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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **OBJECTION RE: FINDINGS OF FACT AND CONCLUSIONS OF LAW** Judge David Nuffer Magistrate Judge Evelyn J. Furse

I. OBJECTION TO PLAINTIFF'S "OVERVIEW"

Defendants object to the unnecessary and redundant "Overview" section of the Findings of Fact and Conclusions of Law. The Overview unfairly mixes statements of fact and conclusions of law and unsupported, gratuitous disparagement including that Defendants engaged in a "massive fraud". Although this case has been pending since 2015, Plaintiff has never provided a cogent statement of what it claims comprises an "illegal tax scheme." Defendants in good faith believed they qualified for tax incentives under their understanding of the tax laws. There is no document

or testimony that notified Defendants that it was necessary to produce electricity in order to qualify for solar energy tax incentives. It was not until the Court's oral ruling in this case that Defendants understood, for the first time, that this was necessary to qualify. Immediately following that ruling Defendants began the final effort to end their research and begin electrical production. Defendants have now produced electricity, and reached an agreement to allow their products, including the patented Fresnel lenses, to be used in commercial production of electricity. At the same time as this Objection, a Rule 59(e) and Rule 52(c) Motion is being filed with supporting material from the engineering firm that has been at the Delta site running testing and taking measurements of the electrical output that has been accomplished using the Defendants products. Defendants have not engaged in a "massive fraud" but have in good faith entertained the mistaken belief that research and development qualified for energy tax credits. That mistaken belief only ended with the Court's oral preliminary ruling.

During discovery Defendants attempt to discover what the Plaintiff contended ran afoul of the revenue code. The discovery was thwarted because Defendants were prevented from taking the deposition of a designated representative of the IRS. Instead of producing a witness to identify the basis for their claim, Plaintiff filed United States' Motion For Protective Order Prohibiting Defendants From Deposing United States' Trial Counsel, in which they argued that these central topics that were essential for the Plaintiff to prove should be protected from discovery. (ECF 170.) Even though Defendants explained they did not want to depose trial counsel, this Court sided with Plaintiff and granted the Protective Order. (ECF 195, 196).

Throughout the trial, Plaintiff's counsel has raised Rule 37(c) to object to defense evidence. (See Trial Transcript "TR." 1183:17-18, 1825:14-15, 1835:24, 1842:8, 1866:10-11, 1925:9, 1974:11, 1989:1, 1992:14, 2036:7-8, 2066:17-18, among other places). Plaintiff's counsel based

its objections on the failure to disclose in discovery or initial disclosures, should bar its use at trial. See Trial Tr. P. 1836:1-3. Defendants made the same objection to Plaintiff's witnesses who were not disclosed in discovery or initial disclosures, nor identified until the pretrial witness list. (ECF 296). The Court denied Defendants' objections and allowed Plaintiff to call these witnesses, despite the failure to comply with Rule 37. (ECF 342; see also TR. 823-851 (testimony of Jo Anna Perez and Amanda Reinken).) Defendants were forced to respond to surprise testimony and exhibits throughout the trial, even though Defendants attempted to obtain this information during discovery. Despite all these surprises and tactical disadvantages imposed on them, Plaintiff never identified what the "illegal tax scheme" involved. Nothing in Plaintiff's case in chief has clarified the alleged "scheme".

Further, Plaintiff has never identified whether it sought, or intended to prove that the statements were fraudulent or merely false. Plaintiff made no effort, and insufficient evidence was submitted, to establish fraud and each of its elements. Therefore, the Plaintiff only attempted to and only proved false statements and not fraud by Defendants. Therefore, any language describing the conduct of Defendants as "fraudulent" is objectionable and should be removed.

II. OBJECTION TO PLAINTIFF'S "INTRODUCTION"

Like the "Overview," Defendants object to language included in the unnecessary and redundant "Introduction" section of the Findings of Fact and Conclusions of Law. The Introduction unfairly mixes statements of fact and conclusions of law and makes unsupported assertions including that Defendants ″raked in more than $50 million dollars from the solar energy scheme at the expense of the United States Treasury.″ This statement is directly controverted by proposed Findings 75-85, 422, and others that more accurately reflect Plaintiff's evidence.[1] There

[1] Defendants object to the proposed disgorgement on the basis that is further described herein.

has been no evidence to support a disgorgement judgment of $50 million. The language proposed in the introduction misrepresents the record, is an unnecessary commentary on the evidence, and should be stricken.

III. OBJECTION RE: DISGORGEMENT AWARD

A. Plaintiff Has Not Provided a Reasonable Approximation of the Disgorgement Penalty.

Defendants object to the calculation of disgorgement and the proposed findings intended to support them. This Court has ordered that ″a claimant bears the burden of showing the disgorgement amount is a reasonable approximation of [defendants′] unjust enrichment.″ (ECF 359). Disgorgement is an equitable remedy intended to prevent unjust enrichment.[2] The government has the burden of establishing the disgorgement amount. To be entitled to disgorgement, Plaintiff must prove at least a reasonable approximation of the defendant's ill-gotten gains.[3] Once the government satisfies its obligation to prove a reasonable approximation, the burden shifts to the defendant to show that the plaintiff's estimate was not a reasonable approximation.[4]

Plaintiff has not met its burden of showing a reasonable approximation. Rather, Plaintiff presented a vast range of possibilities between $5 million and $50 million as the possible floor and ceiling of what may have been received by Defendants in aggregate. That is not a reasonable approximation. The difference between $50.00 and $100.00 is one matter[5], but a $45,000,000.00 difference is quite another. That is not a reasonable approximation.

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[2] *Porter v. Warner Holding Co.*, 328 U.S. 395, 399, 66 S.Ct. 1086, 1090, 90 L. Ed. 1332 (1946))); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014) (per curiam).
[3] *See S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[4] *S.E.C. v. Lauer*, 478 F. App'x at 557.
[5] See *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) – example cited by Plaintiff to argue that the upper limit of an appropriate range of damages should be awarded.

During the 12 days of trial, Plaintiff suggested at different times that the proper amount for disgorgement was: $17 million[6], between $17 million and $50 million[7], $5 million to $51,885,000[8], $25 million[9], $25,874,065[10], $32 million[11], and $175 million[12], among other amounts. Prior to trial, the first time Plaintiff identified *any* damage figure was in its first Motion to Appoint a Receiver and Freeze Assets[13] in which they argued that disgorgement damages should be $47,461,050. *Id*. at pg. 9.[14] Even in its proposed findings of fact, although it has apparently settled on a $50,025,480 penalty against Neldon Johnson, the support for that proposition ranges from $4,746,525 to $172,952,500. (See proposed Finding 79). Plaintiff includes this wide range while also proposing that the best evidence they have of actual payments received comes from isolating the word "full" in Exhibit 749 in an attempt to identify payments. Doing so, they allege gains of $17,911,507. (See proposed Finding 77). This part of the Plaintiff's case is a ′shotgun approach′ and is not a reasonable approximation of "ill-gotten gains" received by Mr. Johnson.

Plaintiff carries the burden to establish the disgorgement damages to a reasonable approximation. A range of $4,746,525 to $172,952,500 is not a reasonable approximation. How could any defendant reasonably defend against this kind of wildly swinging guesstimates once the deadline for expert witnesses had passed? If this had been disclosed in the usual course of pretrial deadlines, Defendants would have been able to use expert witnesses to review and testify to the actual numbers. Defendants were deprived of that opportunity by Plaintiff's failure to disclose,

[6] TR. 887.
[7] TR. 895.
[8] TR. 2317.
[9] TR. 2441.
[10] TR. 2441.
[11] TR. 2447.
[12] TR. 2514.
[13] ECF Doc. 252.
[14] This Court should note, the date of this filing was well after the close of both fact and expert discovery and was based upon an inaccurate extrapolation of alleged lens sales. See additional argument in this regard below.

and calculated ambush tactics employed in this case. Still Plaintiff has not met its burden and their Findings of Fact and Conclusions of Law is deficient to the extent it relies on this inexact, speculative and inconsistent proof.

