they were served thereafter, the very last day that the defendants could possibly remotely claim that they did not have reason to know that their statements were false or
09:57:44 fraudulent. Further in November 2017, the Oregon Department of Revenue issued two rulings, one against Kevin Gregg, Peter Gregg's father, and one against Matthew Orth, denying all tax benefits the defendants promote.

So really everything so far, Your Honor, has been
09:58:09 addressing the issue of defendants' statements that are false or fraudulent, and there are reasons to know that those statements are false or fraudulent. That's all under the auspices of Section 6700(a)(2)(A). But Section 6700 has a second provision that creates penalty conduct, 6700(a)(2)(B).
09:58:31 6700 -- well, we'll just go with that. And defendants

violated 6700(a)(2)(B). When they were promoting the solar energy scheme they made or furnished and caused others to make or furnish gross valuation overstatements as to the value of solar lenses.

09:58:53 A gross valuation overstatement is any statement as to the value of property or services if the value of that property is directly related to the amount of any tax benefit and the stated value is more than double the correct value of the property.

09:59:15 Now an important distinction between 6700(a)(2)(A) and 6700(a)(2)(B) is that there's no knowledge requirement under 6700(a)(2)(B). Specifically there is no scienter. It is a strict liability statute. If someone makes or furnishes a gross valuation overstatement in the course of promoting a 09:59:42 tax plan or arrangements, then they are liable for the 6700(a)(2)(B) penalty. Further, merely stating a price as the defendants did throughout is furnishing a statement of value that could qualify as a gross valuation overstatement. The defendants made a gross valuation overstatement each time they 10:00:08 stated the price of a lens, especially because the correct valuation of any lens is about 26 to $35.

Correct valuation is necessarily an approximation and can be within a range. Generally a correct valuation is a price that is agreed to by a willing buyer and a willing 10:00:36 seller. But that is not true in a transaction when the

parties have incentives to agree to an inflated purchase price, for example, to inflate the tax benefits to the purchaser.

As the evidence has shown customers had no incentive to negotiate the price down here, and, in fact, none of them did attempt to negotiate because that would have reduced the tax benefit that they claimed.

Because the lenses are component parts of a purported system that does not work to generate income, the best evidence of the correct valuation of the lenses is their raw material cost. Another option for their correct valuation is their scrap value.

In a case eerily similar to this one, United States vs. United Energy Corp., 1987 Westlaw 4787 out of the Northern District of California, February 25th, 1987, that court concluded:

United Energy Corp.'s modules, which had to do with solar, purported solar energy technology, were and are simply not functional. Although the solar industry is still in a developing stage, UEC's modules fall drastically short of the quality of products made by other manufactures. Thus, the best evidence of the modules value is the trustee's sale of them for scrap, which will bring at most several hundred dollars each.

Here a good way to value the lenses is the cost of

raw materials. Defendants bought sheets of plastic from Plastilite as the evidence showed. The price for those sheets of plastic ranged between 26 and $35 -- excuse me -- ranged between $52 and $69. But as the evidence showed defendants would cut each sheet in half, so each lens, the correct valuation of each lens is approximately $26 to $35.

10:02:42

Defendants admitted in their response to interrogatories that they incurred no other expenses to produce each lens. Although if the Court is feeling generous they could look to Mr. Johnson's own valuation for each lens issued on the eve of trial in this case which we saw in Plaintiff's Exhibit 796.

10:03:03

Now putting aside the absurdity of this trick, paying people, quote-unquote, in kind for all the lenses they already purchased, Mr. Johnson told customers in this memo that every lens he was giving a customer is the equivalent of $750. Now even if we accept this $750 value as true --

10:03:21

THE COURT: But doesn't the next page say they remain liable for the full $3,500? Isn't that the next page of this memo?

10:03:43

MS. HEALY-GALLAGHER: It does say that. No lens has ever generated any income whatsoever. So what Mr. Johnson was saying that purportedly income from the lenses he was giving people because their lenses had never generated income would eventually get them up to $350. But on the stand, trial

10:03:58

transcript Page 2250 he testified that every lens he has given a customer this year is equivalent of $750. But even if we accept that as true defendants nevertheless may have furnished gross valuation overstatements because $3500 is more than
10:04:23 double $750.

Now I want to pause here to point out that there is no authority for the proposition of a value of an item derives from the costs that were purportedly sunk into it to create it. Therefore, all of the self-serving and uncorroborated
10:04:45 testimony from Mr. Johnson about the cost incurred to create these lenses in the first place is not only not credible, it is irrelevant on this point.

Because defendants violated both provisions of Section 6700 and will not stop, an injunction is appropriate
10:05:09 to prevent them from making false or fraudulent statements and gross valuation overstatements as to material matters in connection with the solar energy scheme. Further, an injunction and the other equitable relief that we request are necessary or appropriate to enforce the Internal Revenue laws
10:05:30 of the United States. That's because each defendant here was a critical player in the solar energy scheme. They each had their different roles, and without any of them it would not have been so successful.

Each defendant has continually and repeatedly
10:05:46 engaged in conduct that must be enjoined. Each defendant knew

and certainly had reason to know that he was making statements about tax benefits that were false or fraudulent. The defendants are unapologetic about their conduct. Mr. Snuffer acknowledged that yesterday. They are not going to stop
10:06:07 without an order from this court. And their ongoing activity puts them in a position to continue with the solar energy scheme. People are still buying lenses and claiming tax benefits as a result.

Further, defendants have caused serious harm to the
10:06:27 Treasury as the evidence has shown. We walked through in the testimony the different places that Your Honor could find that specific tax harm. Depreciation is both on the Schedule C and the front page of the 1040. The tax credit we identified on Form 3468 and Form 3800 also on the second page of the 1040.

10:07:00 Now we heard from Ms. Perez who provided summary testimony of about 1600 tax returns that she had reviewed. And those tax returns were from tax return preparers that we have heard about in this case who prepared returns for RaPower3 customers. We heard from Greg Shepard, Preston
10:07:27 Olsen, Lynette Williams and from Peter Gregg that Greg Shepard advised them on the tax return preparer to use to claim the tax benefits promoted. These people included but were not limited to John Howell, Kenneth Alexander and Richard Jameson. He advised people to use these preferred return preparers
10:07:49 because they were willing to go along with defendants'

promoted tax benefits. They took the defendants' assertions for the truth and did not investigate further, as you've already identified with respect to Richard Jameson. You'll see and you did see in Mr. Howell's deposition that the same -- the same approach that the court identified that Mr. Jameson took applies to Mr. Howell, as well.

10:08:09

Based on Ms. Perez' review of these returns from these tax preparers and keywords and phrases that we've talked about through the course of this trial to identify those returns as being involved with RaPower3, for example, equipment rental services on a Schedule C; alternative energy systems; RaPower3 on a number of tax returns; and so on, after she reviewed all of those tax returns and entered numbers about depreciation in the solar energy credit on a spreadsheet she determined after some mathematical calculations from Excel that the ultimate harm to the Treasury for the three tax years that are at issue here was more than $14 million. Now this number is simply a snapshot of the harm to the government in the course of time because it does not include tax years prior to 2013, it does not include 2017 and we have yet to know what, if any, tax returns will be filed for tax year 2018 with the tax benefits defendants promote. Further, this does not include people who self-prepared their returns or had returns prepared by people who we don't know about. Defendants offered no countervailing evidence to Plaintiff's Exhibit 752

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or Ms. Perez' testimony. And we provided any number of tax returns for the Court to review.

Furthermore, defendants have organized the customers' response to the IRS. Mr. Johnson is bank rolling the tax court, some of the appeals and the tax court petitions, and Mr. Shepard advocates directly to IRS revenue agents and appeal officers.

10:10:11

For all of the reasons we've discussed so far and in light of all the evidence in the case, disgorgement is necessary or appropriate here to enforce the internal revenue laws. That's because the entire point of this scheme was to get money out of the Treasury, much of which went to defendants as the defendants illustrated in Plaintiff's Exhibits 496 and 777.

10:10:33

But as with many things about defendants' statements the evidence has shown that this diagram contains numerous false statements. There is no utility paying anyone any money. They're certainly not paying to any entity that generates any electricity much less any income. RaPower3 has never actually financed anything due to the illusory contract documents. No customer has ever received a bonus or lease payments. There is no performance guarantee, no maintenance, no nothing. Stripping out all of the false statements in this illustration the true flow of money appears, money out of the IRS through the customer up to RaPower.

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10:11:19

10:11:44

And, in fact, defendants expressly instructed customers to pay RaPower3 with the money that they saved on their taxes, as illustrated in Plaintiff's Exhibit 714. The question at the bottom, when do I need to pay RaPower? Mr. Shepard wrote: You need to pay RaPower3 the full deposit by check within 30 days after you place your order, then the balance in April to May of next year when you get your refund.

10:12:12

Defendants knew that customers had been getting significant tax benefits since 2006 as illustrated by this ad drafted by Greg Shepard in Plaintiff's Exhibit 435. I'd also note here Plaintiff's Exhibit 674, Tax Time Success Stories, which Mr. Shepard posted on an old version of the RaPower3 website. It shows that the only success the solar energy scheme ever generated was in getting tax benefits out of the Treasury. It was not in generating electricity or any income. And defendants knew that selling tax benefits made them more money.

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10:12:59

Here in Plaintiff's Exhibit 504 Mr. Shepard instructed people at the RaPower3 national convention that they should have people in their downline make a copy of their tax refund check from the IRS so both of you can use it as a valuable tool in your presentations to sell more lenses. Mr. Shepard reminds them: 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

10:13:17

10:13:41

again.

It has nothing to do with generating electricity or any other income source. This along with plenty of other evidence in this case shows the causal connection between
10:14:01 defendants' wrongdoing and their gross receipts from the solar energy scheme.

The proper measure of disgorgement here is defendants' gross receipts. And we have provided evidence to this court that gives a reasonable approximation of the
10:14:18 defendants' gross receipts. As this Court has already ordered in ECF Number 359 we do hold that burden of showing the disgorgement amount is a reasonable approximation of defendants' unjust enrichment. But then according to the same order, the defendant is free to introduce evidence showing the
10:14:41 unjust enrichment is something less than the amount that the plaintiff has put in. Defendants have not done so. They did not put on any evidence to counterbalance our reasonable approximation of defendants' gross receipts, which I will walk through now.

10:14:58 THE COURT: Thank you.

MS. HEALY-GALLAGHER: If I can have one second.

(Time lapse.)

MS. HEALY-GALLAGHER: The evidence has shown that RaPower3 does not generate revenue from any source other than
10:15:36 selling lenses in the solar energy scheme. That's why the

bank deposit analysis that Miss Reinken conducted and put forth in Exhibit 735 is appropriate for RaPower3. Based on that deposit analysis where Miss Reinken took care as much as she could to avoid transfers among the defendants, the gross reimbursements for 2009 through 2016 for RaPower3 are more than $25 million.

Now, we only had bank records through the end of 2016 in this exhibit. So for 2017 through February 2008, the Court can look at Plaintiff's Exhibit 749. Your Honor demonstrated facility with filtering in Excel, so I'll simply leave some notes here and you can take a look and see what you see.

But to arrive at the $563,395 in gross receipts for that span of time, we looked at the order tab of Plaintiff's Exhibit 749. We filtered for any comments that include the word "paid." Then we also filtered the date added column and only chose orders that were added to defendants' customer database in 2017 and 2018. Combining those two numbers arrives at a total amount, a reasonable approximation for disgorgement for RaPower3 from 2009 through February 2018 $25,874,065. This amount is reasonable, and defendants have not shown that it isn't.

Now with respect to International Automated Systems, we heard testimony from Cody Buck about where to find information about the customer deposits due to lens sales in

the 2009 10K. That's Plaintiff's Exhibit 371. As for the fiscal year that ended in 2010, which, of course, was the year that IAS stopped selling lenses and RaPower3 started selling lenses the total amount of customer deposits that IAS had received was more than $2.3 million. And we see that in Plaintiff's Exhibit 852.

10:18:16

Then later, although IAS had stopped selling lenses itself, the evidence has shown that in fiscal year 2016 Neldon Johnson directed that RaPower3 send more than $3 million to International Automated Systems. Because that money came as a result of proceeds from the solar energy scheme, International Automated Systems should be jointly and severally liable with RaPower3 for that amount.

10:18:43

THE COURT: Exhibit 738 shows that IAS had receipts in 2011, '12, '13, '14 and '15, and they're sizable. 3, 5, 7, $10 million? What's that if IAS didn't sell between '10 and '16?

10:19:03

MS. HEALY-GALLAGHER: Well, Your Honor, what we're asked to do is provide a reasonable approximation. If Your Honor based on the evidence feels that those are appropriate to include, then that's up to your discretion as the chancellor in equity in this case.

10:19:27

THE COURT: Well, are you abandoning that claim?

MS. HEALY-GALLAGHER: Oh, you're talking from our bank deposits?

10:19:40

THE COURT: Right.

MS. HEALY-GALLAGHER: Yes, Your Honor. Yes. The evidence that we are focused on for disgorgement appears in these slides.

10:19:50 THE COURT: Okay.

MS. HEALY-GALLAGHER: Because we know that lens sales stopped and that IAS may have had receipts from other sources.

THE COURT: Well, what would that possibly be?

10:20:00 MS. HEALY-GALLAGHER: Well, there are deposits from Mr. Johnson and his family, potentially. It's not 100-percent clear. Other stockholders. But basically what we're trying to show because we are trying to provide a reasonable approximation, we have a clear number that we can identify as

10:20:22 directly related to the sale of lenses.

THE COURT: Uh-huh (affirmative).

MS. HEALY-GALLAGHER: So that's what we're using.

THE COURT: And that's on this document, which is Exhibits 852 and 507?

10:20:34 MS. HEALY-GALLAGHER: 852 is the 10K for fiscal year of 2010. So, yes.

THE COURT: And I can't remember what 507 is. What is it?

MS. HEALY-GALLAGHER: 507 is the 10K for fiscal

10:20:48 here ending 2016.

THE COURT: Okay.

MS. HEALY-GALLAGHER: Now that 10K does not include customer deposits. Instead that's the 10K that shows the transfer of $3 million from RaPower to International Automated Systems.

10:21:02

THE COURT: Why isn't that double counting if you're including money transferred from one entity to another?

MS. HEALY-GALLAGHER: So we want to identify it as an amount that each of those defendants is liable for, but ultimately they are jointly and severally liable for that amount, because we're not double counting.

10:21:15

THE COURT: Well, okay. I don't understand that. If I get $100 and transfer it to you you've got $200 so we can't be jointly and several liable for $200.

MS. HEALY-GALLAGHER: The $100 you transferred to me we are.

10:21:34

THE COURT: So are you saying $3,077,000 does not show up in RaPower receipts?

MS. HEALY-GALLAGHER: It does. And that's why RaPower and AIS are jointly and severally liable for that amount. So, for example, we would not -- if we collected 3 million from RaPower3 -- or we collected 3 million, for example, from IAS, RaPower3 owes much more than 3 million, but it's possible that we could count that 3 million as collected.

10:21:45

THE COURT: Let me ask you a related question here,

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and I know this is not the topic that you're on. But if I impose a disgorgement judgment here what happens to all of these people who claim a refund or sue defendants trying to get their money back? The government winds up with the money and the individuals don't?

10:22:33

MR. HEALY-GALLAGHER: Well, Your Honor, what we're looking at and what the evidence has shown is that the money that defendants collected has come out of the Treasury because of the way that they promoted the scheme.

10:22:46

THE COURT: Well, that's your calculation of the tax credits and the tax effects of the deductions. That's about 14 million. This is gross receipts. It seems like imposing disgorgement for gross receipts could disable individuals from receiving any relief for the fraud perpetrated on them.

10:23:06

MS. HEALY-GALLAGHER: Well, the money that the customers got out of the Treasury was actually unlawful. Like in terms of claiming the tax benefits here that the defendants promoted, the customers don't necessarily have a right to that money, anyway.

10:23:20

THE COURT: Okay. I understand your theory. Go ahead. Sorry for the interruption.

MS. HEALY-GALLAGHER: That's all right. So ultimately International Automated Systems itself is liable for more than $5.4 million.

10:23:34

Now, we're going to talk about a couple of entities that have been identified in this case, SOLCO1 and XSun Energy. These are entities that Neldon Johnson owns and controls, and both of them, their sole purpose was to generate revenue by selling lenses. That's it. The lenses that they sold, the idea was the same. The customer would claim tax benefits from the Treasury, get money from the Treasury, which money they would send to the defendants.

10:23:59

Mr. Johnson also used both SOLCO1 and XSun Energy to obtain the Kirton McConkie memorandum which he then used along with Greg Shepard to sell more lenses. So SOLCO1's gross receipts -- SOLCO1's and XSun Energy's gross receipts are due to Neldon Johnson's specific efforts to perpetrate a fraud on the United States. That's why for purposes of Neldon Johnson's personal liability, which I'll address a little bit more in a moment, we provided a bank deposit analysis for SOLCO1. That amount results in gross receipts of $3.4 million.

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As Your Honor has already identified, Mr. Johnson is really the key to this case. He's the inventor of the purported solar energy technology. He's the manager of most of the entities that have any activity including SOLCO1 and XSun Energy. And he makes all the decisions for the entity defendants. Further, he instructs these entities to pay money out to him and his family members from the proceeds of lens

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sales. For these same reasons, we did a bank deposit analysis for XSun Energy, which results in gross receipts of $1.1 -- more than $1.1 million.

Now, the reason that Neldon Johnson should be liable for the gross receipts of his entities is that there is no difference between the entities and him. That's true for SOLCO1, XSun Energy, RaPower3 and IAS. He controlled and controls each of the companies and made all decisions for them. He directed them to engage in the activities that further the solar energy scheme, and he directs that the entities pay him and his family members out of the proceeds from lens sales. That means that he should be held personally liable for the gross receipts of these entities.

THE COURT: So you're at 1:20, just so you know.

MS. HEALY-GALLAGHER: Thank you. We have identified and summarized the gross receipts from each of the entities here. But I did want to point out, Your Honor, that we've identified we are not double counting that 3 million that went from RaPower3 to IAS. So the total of Mr. Johnson's personal liability for disgorgement should be more than $32 million.

THE COURT: Now I have a similar document from your earlier slides that is 35 million. Is that because it doesn't deduct the 3.077?

MS. HEALY-GALLAGHER: Correct. We realized that we

had included that and should not have.

THE COURT: Okay. Thanks.

MS. HEALY-GALLAGHER: Now as for R. Gregory Shepard the evidence has also shown that he personally and his entities received gross reimbursements from his activity specifically related to the solar energy scheme. He was paid by both International Automated Systems and RaPower3. His entity Shepard Global and also Shepard Energy were paid by RaPower3 for his activities.

10:27:23 10:27:42 10:28:04 10:28:26 10:28:48

This chart provides a summary of all of the places in the record that show the evidence of payments to Greg Shepard or to his family at his direction and payments to Mr. Shepard's entities that received money from the solar energy scheme. Just like Neldon Johnson controlled his entities and should be personally liable for their gross reimbursements, so should Greg Shepard. The evidence has shown that the sole purpose of his entities was to sell lenses. He controls the entities, and he and his family are paid from the entities using the proceeds from lens sales. Therefore, ultimately Mr. Shepard should be liable for more than $702,000.

THE COURT: Does that number include commissions?

MS. HEALY-GALLAGHER: That does.

THE COURT: Okay. Your summary of his receipts prior -- I don't know if you used this page, it's Exhibit 736,

shows disbursements to him of $2.2 million.

MS. HEALY-GALLAGHER: And again, Your Honor, upon reviewing the evidence and trying to provide the most reasonable approximation to you for a number of disgorgement, we opted to go for the specific places where he had admitted the payments or we demonstrated them through other evidence introduced in the trial.

10:29:07

THE COURT: So these gross receipts, this is in a personal account?

10:29:23

MS. HEALY-GALLAGHER: Correct.

THE COURT: This is not disbursements from the entities.

MS. HEALY-GALLAGHER: Correct.

THE COURT: Okay. And that's 736, Exhibit 736, just so the record is clear. Thanks.

10:29:31

MS. HEALY-GALLAGHER: Now for all the reasons we've talked about, these numbers that we have offered throughout trial and today are a reasonable approximation of the defendants' gross receipts from the solar energy scheme.

10:29:47

Now the defendants failed to introduce evidence showing that our numbers are not a reasonable approximation of unjust enrichment. And now under principles of restitution, the defendants bear any risk of uncertainty in this calculation. That's because they have possession of all the information that might apply here. But they've chose in

10:30:09

various ways not to disclose information that they might rely upon, and they also refuse to produce information in response to our discovery requests.

So they chose to make those omissions in discovery so certain evidence was properly excluded, and defendants chose not to offer any proof in their own case that would contradict our reasonable approximation or would reduce the risk of uncertainty here. And importantly, arguments made by their attorneys are not evidence and should not go into the evaluation of the reasonable approximation here.

Further, defendants should not be given any credit against disgorgement for purported business expenses. As the Court has already noted in ECF Number 359 the defendant has the burden of proving entitlement to a credit or deduction for business expenses. But the defendant is not entitled to a credit for costs or expenses incurred in an attempt to defraud the claimant.

This is defendants' burden, and they did not meet it because no part of their business involving solar lenses was legitimate.

Further, even if the credit were appropriate here, which it is not, the defendants did not provide any credible evidence of an appropriate amount. The only information is Neldon Johnson's testimony which was conclusory and unsupported by any independent facts. He did not explain the

underpinnings for his assertions about the purported millions that he spent on research and development. It is unclear which of those dollars even went to lenses as opposed to some other components. And customers only buy lenses, they don't buy other components.

10:32:19

And let's not forget Mr. Johnson claimed that he was spending millions on research and development during the same time period that he swore to this court before Judge Benson that his financial condition would not allow him to pay a $2-plus million disgorgement award when he was enjoined from engaging in securities fraud. That is in Plaintiff's Exhibit 781.

10:32:36

And, Your Honor, no one asked Mr. Johnson to spend the money that he claims to have spent on window dressing for his tax scam. Whatever money he has spent he spent to create a realistic facade so that customers would just keep buying lenses with promises of great progress, income is on the way. We haven't seen it to date.

10:32:56

He and Mr. Shepard wanted customers to spend more money so they continued to spend money to pursue the disconnected components or whatever it was that they were doing well after they knew or had reason to know that the solar energy scheme was abusive. That is not normal.

10:33:19

So based on the paucity of evidence caused by defendants themselves by not producing documents and

10:33:41

information in discovery and not putting on a case the Court would be ill-advised to estimate defendants' unsubstantiated expenses. Ordering disgorgement in the amount that we've requested today of each defendants' gross receipts will simply return the defendants to the place they would have been, the place they would have occupied if they had not broken the law.

10:34:02

And, Your Honor, we've already talked about avoiding double counting. This last slide shows a Venn diagram not to scale, but illustrates how the various liabilities of each defendant overlaps. So that the Court can be clear, for example, IAS and RaPower3 are jointly and severally liable for that $3 million. Meanwhile, R. Gregory Shepard, the bottom corner here, is jointly and several liable with AIS for $51-plus thousand for RaPower3 for the remainder. And, of course, Neldon Johnson is responsible for the entire $32-million-plus and would be jointly and severally liable with the other defendants for their amounts.

10:34:23

10:34:47

For all of these reasons, Your Honor, defendant should be enjoined under Section 7402A and 7408 for among other things violating both penalty provisions of Section 6700. We also ask that this court grant all remaining relief that we request in our complaint. And you can see the proposed order in our proposed findings of fact at ECF Number 334 that details all of that relief with the amendment of the disgorgement numbers based on our

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presentation today.

Certainly we would ask that this court deny defendants' 52(c) motion because we have more than proved our case under any standard of evidence.