B. Gross Revenues as Measurement.

In SEC disgorgement cases, courts have ordered disgorgement from defendants where all of the defendant's conduct was fraudulent or the defendant's illegitimate activity is indecipherable from his legitimate activity.[15] However, in those cases the plaintiff always bears the burden of producing the disgorgement amount to a reasonable approximation. This evidence generally involves the review and presentation of banking records, defendant's tax returns showing gross revenues, and fees earned in preparing fraudulent tax returns on a taxpayer's behalf.[16] Without sufficient evidence to reach a reasonable approximation, courts have denied disgorgement requests:

In *United States v. Stinson*[17], a case involving disgorgement of fees earned from the fraudulent preparation of tax returns, the district court held that the government's proposed disgorgement amount was not a reasonable approximation of defendant's ill-gotten gains. There, the government request for disgorgement was broken down into five categories. The court refused to order all fees from all categories because:

> "...the Court cannot discern whether fees from categories (1) and (2), which includes years 2011-2014, are duplicated in categories (3), (4), (5), and (6) because those categories include fees from the same years. It is not a reasonable approximation to seek disgorgement from Stinson for twice the amount of fees for the same tax returns."[18]

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[15] *S.E.C. v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012); s*ee S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[16] *United States v. Barwick*, No. 6:17-cv-35-Orl-18TBS, 2018 U.S. Dist. LEXIS 32289, at *3 (M.D. Fla. Jan. 25, 2018) (testimony regarding review of tax returns which included an inflated EITC amount, non-existent business, and fabricated unreimbursed business expenses and fees earned by defendants in preparing these returns)
[17] 239 F. Supp. 3d 1299, 1329 (M.D. Fla. 2017).
[18] *Id*.

In sum, the *Stinson* court held that the government had failed to carry its burden in providing a reasonable approximation of defendants' ill-gotten gains and restricted its award only to the amount proven (categories 2-3) explaining that the government had not shown that fees in the later categories were distinct from categories (1) and (2) and therefore included double-counting of the alleged damages.

In *United States v. Mesadieu,*[19] another fraudulent tax-preparer case, the court declined to accept plaintiff's proposed disgorgement amount as a reasonable approximation of defendants' ill-gotten gains. In *Mesadieu*, like this case, the government relied on a random sampling of returns which defendant tax preparer had assisted with filing. The government then relied on ***expert testimony*** to estimate the number of non-compliant returns from the random sampling.[20] The court was unimpressed. It found that the government had access to all returns filed by defendants on behalf of taxpayers (just like in this case), and held that it was not inordinate or impractical for the government to review each return to determine the number of non-compliant returns, from which it could associate fees improperly earned.[21] In that case expert opinion was insufficient to justify a speculative award. In this case Plaintiff failed to review the tax returns in its possession, made calculations without evaluating the returns actual treatment of RaPower-3 lenses, and presented no expert witness in this case to testify about disgorgement damages.

C. Net Revenues as Measurement for Disgorgement.

A court's power to order disgorgement is not unlimited. It extends only to the amount the defendant profited from his wrongdoing.[22] Any additional sum is impermissible as it would

[19] 180 F. Supp. 3d 1113, 1118 (M.D. Fla. 2016).
[20] *Id*.
[21] *Id.* at 1122.
[22] *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).

constitute a penalty.[23] Funds returned to customers or investors is a proper deduction to measure net-revenue subject to disgorgement.[24]

Generally, a defendant is not allowed to deduct business expenses from the disgorgement amount when the business was created and run to "defraud investors."[25] By extension, a defendant should be allowed to deduct business expenses to the extent that it can show that the business was not created to defraud investors.[26] Plaintiff presented no evidence that Defendants did anything to intentionally defraud investors. At every level, Defendants encouraged its customers to seek their own tax advice. Additionally, Defendants provided evidence during trial of business expenses that should also be included and discount any judgment entered against them. Exhibit Number 542 shows expenses for 2011 of $159,975. Exhibit 543 shows expenses in 2012 of $228,410.70. Exhibit Number 520 shows Plaskolite 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 a cumulative net loss of $40,156,398. There is a total of $43,156,400.88 in business expenses related to the research and development of lenses, and to lens sales and business. All of these are evidence of legitimate business expenses in the record and should be deducted in making a final net calculation for disgorgement.

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

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[23] *Id.*

[24] *SEC v. United Am. Ventures, LLC*, No. 10-CV-568 JCH/LFG, 2012 U.S. Dist. LEXIS 51978, at *17 (D.N.M. Mar. 2, 2012)(deducting from disgorgement award the amount repaid to investors as "interest payments"; see also *S.E.C. v. Haligiannis*. 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) ("[D]istributions must be subtracted because they did not unjustly enrich defendant.").

[25] *SEC v. JT Wallenbrock & Assocs..*, 440 F.3d 1109, 1114 (9th Cir. 2006).

[26] *See id.* ("Neither the deterrent purpose of disgorgement nor the goal of depriving a wrongdoer of unjust enrichment would be served were we to allow these defendants — who defrauded investors ... to 'escape disgorgement by asserting that expenses **associated with this fraud** were legitimate.'") (emphasis added).

Plaintiff proposes that this Court find that Defendants damaged the Treasury in the speculative amount of at least $14,207,517. This figure is allegedly calculated by adding all of the deductions used by nonparties who have purchased lenses from RaPower-3, and then, with the help of their own tax advisors, claimed depreciation and/or a solar tax credit. The calculation is not based on actual amounts deducted by RaPower-3 lens purchasers, but rather were calculated based upon average tax rates. There is no evaluation of those deductions on an individual basis. There is no attempt to identify an actual amount of deductions and therefore any actual loss to the Treasury attributable to RaPower-3 sales. This is not an appropriate basis for a disgorgement amount by any measure. If the Plaintiff had reviewed actual returns that number could be determined. The government failed to do this and therefore the number is not known, and evidence was not presented to this Court to verify whether each of the deductions and tax credits were from a taxpayer's involvement with RaPower3, or if deductions were made based upon some other investment or ownership of equipment. Plaintiff made no effort to distinguish energy tax credits claimed by taxpayers for rooftop solar panels, home insulation, other qualifying purchases shown on the tax returns and any purchase of RaPower-3 lenses. There was no effort to make that distinction.

E. Income of Individual Defendants as a Basis for Disgorgement.

The proper measurement of disgorgement is only the amount an individual profited from wrongdoing and there must be a "relationship between the amount of disgorgement and the amount of ill-gotten gain."[27] Accordingly, the income of individual defendants is germane to a disgorgement amount only to the extent the government can show that it is income derived *solely from the illicit or fraudulent activities* of the individual and is not a compounding calculation of

[27] *C.F.T.C. v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999).

amounts already included in the disgorgement calculation for the entities.[28] Here, all amounts claimed against individual Defendants are entirely derived from and also included in the total shown for RaPower-3 and constitutes an improper doubling of the claim. In simple terms, all money from lens sales passed through RaPower-3. RaPower-3 used those proceeds to purchase materials to build the solar systems and also to pay commissions due under the sales program. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS[29], identified in Plaintiff's exhibits 736, 737, and 738 came directly from RaPower-3. To include those disbursements to the individual Defendants as well as the income to RaPower-3 results in a double counting of the same funds and a double recovery to the Plaintiff[30] – which is improper for this Court as disgorgement, in the event the Court determines any disgorgement is proper. RaPower is the only party whose gross revenues should be counted.[31] Likewise, RaPower's costs of business are permitted off-sets to reduce any claim against them, as discussed above.

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

The government relied on the testimony from two Department of Justice paralegals to testify regarding summaries of voluminous evidence.[32] Ms. Perez prepared Pl. Ex. 752, which purports to summarize the contents of "at least 1,643 tax returns that Defendants' customers filed with the IRS."[33] Her testimony included "the total depreciation and solar tax credits that the

[28] See *Mesadieu*, 180 F.Supp at 1122 (refusing to award disgorgement amount when government failed to distinguish legitimate gains from illegitimate gains).
[29] IAS sold lenses in 2009, but in 2010 those sales were transferred to RaPower and thereafter all sales were conducted by RaPower alone.
[30] The government has also failed to account (reduce) for other sources of income for these parties during the relevant time period. The extent of that error, however, is difficult to determine without seeing the government's source documents and how they were selectively used to reach their calculated results.
[31] Further, RaPower did not collect on all sales. What was "booked" and what was "collected" are decidedly different numbers. Collections were much lower.
[32] ECF Doc. 329.
[33] *Id*. at fn. 14.

Defendants' customers claimed, applied the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government)" and the tax credits taken as a reduction to the taxpayers' liability.[34] Determining and applying an "average tax rate" by definition requires the opinion of an expert, involving selecting and applying a hypothetical "average" rather than a mere summary. She was not qualified as an expert witness, not designated as an expert witness, and no attempt was made to meet the Scheduling Order deadline for expert witnesses.