10:35:49 Last, we are going to move, make a second motion to freeze defendants' assets, and that will include Greg Shepard, which our first motion, who our first motion did not include.

THE COURT: Thank you.

Mr. Snuffer, I'd propose that we take a 10- or

10:36:17 15-minute break before you start. Is that all right?

MR. SNUFFER: That is fine. I want to make sure that you're attentive and taking a break may facilitate that.

THE COURT: I have no doubt that it will. Okay. Thank you.

10:36:33 MR. SNUFFER: Thank you.

THE COURT: We're in recess until 10 till.

(Recess.)

THE COURT: Please be seated.

Mr. Snuffer, go ahead when you're ready. We'll

10:50:31 time you for an hour and a half.

MR. SNUFFER: Thank you, Your Honor.

This morning the defense side of this room has our thoughts sort of divided between what's going on here and our client Mr. Gregory Shepard who is undergoing a heart procedure

10:50:57 today.

In this case the government is asking the Court to engage in the worse form of judicial activism. They're asking you to decide this case in direct opposition to congressional intent. They invite the judiciary to ignore the legislature.

10:51:15 The government claims that the RaPower sale of lenses lack economic substance, and that claim is untrue. They provided no proof of this apart from the opinion of Dr. Mancini. Dr. Mancini admitted he was wrong about the Stirling engines economic viability from the transcript at

10:51:34 Page 178. All the other government witnesses testified they believe their investment was and is economically viable.

For example, Preston Olsen testified, quote: The technology seems borderline revolutionary. I think it is going to be incredibly profitable unless they're put out of

10:51:59 business by the government. That's the transcript at Page 1154.

There is no proof the lenses lack economic viability. But even if they do it does not matter. Your e-mail referred to the IRS Commissioner Korb's memorandum

10:52:21 document. That's not the place for this court to find guidance. 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.

10:52:50 Congress explained what both houses of congress

intended. They explained specifically that Section 48 was intended to stimulate investment in solar energy without any requirement that the investment be profitable apart from the tax benefits. A profit motive or any other economic substance
10:53:15 to the investment is not required. The joint committee on taxation summary of the act explains it is not intended to target tax credits for Section 48 investments.

Congress explained: If the realization of the tax benefits of the transaction is consistent with the
10:53:40 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 under Section 48 energy credit be disallowed in a transaction pursuant to which in form and
10:54:08 substance a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage.

Consistent with this congressional intent the Ninth Circuit court reversed the decision denying tax benefits
10:54:32 for investment in solar energy that lack economic substance.

In Sacks vs. Commissioner --

THE COURT: Can you spell Sacks for me?

MR. SNUFFER: S-A-C-K-S. That's at 69 Fed 3d 982, a Ninth Circuit decision, the tax court disallowed energy
10:54:51 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 a pretax profitability does not show whether the transaction had economic substance beyond the creation of tax benefits where congress has purposefully used tax incentives to change investors' conduct. Where a transaction has economic substance it does not become a sham merely because it is likely to be unprofitable on a pretax basis.

10:55:29 If the government treats tax advantage transactions as shams unless they make economic sense on a pretax 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

10:55:53 investments which otherwise would not have been made.

The reason for Section 48 was explained by Dr. Mancini.

Question. Have any of the solar energy technologies that you're aware of beat coal in efficiency?

10:56:14 Answer. I don't think so. I'd be surprised if they had.

That's in the transcript at Page 188.

Because coal is far more efficient at producing energy, solar energy will never be developed without tax

10:56:33 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. That's in the transcript at Page 702.

When the government rested its case we moved to dismiss this case as a matter of law under Rule 52(c) and later moved again to dismiss under Rule 52 as a matter of law. That's Docket Number 481. You deferred ruling on both of these motions until the conclusions of all the evidence. You now have all the evidence. We ask you grant both of those motions. We incorporate the arguments in those prior motions into this closing argument and will not repeat them because they're 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've not met that burden. They hurl acquisitions and insults at defendants, but have not proven a case.

During discovery defendants attempted to have the government explain their theory of the tax code violation. Defendants were not allowed to take a deposition of an IRS representative. The government asked for a protective order

to prevent discovery. That's Document 170 in the docket. 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. That's in the docket at 195 and 196.

10:58:36

If we'd been permitted discovery, this case may never have reached trial. Throughout the trial the government's counsel objected under Rule 37(c). That's in the transcript at Pages 1183, 1825, 1842, 1925, 1974 among other places. The government's objection was based on excluding evidence not disclosed in discovery or initial disclosures. They explained that on Page 1836. The Court sustained this objection.

10:59:02

Defendants also objected to the government's witnesses who were not disclosed in discovery or initial disclosures nor identified until the pretrial witness list. That's in the docket at 296. The Court denied defendants' objection and the government was allowed to call these witnesses despite the failure to comply with Rule 37. That's in the docket at 342. It's also in the transcript at Pages 823 to 851.

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Defendants have been required to respond to surprise testimony in exhibits throughout the trial even though the defendants attempted to obtain this information during discovery. And despite all of these surprises and

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tactical disadvantages imposed upon them nothing in the government's case in chief has clarified or proven their position.

The surprise government witness Roulhac was not disclosed in the initial disclosures nor identified in responses to any discovery requests nor made available during discover. 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 his spreadsheet. He did not compare the spreadsheet records to any bank records. 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. He could not verify any quantity of lenses actually sold. He did not verify there were any actual lens purchases. He could not verify any number represented in actual receipt of payment for a lens purchase. He could not explain how terms were used in the database. The government did not call another witness to fix any of these deficiencies.

The government witness Ms. Perez was not disclosed in the initial disclosures nor identified in response to any discovery requests 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. She did not understand

and could not explain the term depreciation expense used in her exhibits. She did not understand and could not explain the term harm to the Treasury used in her exhibit. 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. She could not demonstrate that the claimed tax losses on her exhibit benefited or added to any account of any of the defendants.

11:02:03

She confirmed that none of the defendants prepared any of the tax returns involved in her review. She could not point to any evidence that any of the taxpayers purchased RaPower3 lenses.

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The government surprise witness Miss Reinken was also 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's not a CPA. She has no training in tax law. She used the term gross receipts but included in that category anything and everything on bank statements without tying amounts to lens sales. She did not use any available information on checks or deposit slips to attempt to identify lens sales. Her exhibit identified only bank statement transfers, not gross revenues generated by lens sales. Her exhibits for RaPower and the other defendants may be titled gross receipts, but none of them limit her total to

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lens sales. She made no effort to isolate the total number by avoiding redeposits or inter account transfers.

The Court's e-mails yesterday show justified concerns about the evidence regarding disgorgement. The government is double counting. None of these witnesses, Roulhac, 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 that defendants made statements does not prove a claim. Defendants do not dispute making these statements. They believe there are tax benefits available for purchasing RaPower3 lenses and have also consistently told purchasers to check with their own tax preparer to decide if they qualify. That's in Exhibits 5, 14, 20, 27, 94, 95, 119, 174, 511, 533 and 620 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 said that at Page 702 of the transcript. Technology does not have to be, quote, operational or commercially viable before the taxpayer can apply for or receive the solar tax credit or depreciation.

It's on that same page.

The IRS has defined the term placed in service and Treasury Reg 1.463(d)(1)(2). To mean when it is, quote, placed in a condition or state of readiness and availability for a specifically assigned function, unquote.

11:05:56

The threshold to qualify for placed in service is extremely low deliberately. If equipment is placed in service it qualifies for depreciation. We've previously cited the testimony of Ms. Anderson, Page 657 of the transcript; Mr. Oveson, Pages 344 to 345; and Mr. Jameson, Page 1315 and 1321 to 22. And I'm not going to repeat it here.

11:06:21

Ms. Anderson testified that once the equipment is placed in service the member can then take advantage of Section 179 deduction, unquote, meaning depreciation. According to her testimony, this does not mean the property must be in use, only that it is available for use. There is no evidence that the representation in the placed in service letters are false and no evidence any defendant knew or should have known the statements were false. Witness Oveson said placed in service only requires the equipment be available and onsite like the lenses in this case to qualify. That's in the transcript at 344 and 345 and again at 394.

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Anderson similarly found the code definition of placed in service only required the equipment to be available for use, and Birrell said it's placed in service if used in

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research and development or marketing.

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. That's in the transcript at Page 1315 and 1320 to 21. Jameson visited the site and saw the lenses were indeed available for use and therefore placed in service. Transcript 1321 to 22. Defendants made no false statements about the lenses being placed in service.

The words solar process heat are used in Section 48 but not defined, nor clarified by any regulation. But solar process heat are not the same words 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 Section 48 has been covered in the following testimony. Dr. Mancini explained on direct examination:

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.

Then on cross-examination I asked him:

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 word solar process heat?

11:09:45 Yeah. It's fundamentally for some process or some other use to do a useful activity.

Would you agree with me that if you collect solar heat through Fresnel Lenses in order to do research and development that that is solar process heat?

11:10:09 I don't know how to answer that. I suppose if you were doing research and development and as part of the process where heating water for a site that could be considered process heat.

That's in the transcript Pages 199 to 200.

11:10:24 The Court asked 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 the Internal Revenue Code. That's at 1314 to 1315 of the transcript.

11:10:40 The lenses do produce solar process heat. Dirty lenses in an array missing some panels at the research and development site produced 750 degrees according to Dr. Mancini's testimony. We've already argued the passive versus active issue, and I'm not going to repeat that.

11:11:04 The government bears the burden to prove five

elements, and this is a quote from a District Court decision in this district in 2012, United States vs. Hartshorn.

Quote: 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 cause to be made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement; 3, they new or had reason to know that the statements were false or fraudulent; 4, the false or fraudulent statements pertain to a material matter; and 5, an injunction is necessary to prevent recurrence of this conduct. Unquote.

In the government's case in chief they have no evidence to identify what makes this energy tax program promoted by defendants false or fraudulent as to any material matter. Indeed several of their witnesses testified that they hadn't even read the memorandum when -- the Kirton McConkie. They didn't know about tax benefits when they purchased it. And Matt Shepard testified he purchased but he didn't claim any benefits.

The government only implies 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 according to their filing in the docket at 334. 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 Section 46 or 48 is available to a qualifying taxpayer or that one who qualifies for a tax credit under Section 48 can also claim depreciation.

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There's no evidence defendants misrepresented the application or interpretation of these provisions. There's 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.

11:13:30

The solar lenses purchased from RaPower by taxpayers exist. A solar lens is in evidence, that is defendants' Exhibit 1522. A video of the solar lens field is in evidence, Exhibit 1500. There is a warehouse full of lenses according to the testimony of Preston at 1082, Jameson at 1321, Shepard at 1549 and Lynette Williams at 1049. Because the representations by defendants that the lenses, one, existed, and, two, were placed in service at the time of sale are true there was no false or fraudulent statement and no tax scheme.

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The government has not shown any contrary evidence that the lenses do not exist nor are not available for use.

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Therefore, the government must be found deficient in proof. There's evidence that the solar lenses qualify under Section 48 which requires equipment which uses solar to provide solar process heat. Dr. Mancini stated that the lenses concentrated solar energy to produce at least 750 degrees.

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There is no place on earth where sunlight naturally generates 750 degrees. To accomplish that requires significant solar energy concentration which the Fresnel lenses RaPower cells 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 development of the energy source for a turbine engine. All of this meets the government expert witnesses' description of solar process heat, the term used in Section 48.

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Other witnesses testified to their observations of the concentrated solar heat including Lynette Williams, the transcript at 1009; Olsen, the transcript at 1161; Jameson, 1234; Shepard at 1545; and Greg Shepard at 1666 and 1750. This Court has stated, quote: The record is pretty clear that there has been some experimental generation of process heat, unquote. That's the Court's comment at it 2195.

11:16:28

The tax code does not require the electricity to be generated. The government is inviting you to make an error by

11:16:54

focusing on electrical generation. Lenses produce heat, not electricity. Even if electricity were produced it would not be RaPower doing it.

The government argued 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 In and Out.

The argument that the 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've 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. That's at Page 1719 to 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. 2027 to 2028 of the transcript. Production is now underway for rods, steel, clamps, U-bolts, frames and metal plates in China. That's in the transcript at Page 2047.

11:19:17

The hydraulic systems, valves and valve bodies are being fabricated in India. That's in the transcript at 2047. These require six to eight-month lead times. That's in the transcript at 2407. One manufacturer's proposed use of glue as a product for lens frames alone caused a nine-month delay. That's in the transcript at Page 1656.

11:19:44

Defendants have, are and will continue developing solar energy. The government has no right to complain that it's taking too long. If lens purchasers are satisfied and have no problem with understandable delays, then the government has no right to complain.

11:20:07

The government contends it is false and fraudulent to say customers were in a trade or business. Defendants saying purchasers are in a trade or business cannot be a 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.

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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.

11:21:11

Witness Shepard, Olsen and Williams called in this case do qualify and explained their work pursuing their business involving their lenses. The deposition transcript they entered into evidence of Mr. Aulds likewise shows that he qualifies. He is pursuing a business. As clearly explained in both the Anderson letters and the Birrell memorandum, taxpayers qualify for the solar energy tax credit if they can meet the requirements of taking depreciation for the asset. There's no evidence that defendants misrepresented the tax provisions or deceived any lens purchaser when defendants advocated that upon buying a RaPower3 Fresnel lens the purchaser was involved in a trade or business.

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That qualification was explained in great detail by Ms. Anderson on the third day of trial April 4th. Ms. Anderson scrutinized the question of material -- or material participation at Page 578 one of the main requirements of whether the energy property is depreciable. Her testimony on this is from Pages 591 to 595. The conclusion which was elicited by Miss Healy-Gallagher in her examination of Miss Anderson is, quote: Material

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participation is based on the facts applicable to the individual taxpayer, unquote. That's in the transcript at Page 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 stated it was provided to help the taxpayer, quote, understand the possible tax saving benefits of purchasing energy equipment through RaPower3 so that you can consult with your own tax professional about the potential tax advantages. That's Exhibit 23A.

The Birrell memorandum similarly included language that in the memorandum Mr. Birrell said 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 adviser based on his or her individual circumstances. That's Exhibit 362.

The RaPower3 website includes a statement that each taxpayer should obtain his own advice on tax matters. Exhibit 832A. Quote: It is the sole responsibility of purchasers of RaPower3 equipment to verify all tax benefits through a competent tax preparer.

Defendants advocated and promoted the potential tax

benefits of buying RaPower Fresnel lens and leasing the lenses for use in research, testing, demonstrations and development. There's no evidence defendants said anything false or fraudulent.

11:24:52 The tax benefits of Section 48 are available to purchasers of RaPower3 lenses who qualify. There's no tax fraud or illegal scheme in that. The government has not met its burden in this case to prove there was an illegal tax scheme.

11:25:07 In my earlier motion to dismiss, I argued that the 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 allows solar lens tax credits and depreciation.

11:25:31 I was wrong. There were seven. I omitted that Mantyla McReynolds accounting firm that prepared Mr. Rowbotham's taxes. They also determined that the lenses qualified. That's in the transcript at Page 944 to 945. The government may disagree, but disagreement has nothing to do

11:25:58 with meeting its burden of proof. This case ought to be dismissed.

Even if the Court disagrees with the meaning of the Internal Revenue Code and the congressional intent, the government is still not entitled to any relief because the

11:26:12 issue that 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 now have the following testimony from Mr. Neldon Johnson on that specific issue:

11:26:32 Question. Did you rely upon people with expert capabilities?

Answer. I always have.

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

11:26:46 Answer. Well, first of all, what I do is try to get a comprehension of the law itself so I purchase books. I call CPAs. I join the National Tax Preparers Association where I could use them to look up various items quicker than I could so I can ask them questions and they can respond to

11:27:06 those questions.

Question. So after you read -- after you purchased books, and I assume you read them.

Answer. I did.

Question. Called CPAs, join the National

11:27:18 Association of Tax Preparers, what else did you do to investigate the tax consequences of selling the lenses?

I hired an accountant and three attorneys -- or two attorneys.

What was the purpose in getting input from three

11:27:31 attorneys and accountants if you had already purchased books

and called CPAs and joined that association?

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

Question. Do you consider yourself a tax expert?

11:27:50 Answer. No, I don't.

Question. Do prepare your own taxes?

Answer. 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

11:28:02 language barrier when you go from one -- I don't know what to call it, but, anyway, from one learning area to another. CPAs and attorneys have a different language that they speak, 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

11:28:21 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.

Okay. So when you went and got information from

11:28:35 the three lawyers and the CPA, after you had done all your background and your study, did you rely on your opinion or on the information you got from the people you hired?

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

11:28:51 Question. You didn't draw your own conclusion?

Answer. No. I would never do that.

Question. What did you rely on then?

Answer. I brought that information to the attorneys so that I wouldn't be in a position to argue my positions.

11:29:06

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

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Answer. I did.

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

Answer. I do not.

Question. Despite all of that, you do not claim

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that your background gives you any expertise?

Answer. No. No. I do not.

Question. To the best of your understanding have you followed the advice you got?

Answer. Yes.

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Mr. Greg Shepard 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 nine pages of his testimony in the record from 1612 to 1621 on that subject.

11:30:05

The government's case defies common sense. No

person operating a scam advises purchasers to check with taxpayers, spends eight years and millions of dollars in development of new Fresnel lens technology, secures seven patents on unique improvements to manufacturing Fresnel
11:30:32 lenses, obtains 26 solar related patents on a system that required more than $40 million in development cost, does the kind of manufacturing and assembly work shown in Exhibit 1500.

If all they were doing was a tax scam, no scammer has produced as much or made so many patentable innovations
11:30:59 along the way. Defendants have never behaved as if they knew or should have known that 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
11:31:19 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.

As to damages, harm to the Treasury is not a basis
11:31:42 to award any disgorgement. All that exhibit does is invite the Court to make an error. If we're going to consider harm to the Treasury we're no longer equitable. We're in an area that the government says they're not attempting to pursue.

The Court's order at Docket 359 reflects the law.
11:32:05 The party is not unjustly enriched if the gains he acquired

flow from any legitimate business activity. And 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 of lens sales and from other sources. None of the witnesses, Roulhac, Perez and Reinken, should have been testified. No other government witness testified on damages. Exhibits 735, 36, 37 through 41 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 nonparty, SOLCO1, and should be stricken or ignored. Exhibit 740 involves a nonparty, XSun, and should be stricken or ignored. Exhibit 741 involves a nonparty, Cobblestone, and should be stricken or ignored.

The Court asked yesterday, this is your e-mail to the counsel, do any documents contain a sum of the annual receipts listed in 735 to 741?

The answer is no. There are no documents because these exhibits were admitted under the Federal Rule of Evidence 1006, and the Court did not order production of the supporting documents on which they were based at the time they were admitted.

Additionally, in the docket at 377, this Court ruled that defendants were not entitled to the Excel

spreadsheet Reinken used to create her summaries in Exhibits 734 to 741 because defendants were given sufficient time to inspect the underlying documents, the bank records after they were produced, end quote.

11:34:06 The Excel spreadsheet was the only document that provided a breakdown of annual receipts in Exhibit 734 to 741. Neither it nor the bank records examined by Ms. Reinken are in evidence. The Court also asked, quote: How do we know we are not double counting when revenue is transferred from one to

11:34:28 the other?

And the answer to that is, we don't. Remember it's the government's burden to come up with a reasonable approximation of ill-gotten gains, not the defendants'. The burden only shifts to the defense once the government has met

11:34:44 its burden. And double counting is forbidden because anything exceeding defendants' receipts is penal and not disgorgement. That's in United States vs. Mesadieu, M-E-S-A-D-I-E-U, 180 Fed Supp. 3d at 1113. Quote:

A court's power to order disgorgement is not

11:35:11 unlimited. It extends only to the amount that the defendants profited from his wrongdoing. Any additional sum is impermissible as it would constitute a pebble, unquote.

That is citing SEC vs. ETS Pay Phones, 408 Fed 3d. 727.

11:35:36 On this note, the Court is justifiably concerned

about the double counting issue, particularly in light of the trial testimony of Ms. Reinken. This flawed computation method was used.

Question. So if there's a deposit made in 2011 into a RaPower3 account, that deposit is something you would have picked up if it was reflected in the statement you reviewed, would it not?

Answer. Yes.

Question. All right. And if RaPower then transferred that deposit amount, say the 50,000 to a different account to a different entity and say International Automated Systems in the amount of 50,000, if that 50,000 transfer would have been on a statement that you reviewed at that time would that also have been counted in your gross receipts for IAS?

Answer. If it was a deposit item then it would have been accounted.

That's in the transcript at 883.

Also consider the second-to-the-last slide of plaintiff's damage computation for Greg Shepard. The amount that they are talking about today and in that slide is $702,001. Compare that with Exhibit 736. 736 is not in evidence, but it's still in the record.

Using the government's method of counting bank statements we have a total of $2,214,729. That's a difference of greater than 300-percent increase from the amount actually

in evidence. The government was well aware of this double counting or double collection issue. Reading from their disgorgement brief at Page 9, quote:

Shepard should be ordered to disgorge his gross receipts from the solar energy scheme. To the extent that RaPower3 transferred part of its gross receipts to Shepard Shepard should be jointly and severally liable with RaPower3 up to the amount of the gross receipts he received from RaPower3. In this way the disgorgement order will avoid double counting or double collection for the amount of RaPower3's gross receipts that were transferred to Shepard, end quote.

The government was well aware of this issue but did nothing to account for it in their computation method and presentation of summary evidence exhibits. The law does not support the government's method. None of the cases the government cited in their briefs relating to disgorgement involved a computation method of counting up deposits in bank records. We have searched for cases involving disgorgement. We haven't been able to find any case that permits this kind of approach in any of our research.

In short, no effort was made by the government to avoid this double counting problem, avoid counting deposits, rendering their computation method fundamentally flawed. And it is the government's burden, not defendants', to arrive at

the number which is a reasonable approximation.

They know their claims are embarrassingly exuberant as to Exhibit 738. There is nothing to show AIS sold any lens after 2009. The record shows that once RaPower began to sell lenses, IAS stopped. That's in the record Page 2181, transcript. IAS has never received a royalty payment from RaPower. Transcript Page 1807. IAS is a publicly trading company. Their 10Ks were audited. That's in the transcript at Page 298.

Exhibit 371 is the IAS 10K for 2010. On Page 63, Note 9 to the financial statement, it 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. Exhibit 371, Page 4, Item 1, quote, description of business explains that.

It would be an outrage to the stockholders of IAS for stock purchases in 2010, 2011, 2012, '13, '14, '15, '16 and '17 to be regarded as gross receipts from lens sales. There is nothing in the record to show any revenue during those years had anything to do with lens sales. On the contrary, they all had to do with stock sales.

The amount for lens sales in Exhibit 738 is 1,045,000 for 2008 and 1,369,000 for 2009. However, Exhibit 371, the audited financial statement of a publicly

traded company explains regarding these amounts, quote:

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 energy, end quote.

11:42:00

That's Page 63 Note 9 of Exhibit 371.

The government's witness Oveson testified, quote:

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, end quote. Transcript at Page 260.

11:42:23

All those lenses were repurchased by IAS. That's in the transcript at 2181 and 2288 to 2289.

IAS should not be a party to this case. They ceased selling lenses six years before this case was brought and nine years ago now. 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 AIS has been unjustly enriched in any amount.

11:42:46

11:43:13

The entire claimed 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 resource as lens sales revenue even when we and the government

11:43:32

know this is speculation.

Even this Court could do no more in your recent order at Docket 407 than say the, quote, evidence received to date indicates, end quote, the revenues, quote, may exceed, unquote. In other words, your order reflects the conjectural, speculative, inconclusive and imprecise nature of the government's inadequate proof. Your e-mails yesterday about the issues you want addressed likewise portray the Court's recognition that a 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 in those Exhibits 735 to 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 defendants' 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.