Worse still, the government blocked Defendants' efforts to obtain the information during discovery that would have disclosed during the available discovery period Plaintiff's proof of disgorgement. In June, 2017, Plaintiff successfully moved to quash Defendants' deposition notice to The US Department of Justice, Tax Division[35]. After being told that "Defendants shall not depose any representative of the United States Department of Justice, Tax Division" [Doc. 196 – Order Granting Motion for Protective Order] Defendants believed no lawyer, paralegal or employee would be allowed to testify in this case about any aspect of liability or damages. Defendants expected DOJ personnel would attempt to argue Plaintiff's legal position without any witness support, but DOJ could not testify substantively. Instead, Plaintiff presented two paralegals—representatives of the US Department of Justice, tax division—to testify as to the DOJ's work-product in accumulating, analyzing and calculating the amounts for Plaintiff's claim of disgorgement. Defendants were given no notice, and provided no discovery of their calculations, summaries or conclusions. Defendants were not provided any opportunity to question the methodology employed by Plaintiff's paralegals; could not have their own expert dissect the summaries to determine whether they were accurate; could not retain an appropriate expert to address and counter the clearly erroneous assumptions, calculations or analysis done by Plaintiff's

[34] *Id*.
[35] Doc. 170.

DOJ employees – because they were not disclosed until the eve of trial, long after Defendants' opportunity for expert witness discovery had already concluded.

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

Plaintiff proposes in fact 76 that the "total sales price of orders placed with defendants by customers was between $50,025,480.00 to $50,097,672.15." This information was taken from Plaintiff's Exhibit 749, prepared by Mr. Roulhoc. Exhibit 749 was never purported to be a damage calculation. The evidence is that Exhibit 749 is an excel spreadsheet created from a database maintained by Defendants to attempt to internally track lens sales, payments, and other information. It is raw data that included "tests" and posted "sales" that did not result in any revenue to Defendants. Roulhoc could not explain and did not understand the numbers he put into this spreadsheet. He did not compare the spreadsheet numbers to any bank records. (TR.800: 17-24). He did not verify any of the numbers represented actual receipts. (TR.806:15-17; 812:24-813:1). He could not verify any quantity of lenses were sold. (TR.813:2-4). He did not verify there were any actual lens purchases. (TR.806:18-20). He could not verify any number represented an actual payment for a lens purchase. (TR.811:10-12; 22-24; 813:5-7). He could not explain how terms were used in the database. (TR.822:6-8). The best Mr. Roulhoc's testimony can be used for is to establish that the information contained in Exhibit 749 came from Defendant's raw database. There is a paucity of evidence about the significance of Exhibit 749. Plaintiff could have deposed or called Glenda Johnson, who entered the raw data, to explain what it meant. They failed to do so and chose instead to amalgamate the unexplained raw data and present it through a witness who did not know if it included any actual revenue received, any actual lens purchases were included, or what quantity of lenses were reliably counted.

Plaintiff relies upon Exhibit 749 to propose that a judgment should enter against Neldon Johnson in the inflated amount of $50,025,480. Plaintiff derives this number from the sum of a column purporting to be lens sales and them multiplied by $1050 – despite clear evidence this amount was never received by RaPower and certainly not by Neldon Johnson. This Court has ordered that "unjust enrichment may be shown by gross receipts or increase in net assets." (ECF 359). The number proposed by Plaintiff is not established by gross receipts of RaPower or any increase in net assets to Neldon Johnson. It is an inflated guess.

Plaintiff acknowledged in open court that Exhibit 749 does not support $50,025,480 as being either the actual gross receipts or the increase in net assets.[36] Nevertheless, they proposed a finding that says "Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480." See Finding ¶ 86. Earlier, Plaintiff identified that number as the "total sale price of orders". See Finding ¶ 76. Those were shown to not be the same thing. In fact, Plaintiff's counsel acknowledged that the amount of gross receipts for payments made identified in Exhibit 749 was $17,911,507.[37] Plaintiff's counsel further stated on the record that "there is evidence that no everybody paid for every single lens in the amount of $1,050."[38] The amount proposed is more than triple the amount identified as paid in full in the very same exhibit. The Plaintiff has the burden to prove a reasonable approximation and they have repeatedly admitted in the record that their guesstimates are not accurate nor reasonable. Plaintiff has repeatedly acknowledged the fact that most of the lens purchasers did not pay the full contract amount as a claimed indicia of the false nature of the alleged scheme. They cannot have it both ways. Either the $1,050 down payment was fully paid for every single lens, which Plaintiff has

[36] Doc. 412 at pg. 98, 102; Transcript at 2447:15-2448:2.
[37] TR. 821:7-822:2; 887:11-8.
[38] TR. 892:16-17.

admitted did not happen, or they admittedly were not, and therefore the amount proposed for disgorgement is grossly and clearly overstated.

Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities"[39], its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts[40], $5,438,089 in IAS accounts[41], and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196[42]. See proposed Findings 81-85. Plaintiff's witness was not a CPA. (TR.877:8-9). She was not a lawyer. (TR.877:10-11). She used a term "gross receipts" but included in that category anything and everything on bank statements, without tying the deposit to lens sales. (TR.877:16-878:22). She did not use any available information on checks or deposit slips to attempt to identify lens sales. (TR.879:1-14). Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits about RaPower and all the other Defendants may have been labeled "gross receipts" but none of the exhibits make any attempt to limit her total to lens sales. (Ex. 735-TR.881:11-16;Ex. 737-TR.881:25-882:6; Ex. 738-TR882:8-14; Ex. 739-TR.882:21-883:1; Ex. 740-TR.883:2-7.) She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no mention or attempt to include the deposit from the purchase of IAS stock, despite the Plaintiff clearly knowing the purchase had been made. (TR.1812:4-12).[43] These numbers are inherently unreliable. Nonetheless, Plaintiff relies on this insufficient proof and asks the Court to add an additional $17,229,284 to the unreliable total of gross deposits into all bank accounts and order disgorgement of $50,025,480. *Id.*, 86. Plaintiff is not entitled to one

[39] Finding, 80.
[40] Finding, 81.
[41] Finding, 82.
[42] Finding, 85.
[43] Interestingly, although in closing argument Plaintiff's counsel acknowledged this "double dipping", it has made no effort to avoid that double dipping here.

penny more than the actual gross receipts or increase in net assets. (ECF 359). Defendants object to the amounts proposed as disgorgement penalties against RaPower-3, IAS, and Greg Shepard, as more fully explained below, but even if the Court were to consider those numbers as a reasonable approximation, an additional $17 million is unsupported and would be a penalty that disqualify this case as an equitable proceeding and convert it into a penalty—which is then a legal proceeding entitled Defendants to a jury as they demanded.

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

Plaintiff also suggested that the total number of deposits into RaPower-3 bank accounts may be the appropriate amount for disgorgement judgment to be entered. This number was provided by simply promiscuously adding up any deposits. Accepting this method of determining disgorgement requires this Court to ignore that Ms. Reinken did not use any available information on checks or deposit slips to identify lens sales. (TR.879:1-14). Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits for RaPower and all the other Defendants may be titled "gross receipts" but none of them limit her total to lens sales. (Ex. 735-TR.881:11-16;Ex. 737-TR.881:25-882:6; Ex. 738-TR882:8-14; Ex. 739-TR.882:21-883:1; Ex. 740-TR.883:2-7.) She made no effort to isolate the revenue from lens sales by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no mention or attempt to include the deposit from the purchase of IAS stock, despite the Plaintiff clearly knowing the purchase had been made. (TR.1812:4-12). These numbers are inherently unreliable.

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

At least $3,077,000 was transferred from RaPower-3 to IAS as a stock purchase Ex. 852, 507. (TR. 1812:4-12). That number is included in the amount proposed, and not grounded in any other proof as an explained transaction. That amount is double counted by being included in both the amount proposed for RaPower-3 and also the amount proposed for IAS. This is a double recovery, double counting, and demonstrates that the Plaintiff has failed to prove a reasonable approximation of the amounts received. Further, the testimony was that all of the lenses that were previously purchased from IAS had been re-purchased by RaPower-3. (TR. 2181:3-8, 2288:22-2289:3). There is absolutely no justification for the $5,438,089 figure as IAS has not had any gains from the sale of lenses.

IV. OBJECTION RE: XSUN ENERGY, SOLCO I AND COBBLESTONE

Defendants object to any mention in Findings or Conclusions of the non-Defendants SOLCO I, XSun Energy and Cobblestone for the reasons set forth below:

Without Due Process, including notice and an opportunity to present a defense, none of these non-Defendants should have anything in this decision that could be misconstrued or misapplied as collateral estoppel or res judicata by another court or in another proceeding. These parties were known to Plaintiff long before the deadline for amending pleadings in this case, and the Plaintiff elected not to amend and add them as parties.

If given an opportunity to present a defense, these non-Defendants know of the Government's tactic to not identify expert witnesses, nor to use expert witnesses, nor to disclose their damage theory until the eve of trial. If they were ever sued, all of these non-Defendants will therefore be able to anticipate this kind of ambush. They will be able to employ expert witnesses in their defense. They will be able to challenge the calculations and assumptions used against the

named Defendants in this case. The defense of non-Defendants SOLCO I, XSun Energy and Cobblestone will not follow the naïve path of assuming Government compliance with Rule 26, Scheduling Order requirements and the Court enforcing Rule 702 to prevent abuse. Therefore, if afforded Due Process before any findings involving these non-Defendants, the defense and the outcome of any claim against them will be different than the pejorative statements now gratuitously included in the Government's proposed Findings of Fact and Conclusions of Law.

Nothing entitles the Government to any relief due merely to sales of Fresnel Lenses. As to non-Defendants XSun Energy, Cobblestone and SOLCO I, there has been no proof that any of their limited sales involved individuals or business that claimed any tax benefit from purchasing lenses. In fact, there was been no proof at trial at all as to the identity of buyers of lenses from those non-parties. No analysis has been done to show what tax payments the IRS has received from the wages, benefits, and contributions to the Treasury from these non-Defendants. That analysis is missing altogether from the record, but would be presented if and when these non-Defendants are called upon to defend themselves in a claim.

Further, SOLCO I and XSun Energy may have the defense of reliance upon legal counsel, since they were the ones who hired and obtained advice from Kirton & McConkie. (See the proposed Finding of Fact No. 389 and 390.)

Any reference to these non-Defendants in the context of disgorgement is particularly inappropriate because non-Defendants cannot be included in a disgorgement award.[44] It is settled

[44] *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1123 (M.D. Fla. 2016) ("Had the Court determined that the Government established a reasonable approximation of the amount subject to disgorgement, the Court questions whether it would have had jurisdiction to order disgorgement of revenue obtained by Mesadieu's companies—entities that are not before the Court.").

that Courts must proceed with caution with respect to disgorgement awards, because any amount in excess of the ill-gotten gain constitutes a penalty.[45]

Further, the government relies upon exhibits that do not provide adequate foundation for the amounts claimed to be obtained by SOLCO. Plaintiff is asking for $3,434,992.29 based upon "sales of lenses" between 2010 and 2016. PLEX 38 does not provide evidence of any actual income. It is a proposal only. PLEX 325 is an email exchange between Peter Gregg and Greg Shepard. It does not even mention Solco I, LLC or any funds. PLEX 495 is a sales diagram. It does not provide evidence of any actual numbers. Those are the only exhibits that make any reference to potential transactions from Solco related to sales of lenses. There is no evidence that any deposits in Solco bank accounts was from the sale of lenses.

Similarly, the government relies upon exhibits that do not provide adequate foundation for the amounts claimed to be obtained by XSun. Plaintiff is asking for $1,126,888.18 for its gross receipts between 2011 and 2016. PLEX 208 identifies Xsun Energy as a parallel company to RaPower3, but does not provide evidence of any numbers. PLEX 355 is advertisement and promotion - not real numbers. PLEX 356 identifies Xsun Energy as the marketing arm for RaPower3 - not real numbers. PLEX 510 is an agreement between Richard Rowe and Xsun Energy. Shows a check to Xsun for $3,570. PLEX 743, p. 11 is a check written by Xsun Energy to Glenda Johnson for $2,000, dated 1/3/2013. Those are the only exhibits that make any reference to potential transactions from XSun related to sales of lenses. They don't identify themselves as being related to lens sales at all. There is no evidence that any deposits in XSun bank accounts was from the sale of lenses.

[45] *SEC v. Orr*, No. 11-2251-SAC, 2012 U.S. Dist. LEXIS 54155, at *17 (D. Kan. Apr. 17, 2012) (citing *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) ("[T]he power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.")).

Accordingly, these non-Defendant entities should have any references to them removed from the Findings of Fact: [SOLCO I] numbers 41, and 84, and legal conclusions on pp. 135 (Footnote 639), and 137; and [Cobblestone] from numbers 284, 285, 286, 287 and 290, and legal conclusions on p. 137; and [XSun] from numbers 41, 83, and 389; and from legal conclusions on pp. 135 (Footnote 639), 137 and 145.

V. IGNORING ADVICE OF COUNSEL EVIDENCE

The proposed findings tactically altogether omit the advice of counsel evidence in the record. Defendants sought for and obtained advice from lawyers and accountants prior to any sale of Fresnel lenses to a customer. The proposed findings are deficient if the record evidence involving Kirton & McConkie, Anderson Law Firm, Hansen, Barnett & Maxwell are omitted.

Further, the Equipment Purchase Agreement and Operations & Maintenance Agreement first mentioned in ¶141 was drafted by Kirton & McConkie. The Government fails to mention anywhere in their proposed findings that the document was prepared by legal counsel. Therefore, the following paragraphs ought to mention the respective "agreement" or "contract" was drafted by legal counsel for Defendants: ¶¶141, 143, 146, 149, 150, 151, 152, 152-footnote 175, 153, 155, 157, 158, 160, 163, 167-footnote 190, 170, 332, 345, 347, and mentioned in the conclusions on p. 108.

VI. DISSOLVING PERMANENT INJUNCTION

Any permanent injunction issued by the Court should be "until further order of the Court" because Defendants are actively producing electricity at present and therefore should be allowed to sell Fresnel Lenses as qualifying solar energy equipment. The Court has already determined that production of electricity would qualify the lenses for favorable tax treatment. Therefore, as

soon as the Court is satisfied the Defendants are producing electricity, the Permanent Injunction should be dissolved.

VII. OBJECTION RE: SPECIFIC PROPOSED FINDINGS

Defendants object to language in the following specific proposed findings[46]:

1. International Automated Systems, Inc. is a publicly traded corporation. While Mr. Johnson is a shareholder, he is neither a manager or direct or indirect owner of that company.

2. The finding should state: "Johnson has invented certain solar energy technology." Defendants have submitted on multiple occasions evidence of the number of patents Mr. Johnson has actually been awarded for inventions of solar energy technology. That is not a claim, but is a fact. The fact that a patent has been awarded is the best evidence of actual invention.

3. The word "purported" should be removed. There is actual solar energy technology. Whether Plaintiff, or even this Court believes it works, does not deserve the derision and disrespect from Plaintiff by adding the term of "purported." The government uses the phrase "purported solar energy technology" 31 times throughout the Findings and Conclusions. All of them should have "purported" deleted.

34. This paragraph has no citation to the record. It is unfounded. There was no evidence that Mr. Shepard's role was to "[disseminate] false information".

61-74. Mr. Freeborn is deceased, and has been dismissed as a party to this action. These facts are not relevant to the issues decided by the Court and should be stricken.

76. As explained above, both of these data figures are inherently unreliable and grossly exaggerated as an estimate of amounts received by any Defendant. Plaintiff states that these numbers are the "total sale price of orders", but acknowledges there are many entries in Exhibit

[46] For ease of review, Defendants will use the paragraph number provided by Plaintiff.

749 that are incomplete and do not represent an actual lens purchase. Column AQ (which Plaintiff deliberately left hidden in court) provides comments regarding payments received by RaPower. A review of Exhibit 749 shows that many of the entries were "test" entries and they do not reflect any actual transaction. They do not reflect actual payments for lenses. Others are blank, because there was never any money paid by the customer. (*Id*.) Plaintiff makes no effort to be accurate with its representation of the actual "total sale price of orders" using their unreliable Exhibit 749. They unreliably parse through an unreliable raw data base to calculate an unreliable total as if that were a reasonable approximation. The Court should curb this enthusiasm. The proposed fact should be stricken or at minimum correctly reflected as merely the total of a column in the raw data spreadsheet that is labeled "TOTAL."

78. Defendants object to this statement. While it is accurate that no Quickbooks data was provided, Plaintiff made no effort to obtain it. Plaintiff pursued the lens sale database through a Motion to Compel and if Plaintiff believed the Quickbooks data was necessary to its case, it could have compelled the production of that information, which it did not. There was no effort include this request in its Motion to Compel. Further, in 2012, Plaintiff raided Defendants' offices and took all computers, data, files, and electronic information. That would include any Quickbooks to that date. Therefore, the statement is incorrect and should be stricken.

79. This paragraph demonstrates the inherent unreliability of the numbers Plaintiff has presented to the Court as disgorgement. Plaintiff's burden is to provide a reasonable approximation. The gaps between what is suggested demonstrates that these guestimates are not reasonable approximations of money received. The range between $4,746,525 and $172,952,500 is far too great to be a reasonable approximation. The "price" of the lens has no correlation to the amount received by RaPower.

Defendants further object to the statement that Defendants offered no credible evidence to show the amount by which the amounts identified in Exhibit 749 should be reduced. Plaintiff chose not to disclose column AQ of Exhibit 749, though it was discussed. That column provides comments, including an attempt to show the amount of payments that were tracked towards any purchase. Plaintiff has elected to ignore it and made no effort to use the data that was provided.