The government has not made a reasonable approximation, but has admitted it is as low as 5,188,000. When an attorney represents a fact to the Court as done in the transcript of this case that becomes a judicial admission. Reading from Boyington vs. Perchron Field Services, B-O-Y-I-N-G-T-O-N, vs. P-E-R-C-H-R-O-N Field Services, a decision at 2017 US District Lexis 184991. This is a decision in 2017 out of the Western District of Pennsylvania.

Case law on this issue from the US 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. 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 made during the course of proceedings. Counsel's verbal admission at oral argument that the government failed to meet her burden of establishing diversity jurisdiction was a binding admission on the government. Statements made by an attorney during oral argument are binding judicial admissions and may form the basis for deciding summary judgment.

I'm leaving out all the internal cites.

When the government admitted that the bottom end of damages is 5,188,000 that was a judicial admission. As the government's attorney explained, quote:

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, unquote.

11:47:24 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

11:47:45 times an inflated number of 49,415 lenses being sold taken from Exhibit 742. That exhibit includes within the total number of lenses tests, lenses assigned for sale that were never sold, lenses sold but were never paid for. The $49,000 number is grossly inaccurate and unreliable.

11:48:15 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

11:48:39 case for which a jury was not needed. It would be in error to now award any damages. Any award must be confined to disgorgement. But the Court is not in a position to know if any amount awarded does include damages and not merely equitable disgorgement of unjust enrichment. The government

11:49:02 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. Nonetheless, defendants have shown the government estimates are unreliable. The defendants must be unjustly enriched before the government is entitled to any disgorgement.

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11:49:45

The record in this case includes a statement of undisputed fact that the defendants and Neldon Johnson in particular offered to repurchase all of the lenses. There can be no unjust enrichment when defendant Neldon Johnson has offered on multiple occasions to refund all the lens purchased payments if tax benefits are not available.

11:50:09

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. They want to stay with their purchase. As Preston Olsen testified, quote, the technology seems border line revolutionary. I think it's going to be incredibly profitable unless they're put out of business by the government, end quote. Transcript at 1154.

11:50:32

Despite all the risks involved, Preston Olsen put his dollars behind the project.

11:50:55

Question. Why did you go forward with additional purchases if you were aware of those risks?

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

11:51:11

Transcript at 1172.

Similarly, 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. That's at Page 1000 and 1001.

11:51:30

Robert Rowbotham testified he believed it was possible to make a profit from owning the lenses even with all the risks. That's in the transcript at Page 952.

Matt Shepard purchased lenses because he wanted to profit from owning, and he did not claim any tax benefits. That sale because it involved no tax issue is by any measure a legitimate business activity and therefore cannot be subject to disgorgement.

11:51:52

These are the government's witnesses I'm referring to. We have to assume that they're the best the government can offer. But none of them show any regret for purchasing or complaining about treatment or information from RaPower3. Before court you ordered a party is not unjustly enriched if the gains he acquire flow from any legitimate business activity.

11:52:12

11:52:37

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.

11:52:57

Peter Gregg testified that he purchased because of the groundbreaking bladeless turbine technology, not tax benefits. He's in it to make money. That's in the depo of Gregg that was designated.

11:53:19

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 of 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 or 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.

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The solar project does not need to succeed to qualify. A solar project does not need to be commercially

11:54:24

viable to qualify. Because as Dr. Mancini testified there is no solar energy production that can compete with coal 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 the encouragement of 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 slide show purchasers can qualify if they meet the 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 lens, 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, a photovoltaic system and hydroponic system.

11:56:40

I should mention the single witness whose deposition testimony claimed he only bought lenses for tax benefits, that's Mr. Michael Penn, testified he never paid for a lens.

Question. In fact, you didn't pay anything, not even the amount you were supposed to pay.

11:57:00

Answer. Right.

That's in ECF Document 305, Defendants' Exhibit 448, his deposition on Page 75.

Therefore the only witness, the only witness they have anything from that says he bought for tax benefits never paid for the lens. No revenues were received. There's nothing to disgorge. That witness is only relevant to prove the government has overstated its disgorgement claim.

11:57:16

11:57:41

This case does not involve any sale of the patented Johnson turbine, nor does it involve any sale of the patent heat exchanger, nor any of the solar patented collectors, solar towers, lens frames, braces, framing fasteners or structural innovations. It doesn't involve the sell of any hydraulic alignment mechanism. It involves the sale of

11:58:06

patented Fresnel lenses.

The Johnson turbine preexisted the Fresnel lenses by years. All the other items, collectors, exchangers, towers, lens frames, braces, fasteners, the hydraulic alignment mechanism, all of them were developed using the Fresnel lenses in research and development. All of them. That's a useful function.

11:58:28

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've engaged in shabby conduct throughout this matter. They raided the 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. Shepard's employer, Bigger, Faster, Stronger. They called Shepard'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.

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They intimidated Anderson, Rowbotham, Birrell, Lynette Williams and Bigger, Faster, Stronger. They damaged or destroyed records and computer files. They've attempted to interfere with arm's length transactions between willing buyers and a seller and have acted inconsistent with

11:59:55

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. Innovations, invention, development, risk taking, capital investment, progress, new answers to solve energy needs, new uses for abundant but still non-commercially viable solar energy.

12:00:51 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 strives him. He find it exhilarating. He is confident he can now move into production. As he put

12:01:13 it, quote: All I have to do now is to get it into production. That is it. I mean, that is so exciting I can't tell you how excited I am, end quote. In the transcript at 2210.

Those who have invested and those who have worked on this are all committed to seeing this through to

12:01:37 completion. Lynette Williams testified:

When you purchased your lens did you expect it would immediately produce electricity or did you expect it would take time?

I expected it would take time. There was full

12:01:52 disclosure that it was in the process of being built. All the

technology was in the process of being built, so I knew it would take time.

I asked: Can you describe what progress or advancement you saw being made as you visited?

12:02:07 The first time we saw the machinery that was being used to do something. I'm not sure, but there was a roller there that was designed to work with the lenses and to create the grooves in the lenses. The second time there was still more stuff going on. We saw the roller, we saw whatever was

12:02:23 in that building, then we had this trailer with like a frame on the back of it so we could actually see the lenses. It was all starting of the biomass. There was -- this time the flying saucers were up high and had the concentrator on it.

I asked her about not producing electricity.

12:02:48 At the time that I bought the first lens did I know if electricity had not been sold? I knew it had not been sold.

When you made your subsequent purchases, were you aware that they had not sold electricity?

12:03:02 Yes. I was aware.

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?

I did not know. I'm a techie girl. Like I

12:03:16 testified earlier, I'm writing some software, and I know it

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

She was asked: Before you made any purchases had you seen the Kirton McConkie memorandum about tax benefits?

She answered: No. That came later.

12:03:32 At the time you purchased had you seen the Anderson law firm letter regarding tax benefits?

I have never seen the Anderson law firm letter.

Preston Olsen testified similarly. His testimony is in the record transcript at 1159 and again at 1172. I

12:03:50 won't read that.

Why should this Court allow the government to prevent that exchange to go forward? Why should you stop the people that have put their money on the line? Why should that be prevented? These people believe in what they're doing.

12:04:08 To be sure I've answered the Court's questions from yesterday's e-mail, I want to clarify, the congressional intent to stimulate investment in solar energy development makes the economic substance rule irrelevant for Section 48.

We do know the numbers on Exhibit 735 to 741 are

12:04:28 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 that are in the record, and we made no effort to do this, I remember Dean Rex Lee advising us in trial

12:04:57 practice, when you're ahead quit. And my conclusion in the

state of the record was, we didn't need to do any of this. But some of this has leaked into the record. It certainly is not exhausted, but it does go to illustrate something.

The expenditures that are in the record are Exhibit Number 542 shows expenses for 2011 of 159,975. Exhibit 543 shows expenses in 2012 of $228,410.70. Exhibit Number 520 shows Plastilite purchases of $1,145,930.18. Research and development expenses for 2008, Exhibit 371, are $760,798; and for 2009, $704,889. The cumulative net loss in the 10K of IAS for 2009, Exhibit 371, is $35,334,617. And in their 2016 10K at Exhibit 570, it shows accumulative net loss of $40,156,398.

The reason why investors are motivated to invest in a company that is losing money is because they disclose their research and development company, and people want to encourage and participate in that.

The first day of trial I had suggested that we ought to divide this case up and go forward, first of all, trying to establish that there's been a violation of the law; and then secondly, look at knew or should have known; and then thirdly, look at damages if we needed to look at damages. And you asked us, you told us you were going to do that, but you asked us to brief on the issue of disgorgement. And we filed the brief, and I'm not going to repeat it here, but it occurred to me I ought to call your attention to the brief on damages. It's my recollection that disgorgement is not

available for false statements. It has to be fraudulent statements. And the government I don't think has made a fraudulent case. We think that their case is entirely on false, not on fraudulent.

12:07:47 Finally, the government's request for an injunction should be denied because, first, it is not necessary. If the Court finds against defendants and declares that these Fresnel lens do not, cannot and will not qualify as solar energy equipment as a matter of law, my clients will voluntarily and 12:08:20 willingly never say they do, at least during the time it takes to correct that on appeal.

Second, no injunction shall be granted against nonparties XSun, SOLCO1, Cobblestone and Matt Shepard. Third, no injunction can interfere in commerce by prohibiting sales 12:08:46 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 Shepard. IAS has not sold lenses since 12:09:16 2009, and therefore there's no need to include them in an injunction because they make no sales or representation. Neldon Johnson has never sold lenses. And the government's proof is that a named party, LTB1, has done no business. That's in the docket at 302-3 on Pages 3 and 4, which is also 12:09:46 Exhibit 673. If LTB has done nothing there's no need for an

injunction.

Fifth, if an injunction were seriously considered by the Court it must be narrowly tailored to direct RaPower and Greg Shepard 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 alone decide if they are eligible because some people do and will qualify.

12:10:36 Now, I've been asked by my clients to put two concluding thoughts on the record. So for the record, first, Mr. Neldon Johnson also wanted to act pro se in this case and be able to question witnesses, cross-examine and argue before the Court. He believes his rights were abridged by the Court 12:10:55 refusing to allow him to continue in that capacity during this case. He believes and hopes you will be fair in your decision about the case, and he trusts there will be an outcome without any favoritism toward the government.

Second, for the record, the Court's order last 12:11:15 Monday, Docket 407, refusing to continue the trial despite the medical emergency of a named defendant has splintered the defense in me presenting a defense untenable and so we rested. One of the defendants wanted us to ask you to be removed from the case because of bias in favor of the government.

12:11:34 Defendants have been prejudiced by the Court's

order because unlike the government your order placed strict time limits on the defense. During the first 10 days of the original --

THE COURT: Can you slow down a little bit, Mr. Snuffer?

MR. SNUFFER: Yes.

THE COURT: Thank you.

MR. SNUFFER: Your order placed strict time limits on the defense. During the first 10 days of the original trial schedule the government was allowed to use all the trial time without any limits. In contrast, your order gave defendants only seven days for their defense. The government used over 60 percent of the time in the first 10 days. Your order allowed defendants only 40 percent of the remaining seven days of our direct case. No structure or limit or timing was required of the government 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. Shepard's continuing

contributions to his defense would have been impossible under the Court's order. Mr. Shepard missed only one day during the first 10 days of the trial because of illness. That order caused internal disharmony between the defendants and factored greatly in us resting our case.

12:13:05

When the government has not met its burden it's no more entitled to relief than any other party. They didn't meet their burden here. They aren't entitled to relief. If you favor them and give them deference it's nothing more than that 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 litigant.

12:13:28

THE COURT: You've got --

How much time?

12:13:49

THE LAW CLERK: Seven minutes.

THE COURT: Seven minutes.

MR. SNUFFER: I'm going to end early. I'm going to add the IRS is in complete control of disallowing and challenging a deduction. The fact the IRS disallows something doesn't mean a thing. It doesn't put anyone on notice. It just means the IRS has an opinion. Suing doesn't constitute notice that you know something. We'll know something when you rule in this case.