80. Defendants have provided a substantive objection to the testimony provided by Ms. Reinken on this matter above.

81. Defendants object to this statement as identified in the objection above. Ms. Reinken made no effort to establish the source of deposits, whether from the sale of lenses or any other deposit from other source or business activity. These numbers are unreliable.

82. Defendants object to this statement as identified in the objection above. Ms. Reinken made no effort to establish the source of deposits, whether from the sale of lenses or any other deposit from other source or business activity. These numbers are unreliable.

83. Defendants object to this statement as identified in the objection above. Ms. Reinken made no effort to establish the source of deposits, whether from the sale of lenses or any other deposit from other source or business activity. These numbers are unreliable. Further, the statement is irrelevant as XSun Energy is not a party to this action, and there was no evidence presented that it sold lenses to any customer who later claimed or received any tax benefits.

84. Defendants object to this statement as identified in the objection above. Ms. Reinken made no effort to establish the source of deposits, whether from the sale of lenses or any other deposit from other source or business activity. These numbers are unreliable. Further, the statement is irrelevant as SOLCO I is not a party to this action, and there was no evidence presented that it sold lenses to any customer who later claimed or received tax benefits.

85. In addition to the reasons identified above, Defendants object to this finding as the representation of the total amount all Defendants received from the purchase of lenses is incorrect. It includes transfers of money between the parties. It includes deposits into nonparty bank accounts. It includes deposits from sources other than lens purchases. It double counts funds deposited in more than one of Defendants' accounts.

86. Earlier, Plaintiff alleges that the $50,025,480 number it now proposes should be attributed to Neldon Johnson, was solely derived from the "total sales price of orders." Now, it alleges that this amount has been paid. These facts contradict. Testimony at trial was clear that Mr. Johnson did not receive these funds. Plaintiff is overreaching because they have not and cannot show a reasonable approximation of the Defendants' gains.[47]

87. Defendants object to this statement as more fully described above. Additionally, as described in attachments to a contemporaneously filed Rule 59e Motion, Defendants' have a system that actually and verifiably does produce electricity. Therefore, the statement is incorrect and should be stricken.

88. Defendants object to this statement as it is untrue. Ex. 646 are checks written from IAS to Neldon Johnson $2,993.00, $2,500 and, $3,500 written in February 2005. There is no evidence any of these funds were derived from the sale of lenses. Ex. 647 is a check written to the NP Johnson Family Limited Partnership from IAS in January, 2012. This was long after IAS stopped selling lenses and there is also no attempt to track this to lens sales receipts.

[47] The Court has shown the DOJ deference that no litigant should be entitled to receive. They did not comply with required damages disclosure, nor support their damages claim with expert testimony, nor call witnesses who actually reviewed tax returns to see if the numbers they added were related to RaPower lenses, who could not even define such terms as "harm to the Treasury", and never settled on one damage amount or how to calculate it. If any mere citizen litigant, rather than DOJ, presented such a shabby case the Court would dispense a rebuke rather than deference. The DOJ should not be unfairly spared from the burdens imposed upon citizens who submit to the judiciary for an impartial resolution of disputes.

Further, as a matter of fact, the exhibits used to identify expenditures do not include any payments to their employees. Exhibit Number 542 shows expenses for 2011 of $159,975. Exhibit 543 shows expenses in 2012 of $228,410.70. Exhibit Number 520 shows Plaskolite 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 a cumulative net loss of $40,156,398. There is a total of $43,156,400.88 in business expenses related to the lens sales and business. All of it is legitimate and should be included in making a final net calculation.

Lastly, the majority of the checks identified in Plaintiff's exhibits were from IAS. It is undisputed that IAS has other business outside of the sale of lenses and production of solar energy systems. IAS raised revenue from selling stock, which is wholly unrelated to the lens sales of RaPower. Plaintiff made no effort to distinguish the purpose behind the payments that were made to IAS' employees, including family members of Neldon Johnson, and provided nothing to track revenues from lens sales to payments made to Neldon Johnson or his family members.

89. Defendants object to the statement that "Johnson, personally, received $623,449 from his role in the solar energy scheme." This statement is loosely based upon Exhibit 737, which is alleged to be a "summary of accounts where the main account holder was Neldon Johnson." (TR. 874:11-12.) There has never been any evidence that Mr. Johnson sold a single lens personally. There has never been any evidence that Mr. Johnson personally received payments tracked from purchases of any lenses. Rather, all purchases of lenses were made through RaPower-3 or IAS, each of which is a separate legal entity. There was no effort to distinguish whether payment was made to Mr. Johnson from IAS, RaPower-3, or some other source in Exhibit 737 and no evidence presented to the Court to establish either the validity of the exhibit or the source of

the date included on it. This amount should not in any way affect any order of disgorgement because to do so would require this Court to double count funds that came through RaPower-3, IAS, or some other non-party source, and then also attributed secondarily to Mr. Johnson. To do so exceeds the limits of disgorgement. Without demonstrating the connection between these calculations and lens sales, the amount of disgorgement ordered against Mr. Johnson would be punitive and impermissible under section 7400.

90. Defendants object to the inclusion of the phrase "his entities". The entities have management structures and members or shareholders. They are owned by different parties. They were organized for different purposes. Neldon Johnson may have roles in various business entities but they are dissimilar. What entities Plaintiff intends to be included in this overbroad statement are not identified, leaving it vague and incorrect. Further, Plaintiff fails to include the fact that each of the family members who ever received money as identified in exhibits used in the trial of this matter were or continue to be employees of those entities and entitled to be compensated for the work they have performed as an employee. Since the Plaintiff omitted all the other employees paid for their labor, they have admitted that employees are generally entitled to be compensated for their work. This is equally true for Johnson family members.

92. Defendants object to the language "directs customers to use tax return prepares who are part of the solar energy scheme". No evidence was presented that any of the tax preparers mentioned were a part of any scheme. Further, none of these named persons were parties to this action. The statement implies collusion between the named parties and the named tax preparers, when no such evidence was presented and none of the named tax preparers has had any opportunity to defend themselves against such a charge.

93. Defendants object to the mischaracterization of Mr. Jameson has having minimal qualifications, sophistication or expertise. Mr. Jameson has "a bachelor of science in industrial technology with a major in economics and a major in business administration", "a masters of social science in inter-disciplinary public administration with a major in economics", "a masters of science in taxation" and he is "currently working on [his] PhD in taxation." (TR. 1319:11-16.) He is an IRS enrolled agent, has a designation as a fellow from the National Association of Enrolled Agents which required three years of training. (*Id*. 1319:18-25.) He also did another three-year course through the National Association of Enrolled Agents to become a Graduate Fellow of Federal Examination (of which there are only 8 in the country). (*Id*. 1318:25-1319:1). He has also been preparing tax returns for more than 30 years. (*Id*. 1222). Therefore, it is a mischaracterization and unsupported by the record to state Mr. Jameson has minimal qualifications, sophistication or expertise.

94. See objection to proposed Finding 93.

102. This statement mischaracterizes the record. From the trial transcript:

> A. That is not correct. That is not what I said. What I said was, I would be happy to do his return and help him with planning to reduce his taxes overall.
>
> That did not include RaPower3. It said overall. I do a lot of tax planning for a lot of clients. The number of clients that I have in my business who have RA3 lenses is probably less than 6 percent. I spent a lot of time doing tax planning for clients that have nothing to do with solar lenses or RaPower3. And if you read my sentence it says, planning to reduce his taxes overall. It doesn't say with RaPower3. You're misinterpreting what I said, and I think that's wrong.

(TR.1254:24-1255:9). This proposed finding should therefore be stricken.

104. This statement is not supported by the record cited. The record cited says nothing about what Mr. Jameson understood about LTB. Therefore, it should be stricken.

107. Mr. Jameson's demeanor did not demonstrate deficiency in either his memory or his credibility. Plaintiff's counsel spent a considerable amount of time badgering and goading this witness to make the statement she wanted to hear. It is inappropriate now to rely upon those tactics as evidence of a witness' recollection. Mr. Jameson was truthful and informative. The proposed finding gratuitously disparages a witness and should be stricken.

115. Defendants object to this proposed finding. The fact pre-supposes that once an investigation is commenced by the IRS, the activity being investigated is per se wrong. That runs counter to the notion of due process and improperly characterizes Defendants. Defendants received tax advice by lawyers, accountants, and other tax professionals. They had done their own investigation and to the best of their lay ability studied the law. They believed what they were doing was within the confines of the law. Where the law is unclear, they are entitled to continue to pursue a course of action based on the advice of counsel and others to promote their business until a proper authority tells them otherwise. That is how our system of checks and balances works. That is what has happened since this Court's finding. The proposed finding implies more than this Court has found and should be stricken.

142. This finding is unsupported by the record. Even after knowing that the IRS was disallowing the benefits in multiple audits, purchasers determined to keep their lenses rather than seeking refunds. They want to be involved. As Preston Olsen testified: "the technology seems borderland revolutionary. I think it is going to be incredibly profitable unless they're put out of business by the government." (TR. 1154.) Despite all the risks involved Preston Olsen put his dollars behind this project:

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

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

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

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

Peter Gregg testified that he purchased because of the "groundbreaking" bladeless turbine technology, not tax benefits. (PLEX 689, Gregg Depo. P. 163, lines 7-13, 22-P. 164, line 9.) He is in it to "make money." (*Id*., Gregg Depo. P. 87, lines 9-13.)[48]

This is the state of the record. Not a single live witness called by Plaintiff testified that they purchased lenses solely for the tax benefit. Not a single one. And these were Plaintiff's witnesses.

The reason for the high price in the lenses was because of the significant amount of work and millions of dollars of expense that had gone into development of the lenses.[49]

170. Defendants object to number 170 because it misstates the evidence and the document it relies upon. The Equipment Purchase Agreement only allows a limited time, ending on January 31, 2012, to reduce the number of purchased lenses because of changes to the tax law. The proposed fact leaves it open ended, as if at any time the sale could be reduced.

[48] Gregg does not expect to realize any return until after the company recovers its development costs. (Gregg Depo. P. 61, lines 5-12.)
[49] Trial trans. at 1845:2-1847:10; 1864:4-1865:6; 1886:1 – 1888:4.

180. Because they are related, Defendants object to 180, 182, 280 and 281 together: The Plaintiff acknowledges that there are "approximately 90 towers" at the Delta site. (SOF ¶9.) There are over 200 arrays shown ready to install on towers in the Defendants Exhibit 1500 video. There were 19 towers on the R&D site used for initial testing and development. The Plaintiff's repeated statement about "19 towers" is misleading in the following paragraphs: ¶182: Discusses the true representation by Freeborn that additional towers beyond the initial 19 were planned. Misleading without including the fact that this was a true statement when made, and true today. ¶280 is false in stating that the only towers today are the original 19 at the R&D site. Should be deleted. ¶281 is false because beyond the original 19 towers in which lenses were installed, it is false that the only lenses installed are limited to those original R&D towers. Defendants Exhibit 1500 video shows tens of thousands of lenses have been installed. In 200 towers, with 4 lens circles each of which had 34 separate lens segments, a minimum total of 27,200 lenses have been installed to date.

211. Defendants object to the use of "Defendants" here. This table was created and published solely by Shepard on the RaPower.com website. The paragraphs thereafter (212, 213, 214, 215, 216, 217 and 218) correctly limit the reference to "Shepherd" alone. Similarly, number 226 refers to "RaPower-3" when discussing a website maintained by Shepherd alone. The Defendant RaPower-3 did not own, control or manage the website, and therefore the statement of fact is misleading and inaccurate.

232. Defendants object to this proposed finding. There is no evidence in the record to support it and it should be stricken. It is complete conjecture.

235, 240. Defendants object to number 235 and 240 because in addition to Johnson, Matt Shepherd (TR. 1547:3-5), Greg Shephard (TR. 1610:18-25), and Richard Jameson (PLEX 163, TR. 1234:1-7, 1262:1-10, 1325:2-18) also testified that they witnessed electricity being generated.

255. Plaintiff's Exhibit 901 is not a misrepresentation of the law. Exhibit 901 contains no representations about any agreements between Pacificorp and IAS or any other Defendant. It does not even imply that any agreement exists. The statement is a misrepresentation of the record and should be stricken.

260-264. Defendants object to the prophecy urged by Plaintiff that the Fresnel Lenses and other inventions of Johnson "never will" produce electricity. These are statements of future events, and are not facts.[50] These paragraphs should eliminate any reference to Johnson's patented inventions "never" being able to generate electricity at any future time, particularly since they are doing so at present.

267. This entire statement is one of conjecture, not fact and should be stricken.

342. There is not a consensus on every tax question. The Tax Code is nearly impossible to clearly understand. Witnesses Birrell (TR. 356) and Oveson (TR. 356, 394) were tax professionals who admitted the Tax Code could be interpreted differently by different tax preparers.

394. The statement of fact is unsupported by the record. Plaintiff's Ex. 364 are copies of legal bills. There are no entries that state that Mr. Birrell reminded Johnson that the memorandum only applies to C Corporations. The statement misrepresents the facts and should be stricken. Rather, on cross-examination Birrell testified that the analysis in his work product remained accurate statements of the law (TR. 696). Anderson testified similarly. (TR.643-644).

419. The raw cost used does not include the millions of dollars invested into creating the lenses. Mr. Johnson testified that the development of the lenses took more than 11 years. (Tr.

[50] *Layton Constr. Co. v. Wrapid Specialty, Inc.*, No. 2:14-cv-00402, 2015 U.S. Dist. LEXIS 156945, at *49 (D. Utah Nov. 19, 2015) ("Just as an affirmative representation regarding a future event is not actionable, an omission regarding a future event is equally not actionable.")

Trans. 1830-1886). Mr. Johnson testified that during those years, in order for the lenses to be developed he invested at least $14,000,000 (TR. 1866), and that during those years they took the following steps just to be able to produce the lens:

Years of time were spent performing mathematic equations analyzing the type of plastic, heat co-efficient of the plastic in relation to cooling temperature, factors for deformation at cooling, how to avoid the "stickiness" of the plastic coming off the roller, determination of the angles for every position of the lens, and then for every position on the roller die, the rate of cooling of each location of the roller, exact angles for the lenses, and temperatures that needed to be maintained to cool effectively. (TR. 1842:13 – 1843:7).

Evaluation of multiple types of plastics for use in the modeling, how long they last, what evaluation from sunlight exposure, how they would degrade over time. (TR. 1850:13-18).

Testing and evaluation of the heat transfer of the actual metals reacted with the plastics, what temperatures needed to be maintained across the entire form in order to hold all of the plastics from pulling away at the same time on the lens roller die, what working fluid should be used in the cooling process. (TR. 1851).

Determination to use copper instead of stainless steel to facilitate uniform heat transfer. (TR. 1852).

Speed of the rollers during the time of molding had to be determined over time and use. (TR. 1852).

Purchased a small plastic extruding system used to test the lenses because they had limited access to a high speed extruding roller system. Numerous tests were made in order to understand where the efficiencies could be maintained when using the high speed roller system. (TR. 1853).

Determination of the thickness of the copper on the roller. (TR. 1858).

Building of the rollers, which occurred in Canada, Tennessee, California, and Utah.

Required the hiring of an aerospace facility to rent space and cut the mold for the roller. (TR. 1861).

Required the hiring of a machinist in California to make the mold. (TR. 1861).

It took between 8 and 9 months to complete the mold. (TR. 1861).

It took approximately 3 years for the first mold to be created in Canada, at a cost of around $3,000,000. After this time was spent, the Canadian group told Mr. Johnson they couldn't make it work. (TR. 1864).

In the creation of the original mold hours and hours of time were spent polishing each line. (TR. 1865).

The total cost for the development of the workable Fresnel lens was approximately $14,000,000, (1866) which Mr. Johnson paid for prior to the production of any Fresnel lens for sale. (TR. 1867).

Testing and determination of wind load of the plastic. (TR. 1872).

Thousands of runs on different thicknesses of plastic to see how they would change the root, the back groove, the facet. (TR. 1873).

And the following patents were awarded during this process:

Patent 8900500 "facet deformation minimizing Fresnel lens die roller and manufacturing method."

Patent 7789650 "Fresnel lens angular segment manufacturing apparatus and method".

Patent 7789651

Patent 7789652 "roller extruder for manufacturing Fresnel lens angular segments from raw plastic."

Patent 20080150189 "Fresnel lens angular segment manufacturing apparatus and method."

Patent 20080150175 “Fresnel lens angular segment manufacturing apparatus and method.”

Patent 2008050179

Patent 20120177768 “facet deformation minimizing Fresnel lens die roller and manufacturing method.”

All of the above actions were taken just in the development of the lens. Years of additional work were performed in creating the towers, tracking system for the towers, the mechanisms holding the lenses, and the development of the other components of the system.

To say that there was an overvaluation of the value of the lenses would be the same as saying that a contact lens should cost pennies, because of the actual cost of the materials used in the contact lens. Contact lenses cost hundreds of dollars, because of the technical costs associated with their development and manufacture. The same is true of these Fresnel lenses.

This is therefore an insufficient valuation for the lens. If this were true, people would be purchasing contact lenses and glasses for pennies because the cost of the plastic used in those items is much less than the cost of the plastic used for these lenses.