12:14:02

The fact is that the IRS loses about 60 percent of their challenges in the tax court. About 60 percent of the

12:14:27

time they're wrong, and the tax court tells them that. If all the IRS has to do to make the claim that someone knows or should have known that they were doing something impermissible then every time a person gets audited and a deduction challenge they're on notice and they're at risk for committing fraud or doing something false, that isn't the standard, and the things that were pointed to as showing a notice are inadequate.

12:14:47

I would like to, if you'll permit me to do so, go ahead and file this as a document with the Court as I did earlier argument on the Rule 52 motion.

12:15:04

THE COURT: Certainly.

MR. SNUFFER: And I have conveniently available the congressional publication about what they intended, the document I call the technical -- well, that congress called Technical Explanation of the Revenue Provisions of the Reconciliation Act of 2010 as amended in combination with the Patient Protection and Affordable Care Act. If you want that, I can --

12:15:20

THE COURT: Attach it when you file it. I have a question for you.

12:15:36

MR. SNUFFER: Yes.

THE COURT: You indicated that IAS had refunded all purchase money paid to it for lenses. I don't remember that being in the record. Can you point me to it?

12:15:46

MR. SNUFFER: It is in the record. I cited the place in the record of the notes that I will file with the Court. Every statement I made is actually supported by a reference in the record including that one. And I can look it up, but it would take me just a moment.

THE COURT: That's fine.

MR. SNUFFER: Okay.

THE COURT: Thank you.

So, Ms. Healy-Gallagher, you've got a half hour. Let me tell you what I would like to do here. I'd like to proceed with that so we can take a lunch break so we can come back and I can give you some further instructions. Would you rather do the lunch break before you speak, or are you okay going ahead for your rebuttal?

MS. HEALY-GALLAGHER: I would appreciate the lunch break, if that won't throw too much of a wrench.

THE COURT: No, I don't think it will. We'll come back at 1:30.

I know that's delaying you further, Mr. Snuffer.

MR. SNUFFER: It is.

THE COURT: I promise to get you on your way to Boise. But I think we have serious issues, and I want to give them the time that they deserve. So we'll come back at 1:30.

MR. SNUFFER: Thank you.

MS. HEALY-GALLAGHER: Thank you.

THE COURT: We're in recess.

(Recess.)

THE COURT: Miss Healy-Gallagher, are you ready to proceed?

13:27:19 MS. HEALY-GALLAGHER: I am, Your Honor.

THE COURT: Go ahead.

MS. HEALY-GALLAGHER: What we've just heard from Mr. Snuffer resembles what his clients have to offer. Long on enthusiasm and short on a robust and disciplined analysis of

13:27:42 the defendants' solar tax scheme. For example, Mr. Snuffer said that he had already argued or explained to the Court why defendants' customers purported lens leasing business satisfied the requirements to be an active business rather than the passive activity that Section 469 tells us that any

13:28:08 business renting tangible personal property is. Defendants have never offered an explanation for this.

Similarly, we heard a lot of enthusiasm for what the lenses purportedly can do. But there's no actual evidence in the record that they actually do anything. The

13:28:39 mysterious -- the mysterious research and development that Mr. Snuffer identifies that these lenses have purportedly been placed in service to do that's actually a conclusory statement. There's never been any description of what these lenses may or may not do.

13:28:58 Further, Mr. Snuffer cites no authority for his

position that customers' lenses have any business being placed in service for yet another company to use them for research and development. It just doesn't make sense. When you don't follow the analysis set forth by the black letter law of the Internal Revenue Code, things get confusing.

13:29:27

Further, any activity that the defendants may claim involves research and development we call tinkering at best and a fraud at worst. That's because Neldon Johnson has no business claiming that he's engaged in research and development to create a solar energy technology. The Court concluded that or observed that when reaching its conclusions about Mr. Johnson and his total failure to show qualifications to testify as an expert under Federal Rule of Evidence 702. The Court concluded that Mr. Johnson's testimony is not the product of reliable and accepted principles and methods, and there's insufficient proof that he's ever reliably applied the principles and methods of science to the facts at issue in this case. He presents with no college degree, no experience with solar energy other than one short stint managing a plant in Alaska, other than his purported work with International Automated Systems. He's never published his data to the extent he even keeps any data. He's never published any articles. He's never submitted any research or actual work for authenticated peer review.

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Mr. Johnson offered no contemporaneous

documentation of his work and was unable to present current and valid documentation of his work and instead offered the highly questionable authentication of his work through unnamed experts, which this Court found not credible. Therefore, this
13:31:48 Court concluded that he did not have the qualifications necessary to testify as to anything that requires a basis under Rule 702.

Dr. Mancini observed this, as well. Dr. Mancini knows exactly what it takes to work in solar energy technology
13:32:11 in a real way. And he credibly testified to this Court that neither Neldon Johnson nor anyone associated with this energy scheme has the slightest hope of reaching those qualifications, reaching those technical standards, having that experience. And, in fact, defendant offered no expert
13:32:32 testimony to rebut Dr. Mancini.

Certainly Preston Olsen's testimony about what he thinks about the defendants' solar energy technology and other customers' blind enthusiasm for nonworking purported technology does not rebut Dr. Mancini.

13:32:53 What these points come down to and what much of this case comes down to is that the defendants themselves knew facts about the solar energy scheme that gave them the knowledge and at the very least the reason to know that their statements to customers were false or fraudulent.

13:33:27 Now, we heard a lot about the customers' opinions,

about what this technology could do or what it could be or what profit they expect to make from this. All of that information came directly from defendants, and all of that information was false or fraudulent.

13:33:47 We also heard a lot about defendants' disclaimers and their instructions to customers to have their own tax situation reviewed by tax professionals. But under the case law that applies to Section 6700 and 7408 it is clear that defendants -- that courts have long rejected such disclaimers 13:34:36 when the defendants' own promotional materials claim to be based on legal content and directly cite legal authority. That's from the United States vs. Alexander, 2010 Westlaw 1643425 at Page 6 in the District of South Carolina, April 22, 2010. That court cites to the case of United States 13:35:07 v. Schultz, 529 F. Supp. 2d 341 at 351, Northern District of New York, 2007.

Schultz has a set of factors which showed that attempting to avoid liability under 6700 by pointing to a disclaimer that accompanied false or fraudulent statements 13:35:36 does not exonerate anyone. For example, in the Schultz case as in this case nowhere in the defendants' materials do they disclaim the basis for their claims concerning the tax laws, rather they merely encourage people to have the material reviewed by, quote, qualified legal counsel.

13:36:03 So for that and other reasons including the

defendants' citations to legal professionals who purportedly supported the defendants' positions the Schultz case rejected an attempt to evade liability under 6700 by use of a disclaimer.

13:36:26 The reliance on any disclaimers in this case is further demonstrated to be ridiculous because defendants send customers to their pet tax return preparers. The evidence has shown that they tell people that those pet tax return prepares are the only ones who can prepare their returns without a

13:36:50 mistake.

Further, the defendants expressly tell customers that they can rely on the Kirton McConkie memorandum and the Anderson draft to support their claims for tax benefits that the defendants promote. In short, defendants' reliance on any

13:37:18 sort of disclaimer in their materials is a red herring and does not exonerate them.

Next I'd like to address some of the defendants' arguments about disgorgement. Now, first we are not called to exacting proof of the amount of defendants' unjust enrichment.

13:37:48 We're called to offer a reasonable approximation. And if there's any uncertainty in the amount of the reasonable approximation of a defendants' gross receipts it is because of defendants' own conduct. They're the ones who didn't produce evidence on these topics. They're the ones who did not

13:38:10 disclose any information that they would rely upon to claim

any sort of reduction in the reasonable approximation that we presented. In fact, as we saw in Plaintiff's Exhibit 789 in defendants' responses to our discovery requests on these very topics the defendants basically said, you've subpoenaed the banks. Use the bank records. So that's exactly what we did.

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Further, the bank deposit analysis for RaPower3, SOLCO1 and XSun Energy is entirely appropriate because evidence in this case has shown that the only revenue those entities receive is from selling lenses.

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The defendants were free to come up with an alternative bank deposit analysis themselves. They were free to actually offer an explanation of anything that we presented here. The defendants had all bank record documents, all underlying documents, everything that was appropriate for them

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to receive to create their own evidence on any of these points.

Further, the expenses that Mr. Snuffer identified in the course of his closing are also rather conclusory. None of those expenses tell us whether, for example, a particular

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expense was paid out to Randy or LeGrand Johnson for activities involving, I'm not sure what, but really nothing to do with solar energy technology because they are not equipped. They have no experience. They have no expertise. They have no education. And yet, they were paid out by Neldon Johnson's

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firms, for example.

With respect to the 5.1 million number that Mr. Snuffer submitted as the only possible top end of disgorgement that this Court could order, his actual quotation from the argument identified specifically that we're submitting or we did submit $5.1 million as the low end of the disgorgement range. And again, the case law shows we're entitled to present a range of the defendants' unjust enrichment as a reasonable approximation especially when defendants' own conduct is what caused any uncertainty in valuation.

Further, I won't go back into it because as Your Honor has already seen within our presentation this morning, we set out exactly what we believed disgorgement should be in this case based on the evidence. And our assessment is that reasonable approximation which defendants have not rebutted.

THE COURT: How can I order disgorgement against nonparties entities SOLCO1 and XSun?

MS. HEALY-GALLAGHER: Those entities are entirely controlled by Neldon Johnson. They are him for all purposes. For example, we have the United States vs. Stinson case that I believe is cited in our disgorgement brief, which expressly allows an entity that does not have -- an entity that does not have a distinct identity from a promoter. In that situation, the individual promoter himself may be personally liable for the gross receipts that that entity collected from penalty

conduct under the Internal Revenue Code.

Further, Mr. Snuffer raised questions about some of the aspects of relief that we request in our complaint, in particular enjoining the sale of solar lenses. All relief that we request is more than authorized by 26 USC 7402A. That is a broad grant of authority for relief that is necessary or appropriate to enforce the Internal Revenue laws.

13:42:56

And here, stopping RaPower3 and any defendant from selling lenses is entirely appropriate. Defendants have fully poisoned the well of any lens sales because of the vast number of statements they have put out about these purported tax benefits connected with the lenses. They have already sent people to their pet tax return preparers to claim the tax benefits that the defendants promote. And we have an example of how the defendants, for example -- well, I've give you this example. I believe it was in 2016 defendants stopped promoting depreciation as a tax benefit connected with the solar energy scheme. Now, as an initial matter, that makes no sense because that property is depreciable as a prerequisite to qualify for the solar energy credit. Nonetheless, they stopped doing that. They stopped promoting depreciation. That didn't stop people from claiming depreciation on their tax returns as connected with their purchase of solar lenses.

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So defendants have already flooded their customers with information about the purported tax benefits connected

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with these solar lenses. So if they continue to sell lenses, people will continue to buy them and claim these tax benefits. So they should be enjoined from selling altogether.

For all of these reasons, Your Honor, again, we ask this Court enjoin defendants, grant all of the additional equitable relief we request, freeze the defendants' assets on our soon to be filed motion and, of course, deny outright defendants' 52(c) motions.

13:45:03

THE COURT: I've got a couple of questions for you. They relate to your draft findings.

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Ms. McNamee, can you provide these to counsel? There's three for each set of counsel.

I just have questions about two paragraphs of relief. I think I misunderstood this morning, this is not one of the two paragraphs, I misunderstood that you were indicating that this document, your draft findings, asked for an asset freeze. That's not correct. You asked for it in a motion.

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MS. HEALY-GALLAGHER: Yes.

THE COURT: And I denied it. And you're going to renew a motion.

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MS. HEALY-GALLAGHER: Well, correct. We're calling it a second motion because Greg Shepard was not part of the first motion. He is part of the motion we will file.

THE COURT: Okay. My questions are about

13:46:12

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?