Most importantly, Plaintiff’s ‘raw cost’ valuation approach is based on authority in cited in closing.[51] The court found that because the modules were not functional, the best evidence of the module’s value is the trustee’s sale of them for scrap. However, based on the evidence now available to this court via Defendants’ Rule 59(e) Rule 52(c) motion, the Fresnel lens are now functional and have been proven to generate electricity. Therefore, the ‘raw cost’ evaluation is no longer based in fact, and it would be error for the court to conclude otherwise.

422. Defendants object to this finding as more fully argued above.

[51] Tr. Trans at 2433:13-24; *United States v. United Energy Corp.*, No. C-85-3655 RFP (CW), 1987 U.S. Dist. LEXIS 10514, at *16, 59 A.F.T.R.2d (RIA) 768 (N.D. Cal. Feb. 25, 1987).

428. The statement is inaccurate and conjecture. Not one of these Defendants prepared or filed a single tax return for any individual who claimed a tax benefit relating to the purchase of these lenses. Each purchase was made independently. Each tax benefit claimed was made by the individual, who made the decision to claim the tax benefit, who was advised that they should seek counsel from attorneys or their own tax preparers as to whether or not they should claim the taxes. Further, the IRS has initiated and will continue to audit every single one of these individuals and will reclaim any dollar that was ever claimed.

VIII. OBJECTIONS TO CONCLUSIONS OF LAW

Defendants object to the conclusions of law in the following specific particulars:

A. There Is No Solar Energy Scheme.

Defendants object to the proposed conclusion that Defendants organized, or assisted in organizing a scheme, and sold the scheme to customers. Plaintiff relies upon case law in which an enjoined defendant created and sold a tax avoidance plan. That was their business, or purpose.[52] That was not the purpose of these Defendants. Their purpose was to market and sell their solar energy system, not a tax avoidance program. Under the Internal Revenue Code, the court "may enjoin [a] person from engaging in . . . activity subject to penalty under this title." *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at *6, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (citing I.R.C. § 7408(b)). "Such activity includes the promotion of abusive tax shelters under I.R.C. § 6700." *Id.* "The government must prove five elements to obtain an

[52] See *United States v. Raymond*, 228 F.3d 804 (7th Cir. 2000) (Defendant promoted the unconstitutionality of tax laws); *United States v. Stover*, 650 F.3d 1099 (8th Cir.) (Defendant sold tax avoidance business plans); *United States v. Benson*, 561 F.3d 718 (7th Cir. 2009) (Defendant promoted the unconstitutionality of the 16th amendment to the U.S. Constitution).

injunction under these statutes: (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct." *Id.*

In this case, Plaintiff seeks injunctive relief under § 7408 for Defendants' alleged 26 U.S.C. § 6700 violations, claiming Defendants have organized or participated in a plan or arrangement for which Defendants know or have reason to know is false or fraudulent as to any material matter. Yet, there has been no evidence to establish what makes the energy tax program promoted by Defendants false or fraudulent as to any material matter.

Plaintiff apparently only asserts the "false or fraudulent" statements arise in 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.

Plaintiff has not shown that the energy tax credits promoted by Defendants are not available to qualifying taxpayers. There can be no doubt that a tax credit under 26 U.S.C.S §§ 46 or 48 is available to a qualifying taxpayer, or that one who qualifies for a tax credit under section 48 can also claim a depreciation expense under 26 U.S.C.S. § 36. Those provisions are part of the tax code. There is no evidence that Defendants misrepresented the application or interpretation of those provisions. There is no rule or law that prevents Defendants from alerting the public to the existence of these tax code provisions. Nor is any "scheme" involved when Defendants consistently recommended purchasers consult with their own tax professional to determine if they qualify for the identified tax benefit. (See, e.g., PLEX **5** at pg. 2; PLEX **14** at pg. 2; PLEX **20** at

pg. 3; PLEX **27** at 1-3; PLEX **94**, at pg. 5; PLEX **95** at pg. 5; PLEX **119** at pgs. 1-2; PLEX **174** at pgs. 1-2; PLEX **511** at 1-2; PLEX **531** at pgs. 3, 4, 5, 6; PLEX **533** at pgs. 5-6; PLEX **620** at pg. 6, among others).

It is a fact that the solar lenses purchased by taxpayers exist. Plaintiff has no evidence that the solar lenses are nonexistent. Indeed, a solar lens in is evidence (DEX 1522); a video of the solar lens fields has been received in evidence (DEX 1500) and numerous other exhibits contain photographs or descriptions of the solar lenses. Testimony has established there is a warehouse full of lenses in addition to those already installed on towers (TR. 1082 (Preston Olsen testimony); TR. 1321 (R. Jameson testimony); TR. 1549 (M. Shepard testimony)). There is no contrary evidence that the RaPower-3 Fresnel lenses do not exist in sufficient numbers to cover all lens sales to customers.

Defendants represented that the RaPower solar lenses are "placed in service" during the taxable year for which the credit is claimed by a taxpayer. Numerous copies of the "placed in service" letters are in evidence before the Court (PLEX 103, 104, 105, 313, 321, 322, 327, 466, 534, etc). However, there is no evidence before the court that the Defendants knew that representation was false. Witnesses testified that the placed in service requirement is met when an item is "on site and it works and that someone can use it. " (TR.345, Mr. Oveson testimony). Mr. Oveson also explained "placed in service" as "the equipment had to be produced, had to be delivered in some way to the customer and it had to have the ability to function as it was supposed to function. " *Id.* Mr. Oveson testified that the placed in service issue was the biggest problem his firm faced in providing an opinion to IAS. In testifying on that point he said, "If it was determined that it was placed in service that they qualified we felt for the credit and [depreciation]." *Id.* At 346.

In response to questions from the Court, Mr. Jameson testified that the Internal Revenue Code contains three comments on how an item can be placed in service. He said, "comment number one is the asset is available and ready for use and in case there is a down time or a broken one that's considered placed in service. " (TR. 1315). Mr. Jameson continued by saying, "the third one states that if the asset is being used in the research and development or some other aspect of the business, like say advertising or something that, but the main thing is research and development to further produce or advance the technology." *Id*. Although Mr. Jameson relied on the "placed in service" letters received by his tax clients, he did not do so exclusively. He also researched the requirements for placed in service and satisfied himself that the representation by RaPower was worthy of reliance. (TR. 1320-1322). The testimony supports the conclusion that the solar lenses sold by RaPower3 were "placed in service." Government witness Cody Buck only said he did not think they were, but when asked if he knew how the IRS defined "placed in service" he said he did not know and did not research that question. Nor did he know or research how the courts interpreted "placed in service." (TR.306-307). Witness Kenneth Oveson said "placed in service" only required the equipment to be available and on site, like the lenses in this case, to qualify. (TR.344-345, 394). Oveson said they never finished researching the question of "placed in service" for the lenses. (TR.348, 351, 356-357). Witness Jessica Anderson similarly found the Code definition of "placed in service" only required the equipment be available for use. (TR.657). Kenneth Birrell testified equipment qualified as "placed in service" if used in research and development or marketing. (TR.702). Witness Richard Jameson cited the Internal Revenue Code and explained if the lenses were available for use or used in research and development or used in marketing they qualify as "placed in service." (TR.1315, 1320-1321). Jameson visited the site and saw the lenses were indeed available for use and therefore "placed in service." (TR.1321-1322).

Because the representations by Defendants that the lenses (1) existed and (2) were placed in service at the time of sale were true, there was no false or fraudulent statement to justify the claim there is a tax scheme.

Similarly, there is no evidence to prove Defendants knew that the solar lenses did not qualify as solar energy property under Section 48. Solar energy property is "any equipment which uses solar or wind energy to generate electricity, to heat or cool or provide hot water for use in a structure, or **to provide solar process heat.**" (Emphasis added.) Dr. Mancini testified that "solar process heat is basically a way of taking thermal energy that you collect and applying it to some other application, other than generating power, using the heat." (TR.105). Dr. Mancini added, "I suppose if you were doing research and development and as part of the process where heating water for a site that could be considered process heat." (TR. 200). Dr. Mancini stated that the lenses concentrated solar energy sufficient to generate at least 750°. (TR. 199). There is no place on earth where sunlight naturally generates 750°. To accomplish that requires significant solar energy concentration, which the Fresnel lenses RaPower sells have accomplished. This concentrated solar energy was then used in research and development of patented new concentrators, patented new heat exchangers, and in connection with a turbine engine. All of this meets the government expert witness' description of "solar process heat" –the term used in Section 48.

Other witnesses testified to their observations of the concentrated solar heat, including Dr. Mancini (TR. 104:25-105:3; 198:21-199:11), Lynette Williams (TR. 1009:10-20), Preston Olsen (TR. 1161:16 – 1162:13), Richard Jameson (TR. 1234:11-20), Matt Shepard (TR. 1545:20-25), and Greg Shepard (TR. 1666:7-1667:5; 1750:13-1752:1). This Court has stated that "the record is pretty clear that there has been some experimental generation of process heat." (TR.2195:12-14).