MS. HEALY-GALLAGHER: Well, Your Honor, with respect to 7402A, because of the very breadth of the relief that it allows to craft an injunction that is appropriate in response to violations of the Internal Revenue laws it's our position that, again, because defendants have poisoned the well with respect to all of their statements about the tax benefits purportedly connected with the sale of the lenses, them stopping saying that tax benefits are connected with these lenses will not actually stop the tax harm to the Treasury.

THE COURT: Why not?

MS. HEALY-GALLAGHER: Because their customers will continue to take these tax benefits. Much like when they stopped promoting depreciation as a benefit, customers still took depreciation on the solar lenses because they had already heard it from defendants.

THE COURT: Okay. So you're just falling under the that clause that as may be necessary or appropriate for the

enforcement of Internal Revenue laws. So you want me to stop the sell of product even though the product itself doesn't represent any kind of violation of the law; it's the use that individual taxpayers make of that product.

13:48:19 MS. HEALY-GALLAGHER: Correct; at defendants' prompting. And I will also note that it's not just the solar lenses that were originally at issue in this complaint because as often happens, defendants have shifted a little bit their promotions and now they're claiming things about some kind of

13:48:35 home solar energy system for which customers could claim the solar energy tax credit. So there are any number of statements about products here and their connection to taxes.

THE COURT: Okay. My next question relates to -- Gee, I don't know what the original -- I've got somewhat of an

13:49:00 edited version. Paragraph 16, I guess. Or maybe there's a paragraph that requires them to mail to each of their persons -- each of their customers a copy of the complaint and a copy of the injunction signed by the Court.

MS. HEALY-GALLAGHER: Yes.

13:49:21 THE COURT: And then I'm looking at some edited language that I'm working with. But there's also a requirement that they completely take down their websites. Rapower3.com, rapower3.net and aius.com. That also seemed overbroad to me.

13:49:42 MS. HEALY-GALLAGHER: Okay. Well, rapower3.net to

start is the website that facilitates the form transaction documents, those transaction documents defendants hold out as the entire reason and really the sole reason that defendants can claim tax benefits. Now rapower3.com, its sole purpose is
13:50:07 to sell lenses -- well, really to sell tax benefits by way of selling lenses.

Now, aius.com has changed over time. Admittedly I have not looked at the most recent version. So perhaps some -- perhaps a portion of that cite could come down. You
13:50:29 know, if he wants to talk about some new technology he claims he has that's yet unrelated to any of the tax claims, that may be fine.

THE COURT: Is there any tax advice on aius.com?

MS. HEALY-GALLAGHER: Not that I recall, Your
13:50:47 Honor, except -- well, not explicitly. But the defendants use aius.com as a purportedly authoritative resource to support their false statements about the technology. So they send people there kind of like a corroborating resource to say, look, see. You know, here's the company that owns the
13:51:10 technology. Ooh.

THE COURT: Have you got a case that extends the injunctive relief under 7402A to a technology or product at the -- that is used in connection with the fraudulent tax scheme?

13:51:30 MS. HEALY-GALLAGHER: I do not off the top of my

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

THE COURT: Okay. All right. Thank you.

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

13:51:44

MS. HEALY-GALLAGHER: Thank you.

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

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

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

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

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each would potentially yield $175 million in revenues. I have not attempted to calculate the effect of the March 27th, 2018, letter informing every lens user that they got more lenses and inviting them to take more tax credits.

13:53:31 But the numbers tell us that this is a massive fraud on the defendants' customers, many -- well, I should say some of whom have cases pending against them in tax court, the minority. But it's also a fraud on the American people who have effectively paid to operate defendants' enterprise.

13:53:51 And an injunction will issue, and disgorgement of revenues will be ordered. This enterprise involves great effort and has broad customer support. Mr. Johnson has patents for many components which may function separately or two at a time. But the project to create a useful product

13:54:12 from solar energy has no sound scientific basis as a whole; has no demonstration of economic viability, not even the barest evidence; and does not qualify lens buyers for federal tax credit or depreciation deductions.

Mr. Johnson and other defendants have created an

13:54:34 aura of success by several websites, operating components, a large physical site with impressive construction, intense marketing and communication, but this enterprise is destined to fail by the lack of sound scientific, engineering, utility and management expertise. This is an amateur integration of

13:54:59 tax law, engineering and multilevel marketing enabled by the

defendants' universal rejection of all conventional authoritative expertise and process. It's a hoax funded by the American taxpayer through defendants' deceptive advocacy of abuse of the tax laws.

13:55:21 Enforcement of this -- of the law has been excessively been delayed. Although less than 100 individual tax audits and tax court appeals by my count are underway or have been completed, the government has taken too much time in effectively shutting down defendants' operations. This is in 13:55:40 some part due to the unique nature of defendants' enterprises, the multiple entities used by defendants, the shifting use of entities, the disbursement of thousands of customers across the United States, the remote location of the defendants' physical site and the lack of cooperation by defendants in 13:55:59 providing information in the litigation discovery process.

This delay does not weigh in the merits of the case, but it has aggravated losses to the Treasury, increased the revenues received by the defendants and emboldened the defendants to continue operations. Just days before trial 13:56:18 started they directed customers to take tax credits on lenses defendants distributed at no cost. The RaPower3 website still uses all the arguments and appeals at issue now adjudicated in this case as deceptive.

Mr. Johnson's qualifications by experience or 13:56:41 formal education are insufficient to support a theoretical

analysis of his proposed solar energy project. He has no degree and has never designed or constructed an entire solar energy project and has not published even on portions of his work except in promotional materials.

13:57:02 As one small example of Johnson's simplistic and erroneous understandings it is his impression that the local power company is required by law to allow connection of solar generation to the grid. This is true only of a very small scale renewable energy projects and is still subject to very 13:57:21 specific rules including state tariffs for which he has made no effort of qualification and he's made no other effort of contract negotiation.

While Mr. Johnson claims to have information and evaluations from professionals in many areas of technical 13:57:39 expertise required for solar energy production project he refuses to identify these experts, has provided no identification, has no reports from them.

Mr. Johnson and Mr. Shepard repeatedly received advice from tax professionals that the tax benefits they 13:57:57 sought for customers were not available. They shopped for the opinions they liked. They concealed facts from the few professionals who told them their efforts might have some merit. Contrary to instructions from tax lawyers, they posted and disseminated drafts in limited memoranda in a deliberate 13:58:18 attempt to mislead the public, and they refused to remove them

when the authors demanded removal. This demonstrates defendants' purposeful dishonesty.

Johnson and Shepard drafted summaries and glosses on the memoranda that misrepresented them. Defendants' web page represented the truth about tax law as the defendants simultaneously emphasized the project's goal is to eliminate the customers' tax liability. Suddenly after audits commenced, the tune changed to advocacy of clean energy for America. But none of that appeared in marketing materials prior to the commencement of audits.

The disclaimers buried in defendants' websites have no real effect by virtue of their language and by virtue of the overwhelming predominance of false information about tax law on the websites.

Greg Shepard ignited Neldon Johnson's enterprise with multilevel marketing. Shepard is a master marketer who amplified the information that Johnson provided to fit the sales need. The combination of incentives from multilevel marketing fees and tax benefits energized sales. Johnson, the claimed scientist, engineer and project designer distorted tax issues to fit his plan, and Shepard experienced in marketing overstated the tax and scientific issues and operational facts and misstated and exaggerated this bad advice in volume and content. Shepard has repeatedly glowingly reported that the project is about to create power. For many years promises of

power next month have been repeated so many times.

Shepard was key in his literature in preventing any careful reading of the Kirton McConkie and Anderson opinions by his overstatement of their contents in letters, marketing materials and on the website. He was repeatedly confronted with the truth but rejected it and continued to advocate the falsehoods about the project and its tax implications.

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Mr. Johnson is the center. He has a central control of every entity in his solar energy enterprise, which has any business activity and has interest in other entities which are managed by other persons, but those entities have been shown to have no business activity. He alone makes decisions about businesses.

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Relationships and responsibilities are most often undocumented. Checks have been written from entities with no apparent obligation to make payment to persons with no obligation to receive payment from those entities. His network of entities seems to morph, disappear and reappear without any reason other than his discretion. While contractual documents assigned obligation to entities, those obligations transfer without documentation. The agreements between the entities and customers refer to many documents to defining obligations such as the safety and operating guidelines referred to in the O&M agreement or the routine O&M services referenced in the agreement. But none of those

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standard or referenced documents exist.

Defendants have failed to demonstrate this project can actually function, and plaintiff has demonstrated that it cannot. Defendants have failed to demonstrate that this project has any possibility of creating revenues. Plaintiffs have demonstrated that it cannot. While defendants have assembled a large staff, site and equipment, built massive structures and demonstrated functionality of some components of the energy project, it's a Potemkin project. They have carefully avoided any integrated function of a test site or model project. The many project components which are all unconventional, largely self-invented have never been assembled into a successful end-to-end working model partly because the components are regularly redesigned and perpetually changing.

Johnson claims to have performed tests and produced power but has no records or witnesses to substantiate his claims. Johnson testified that the technology as currently designed has never been fully operational.

Shepard testified that he has seen the lenses produce solar process heat but, quote, I am not sure that I have seen everything work simultaneously to produce electricity, close quote. Shepard has also testified that Johnson has said that Johnson has seen everything produce electricity in doing research and development, but there is no

documentary evidence. Shepard testified that to his knowledge no lenses are putting solar electricity on the grid. Defendants have no evidence that revenue has been produced from any of the project components.

14:03:41 The project site has towers full of lenses arranged in four circular arrays per tower with 34 lenses in each circle and sheets of uncut plastic in a warehouse without any active solar collector, heat exchanger, generator or transmission line interconnect or any effective continually 14:04:02 operating connections between any of those or any connection to a power grid. Revenues might accrue to lens owners if power was produced. And because power production is not possible with any designs to date power production has never taken place and there is no revenue. The field of towers 14:04:24 creates the illusion of effort and success.

The only scientific evidence presented at trial is it that the system will not work and that if it did work overlooking all its untested impossibilities it will not produce electricity at a rate of return that would be 14:04:46 commercially acceptable even assuming generous tax benefits.

Johnson 's methodical avoidance of system components, interconnections and testing conceals the ultimate fraudulent reality of a system and its business. The defendants know there is no factual support for a stable 14:05:06 project but represented to the contrary. In spite of being

under development for 13 years and taking massive tax advantages this project has no production. No contracts are in place for sale of an energy product or any solar product. Normally an energy production product of this size would be financed by commercial entities, but that would require economic viability demonstrated to assure lawyers, bond issuers and commercial investors of some sophistication. But defendants have preyed on the unsophisticated small investors.

How can a project without a viable product be so successful as to generate sales of 50,000 products and $175,000 in contracted obligations and $50,000 in payments to defendants. Deceptive advocacy of tax benefits is the key. A customer who puts down as little as $105 is able to take $1050 in tax credits, and in an example in 2012 on Exhibit 496 also take a first year depreciation deduction of $1,785. Over a 10-fold return on investment is achieved in the first year.

The business model and marketing materials were carefully designed to generate the appearance of tax benefits that outweigh cash outlay and, in fact, they have done so. Most customers have never paid the $3500 cost of a lens and few have paid the $1050 down payment which is equal to the first full year tax credit. As the marketing material states, earn money from your federal income tax. Zero percent of your own money invested. With this program, you pay no federal taxes. In fact, full participation makes you tax free till

2020.

The abuse of tax benefits has warped defendants' model. They fund every component of the project, generators, towers, frames, heat exchangers, concentrators, salaries, equipment, through the inflated lens price which they can exact by promising a tax credit many times greater than or at most equal to the maximum down payment. If not for the tax credit, it is highly doubtful that any investor would pay 70 to 400 times the value of a piece of breakable plastic which has no energy production capability of its own. The lens is a small, low value almost disposable components of an unproven energy production system. Sheets of plastic sitting on pallets in a warehouse uncut, ungrooved are clearly not used in a trade or business or placed in service or solar energy property. Lenses in frames or towers with no realistic possibility of producing power or revenue are not qualified for favorable tax treatment.

When the only cash of an organization comes from investors it is a signal that it is not a trade or business and likely merely a scheme to defraud.

Mike Penn, a purchaser of lenses first heard about the lenses from his tax preparer. He didn't do any research and woke up late on the last day of the year to purchase lenses that entitled him allegedly to tax benefits and click the button before midnight, as he said. He never paid for

anything, and nothing ever happened to him for failing to pay.

He did it again the next tax season. Penn testified that it was presented to him as a tax incentive but not as an investment. He looked at it as a tax viewpoint and received no revenue.

The customers bought lenses created from sheets of Lucite costing less than $100 which were then cut into two and so inexpensive that when the customer's $3,500 breaks it is replaced free of charge. No customer testified that they had ever seen their lens or could identify their lens. No evidence was produced that this sort of identification was possible.

Customers were happy with the overstatement of value that allowed excessive tax benefits. RaPower customers are not concerned with details. Their testimony stated that they knew that technology worked because they've known since they were little children that you can take a magnifying glass and create heat and that the technology just made sense, that they felt heat when they put their hand underneath a lens and they witnessed boards being set on fire. Not one of these customers testified that they had any evidence that these lenses could place actual power on the grid or generate revenue, and few of them even asked.

This case has a disturbing undertone. It's one thing to believe in the underdog, the innovator, the

disruptor, but rejecting expertise on the basis of homespun, untested wisdom on highly technical topics is very dangerous. If we allowed manufacturers to build projects or products without regard to safety standards or food manufacturers to produce food without sanitation or safety standards, we would place society at risk. But individuals seem attracted to unconventional counter authority advocates, and they do so putting themselves in our institutions at risk.

14:11:00

This case echoes of the serious affinity fraud problem we have in this state. The same psychological motivations and willingness to believe contrary to conventional established facts underlie all these schemes that prey on individuals who are ill-prepared and can ill-afford a downside by promising a massive unreasonable upside. An injunction must now be entered to stop the losses and establish the truth.

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The defendants' multilevel marketing strategy has further enrichment of their customers and investors. Representatives of that group and employees are defendants' only supporting witnesses. Some who testified on cross-examination in favor of defendants are under threat of audit and IRS and state tax commissions. If defendants fail as they have in this case these customers face significant tax consequences equivalent to their credits and deductions taken over many years purchased with their very small down payment

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on an inflated purchase price. These people could not turn their back on their benefactor, and their non-credible testimony shows that they're bias -- shows their disabling bias because their financial lives are at stake.

14:12:43 Now, next week I will provide plaintiff's counsel with my notes from trial, my selected notes from trial, and from the deposition designations which I reviewed reflecting facts I've specifically found, as well as a somewhat edited version of the plaintiff's proposed findings of fact and

14:13:03 conclusions of law. Could we distribute these documents?

Copies will be sent to defendants' counsel. Plaintiff's counsel will integrate these materials as appropriate and proposed revised findings of fact and conclusions of law to me by a certain date.

14:13:20 How long will you need to do that?

MS. HEALY-GALLAGHER: Do you mean within the next week?

THE COURT: By a certain date. I'm giving you -- we're going to negotiate now.

14:13:35 MS. HEALY-GALLAGHER: Well, obviously, Your Honor, we would like to do this as soon as possible. I can make every effort to have something turned around by --

THE COURT: Let me just pause for a minute. I just -- we're going to come back to schedule here. I just put

14:13:49 a draft order on your desk. This order is very summary, but I

think it complies with Rule 65(d)(2). It lays out the reasons why it issued, it states its terms specifically, and it describes in reasonable detail the acts restrained or required without referring to other documents.

14:14:19 I intend to enter a limited injunction today which is laid out at the bottom of Page 3, top of Page 4, that all tax information must be removed from all the websites. And I want a declaration of compliance by next week. We've got to get this stuff off the web.

14:14:41 Now, I'll give you a chance to review that. So sit down and take minute, and then I want to talk about a schedule for a more broad order.

(Time lapse.)

MR. SNUFFER: Can I comment about this?

14:17:24 THE COURT: Let's make sure everyone is done reviewing this so we're only doing one thing at a time. But, yes, you are going to be able to comment on this. I just meant not now.

(Time lapse.)

14:18:23 THE COURT: Are both sides ready to talk about this?

MS. HEALY-GALLAGHER: Yes.

THE COURT: Okay. Mr. Snuffer, let me hear first from you.

14:18:29 MR. SNUFFER: I have a client who is fully

functional and capable of dealing with the International Automated Systems website. But as counsel said, there's nothing about taxes on that website, so compliance on that will not be a problem. I don't believe there is an XSun or SOLCO1 website, so compliance on that will not be a problem.

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The problem is that I don't know that anyone other than Greg Shepard is in full control of the RaPower3 websites.

THE COURT: I thought Matt was.

MR. SNUFFER: I need to talk to Matt to find out if he needs anything from his father in order to do that. And the concern I have is the date that you have set, Friday, June 29th. I don't know if Greg Shepard is going to require open heart surgery. My partner Bob Dahle went in a few months ago, and his condition was untreatable with a stent. He was required to undergo open heart surgery, and we didn't see him in the office for about 60 days.

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So I don't know the interplay between control of the websites, Greg Shepard's health, Matt Shepard's ability to control, and therefore what I don't know is the date.

The 29th of June may prove to be for health related reasons something that -- I can't tell you whether that's workable or not workable for the RaPower websites. As to IAS I don't think there's anything there. We shouldn't have a problem giving you a declaration. And I don't think there is an XSun or SOLCO1 website, and we can deal with that in a

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declaration. But the RaPower websites are the concern related to the health and the degree to which the website can be controlled absent the presence of Greg Shepard. I don't know that.

14:20:53 THE COURT: Okay. Well, I recognize there may be a possibility issue. But I would see in today's world there ought to be some kind of backup for that.

You haven't had any word on Mr. Shepard yet?

MR. SNUFFER: No. I don't know anything.

14:21:07 THE COURT: Well, in spite of us going ahead our thoughts are certainly with him.

Miss Healy-Gallagher?

MS. HEALY-GALLAGHER: Yes, Your Honor. You identified one of the things I was going to bring up, which is

14:21:16 the impossibility of the defense to noncompliance with any injunction. So, I mean, if that were to arise, Mr. Snuffer could certainly make that showing.

Now, with respect to the International Automated Systems website, and actually this was a comment I had with

14:21:39 respect to the final paragraph where defendants -- well, where defendants must attest that all tax related information has been removed from websites. I know that my chief would let me know if I was being a little vague if a drafted an injunction with that simply because there are tax statutes certainly that

14:22:08 are referenced on defendants' websites, but there's also an

abundance of factual information on those websites that defendants use to support their claims about why customers get tax benefits.

And so I would point the Court, for example, to Plaintiff's Exhibit 901, which is a screen shot of the current International Automated Systems website which purports to talk about PURPA, which is the act that Neldon Johnson claims purportedly gives him the right to connect into a grid any time he decides. This information on this page was almost certainly pulled from the deposition in this case, and now they're using it on the IAS -- well, it was bastardized from a deposition in this case. But it was almost certainly using it here to try to shore up what they tell customers about tax benefits.

14:22:27 14:22:51 14:23:10 14:23:24 14:23:40

THE COURT: Right.

MS. HEALY-GALLAGHER: And I just simply present that as an issue.

Further, Mr. Johnson's radio shows, so-called, on KNRS are also posted on the IAS website. Those do contain statements, again, it concerns me mostly about facts but also having to do with solar energy tax credit in particular.

THE COURT: That would have to come down.

MS. HEALY-GALLAGHER: All I'm saying is I'm not convinced that AIS does not have tax information on the website.

THE COURT: I don't see anything in Exhibit 901 that relates to tax benefits for customers of lenses. It's about PURPA.

MS. HEALY-GALLAGHER: Okay.

14:23:50 THE COURT: So I don't intend in this interim step to require that breadth of removal. I just think the tax stuff has got to come up off. And that includes the Kirton McConkie memo, the Anderson memo, the digest of those, all of the advice, the calculators, that's all got to come off. So I 14:24:15 didn't know how to be more specific right now then say, tax related information. So that's what I did.

MS. HEALY-GALLAGHER: Understood.

THE COURT: Other concerns or objections or negatives I left out or severe spelling errors?

14:24:33 MS. HEALY-GALLAGHER: Just a couple tiny things.

THE COURT: Misnumbering?

MS. HEALY-GALLAGHER: In the notice that the Court is asking -- or is requiring, excuse me, to be posted on their web pages, RaPower3 in the second-to-last line has a dash and 14:24:51 is an LLC. And then further, on the last -- I'm sorry. The last line on Page 3, that was the second-to-the-last line on Page 3 and the last line on Page 3 starts with XSun Solar, and that should be XSun Energy.

THE COURT: Energy.

14:25:10 MS. HEALY-GALLAGHER: LLC, if we're going to be

official.

THE COURT: Okay. And does it have an LLC or a Corp. or anything?

MS. HEALY-GALLAGHER: LLC.

14:25:18 THE COURT: LLC, okay.

MS. HEALY-GALLAGHER: Yes.

THE COURT: Okay. Thank you.

MS. HEALY-GALLAGHER: Thank you.

THE COURT: Mr. Snuffer, anything else?

14:25:29 MR. SNUFFER: No. Just the concern I've expressed about Shepard's involvement, Greg Shepard's involvement.

THE COURT: Right. My recollection of Matt Shepard's testimony is that he was pretty much the person, and so I hope that's true, because every day that passes I think

14:25:48 more people are being deceived.

Now let's go back to the big question, Miss Healy-Gallagher, about when you can propose revised findings of fact and conclusions of law. I'm not going to have my stuff out to you until earliest Tuesday. The court

14:26:02 reporter tells me she can't have a transcript because of other court commitments until Friday of next week.

So given that, when can you have a draft findings that you can propose to me and to Mr. Snuffer? And then I want his objections to it at some point.

14:26:22 MS. HEALY-GALLAGHER: I think that July 6th might

be a little quick of a turnaround with the holiday if the transcript is not going to be done until the 29th.

THE COURT: Okay. Well, I'm not arguing with you yet. I'm just letting you tell me what you want.

14:26:38 MR. HEALY-GALLAGHER: I'm talking it through. July 13.

THE COURT: July 13th. Okay.

Mr. Snuffer? When could you have your objections if she delivers you her draft on that day, the government

14:26:52 delivers that on that day?

MR. SNUFFER: Two weeks?

THE COURT: Two weeks, that's the 27th. All right. Your objections will be filed by the 27th, okay?

What else do we need to do today other than get to

14:27:19 Boise?

MS. HEALY-GALLAGHER: Your Honor, you clearly already ruled, but we can still get you that e-mail about our exhibits.

THE COURT: Yes. I want it.

14:27:32 MS. HEALY-GALLAGHER: Okay.

THE COURT: Because we've got to get the record complete.

MS. HEALY-GALLAGHER: Understood.

THE COURT: And will you send that copy to

14:27:38 Mr. Snuffer's office so we're all on the same page? I'm sorry

nothing is going to happen on that until Monday.

MS. HEALY-GALLAGHER: Of course.

THE COURT: Because Ms. Bowers is the exhibit keeper.

14:27:48 MS. HEALY-GALLAGHER: Understood.

THE COURT: Thank goodness we didn't have to deliver them to the jury today.

Anything else?

MS. HEALY-GALLAGHER: Nothing.

14:27:54 MR. SNUFFER: Nothing from us.

THE COURT: Thank you all. We're in recess.

(Whereupon, the court proceedings were concluded.)

* * * * *

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, KELLY BROWN HICKEN, do hereby certify that I am a certified court reporter for the State of Utah;

That as such reporter, I attended the hearing of the foregoing matter on June 22, 2018, and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages number from 2396 through 2534 constitute a full, true and correct report of the same.

That I am not of kin to any of the parties and have no interest in the outcome of the matter;

And hereby set my hand and seal, this ____ day of _____ 2007.

_____
KELLY BROWN HICKEN, CSR, RPR, RMR