There is no evidence or testimony that Defendants knew the solar process heat generated by the RaPower-3 Fresnel lens does not qualify as energy property under Section 48.

The government contends in its proposed findings of fact that a component of the "false or fraudulent statement" is that customers were in a "trade or business". Defendants contend that such a statement cannot be the basis for a tax scheme for at least three reasons: first, the statement 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 uniquely determine whether they qualify—and all purchasers are told to consult with their own tax preparer about their unique circumstances.

The question of whether a person qualifies for the energy tax credit of section 48 and whether the person is in a trade or business is circular and dependent on the same facts. Section 48 requires that energy property be depreciable:

> For purposes of this subpart, the term “energy property” means any property—
> (A) which is—
> (i) equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat,
> ****
> **(C) with respect to which depreciation (or amortization in lieu of depreciation) is allowable . . .**

26 U.S. Code § 48 (Emphasis added).

As clearly explained in both the Anderson letters (PLEX 23A and 570) and the Birrell memorandum (PLEX 362) a person can only qualify for the solar energy tax credit if the person can meet the requirements of taking depreciation for the asset. There is no evidence that Defendants misrepresented the tax provisions or deceived any lens purchaser when Defendants advocated that, upon buying a RaPower-3 Fresnel solar lens, the purchaser was involved in a trade or business. There is no evidence that the Defendants did not believe this in good faith.

Plaintiff's challenge on this issue is essentially based on whether all purchasers of lenses qualify as being involved in a trade or business. That qualification was explained in great detail by Ms. Anderson on the third day of trial, April 4, 2018. Ms. Anderson scrutinized the question of "material participation" (TR. 578), one of the main requirements of whether the energy property is depreciable. (See Ms. Anderson's testimony from TR. 591 to 595).

The conclusion elicited by Ms. Healy-Gallagher in her examination of Ms. Anderson is "material participation is based on the facts applicable to the individual taxpayer." (TR. 595). That is the same instruction given by Defendants to purchasers of solar lenses. Defendants always advised purchasers of solar lenses to obtain the advice of their own tax advisor or attorney relating to the applicability of the solar energy tax credit and depreciation.

Ms. Anderson included in her letters the recommendation that the individual taxpayer consult his own lawyer and tax professional if he wants professional assurances that the information and interpretation of it is appropriate in his particular situation. (TR. 660, re PLEX 570). The version of the Anderson letter ultimately adopted by RaPower to give to lens purchasers states the letter was provided to help the taxpayer "understand the possible tax saving benefits of purchasing energy equipment through RaPower-3 . . . so that you can consult with your own tax professional about the potential tax advantages." (TR. 669-670, PLEX 23A).

The Birrell memorandum included similar language as used by Ms. Anderson. Mr. Birrell included the Circular 230 disclaimer that the advice given in his memorandum was not intended to avoid paying federal tax penalties that may be imposed on a taxpayer and that each taxpayer should seek advice from its own tax advisor based on his or her individual circumstances. (TR. 701, PLEX 362, page 16).

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

There can be no doubt that Defendant instructed, advised, recommended, advocated, and promoted the potential tax benefits of buying RaPower Fresnel lenses and leasing the lens for use in research, testing, demonstrations and development. There is no evidence that the statements by Defendants were known by Defendants to be false or fraudulent. They understood what they said to be true. They acted in good faith. Being mistaken is not the same thing as acting in bad faith, knowing and intending to violate the law. The tax benefits of Section 48 are available to purchasers of RaPower Fresnel lenses who qualify. There was no tax fraud or illegal tax scheme.

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

In section B of the conclusions of law, the government concludes that Defendants made statements about the allowability of tax benefits "which Defendants knew or had reason to know were false or fraudulent." The conclusion of law is in error because the government does not make a distinction as between "false" and "fraudulent." The conclusion after trial can only be that the statements were false as there was no proof at trial and no finding that the statements were made with the intent to cause reliance or that the statements were relied upon by any individual. Rather, the testimony at trial was that individuals who purchase solar lenses did so for reasons other than the tax benefits (See Objection herein, page 27, 28 *supra*). Additionally, factors mitigating in favor of Defendants that the statements were not made fraudulently is that Defendants relied on the advice of counsel in making the statements as well as the advice of other accounting and tax professionals. Defendants sought clarification as the trial began as to whether the Court required the Plaintiff to prove fraud, or only false statements. Defendants posed the question to alert the

Court to whether Plaintiff could meet its burden. The Court took the matter under advisement, but did not return to the issue before the conclusion of the case. The Court should explain in its findings that "false or fraudulent" under the code section involved in this dispute has a particular meaning independent from the words "false" and "fraudulent" or should make findings of how the statements made by Defendants were intentionally and knowingly fraudulent.

In Section B, Plaintiff seeks to include conclusions of law regarding the promotion of some unspecified statements. Plaintiff states the following: "A statement about a material matter is false in the tax law context if 'untrue and known to be untrue when made.'"[53] There is no reference to any statement that was either untrue, or that such statement was known to be untrue when made.

"A statement about a material matter can also be false because of what a plan promoter fails to say."[54] Again, there is no mention of what these Defendants failed to say. The evidence in the record in fact shows that they produced full citations of the tax law on their website (ie. PLEX 903) and that they encouraged customers to seek advice from tax professionals. (TR. 1465, EX 832A "It is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer.") Further, it is very clear that no defendant here is a tax professional. They cannot be held to that standard. There was no evidence that they knew something that was not disclosed. Section 6700(a)(2)(A) requires the United States to prove scienter as to false or fraudulent statements. Before liability can be imposed, a person must have known, or have reason to know, of a statement's falsity or fraudulent nature. *United States v. Campbell*, 704 F. Supp. 715, 726 (N.D. Tex. 1988). There has been no evidence presented that showed that to be the case. The Defendants are mistaken based on the Plaintiff's presentation and

[53] FOF, p. 97.
[54] Id.

the Court's preliminary ruling. But there is a great difference between a mistake and knowing that something is fraudulent.

C. Application to Research and Development.

Since there is undisputed proof that the Fresnel lenses sold by RaPower-3 were used in research and development, including framing support design and testing, alignment and positioning mechanism development, heat collector development, heat exchanger development, and testing with the Johnson Turbine, the Court should determine as a matter of law that 26 USC §48 does not allow solar process heat used in research and development to qualify for a tax credit. This is implicit in the decision of the Court and should be made explicit for appellate review.

Richter v. Commissioner, T.C. Memo. 2002-90, Tax Court Opinion (04/05/2002) states that "The energy property must be depreciable, which requires that the property be used in a trade or business or held for the production of income. Secs. 48(a)(3)(A)(i)". FSA 200145011 acknowledges that "research and development" can be a trade or business and discusses factors that the IRS considers when making that determination.

PLR 9413035 and 9507004 acknowledges that "research and development" can be a trade or business.

PLR 8421031 acknowledges a corporate taxpayer that is "engaged in the business of research and development".

PLR 8403028 discusses a corporation that "is principally engaged in the business of research and development of products in the music industry".

FSA 200145011 (http://www.unclefed.com/ForTaxProfs/irs-wd/2001/0145011.pdf) cites to *Snow v. Commissioner*, 416 U.S. 500 (1974), which established that the taxpayer need not currently be engaged in selling or producing a product to qualify for a §174 deduction (the research

and development credit). In *Green v. Commissioner*, 83 T.C. 667 (1984), that tax court held that while the probability of a firm's going into business will satisfy §174, the mere possibility of doing so will not.

> In determining that the partnership's research expenditures in *Snow* were not made "in connection with a trade or business," we applied the facts and circumstances test of section 162, as announced in *Higgins v. Commissioner*, 312 U.S. 212 (1941). 58 T.C. at 594 . However, one factor was given particular weight, and that was the fact that the partnership had made no sales of any product either before or during 1966. 58 T.C. at 594-596 . We cited with approval the concurring opinion of Justice Frankfurter in *Deputy v. du Pont*, 308 U.S. 488, 499 (1940), wherein he maintained that carrying on any trade or business (for purposes of the predecessor of section 162) "involves holding one's self out to others as engaged in the selling of goods or services." 58 T.C. at 594 . The Sixth Circuit affirmed our conclusion that the partnership's expenditures were pre-operating expenses and therefore nondeductible under section 174. 482 F.2d at 1029, 1032 .
>
> The Supreme Court reversed and stated that the meaning of the phrase "in connection with a trade or business" used in section 174 should not be limited by other restrictive definitions of "trade or business" which had been suggested for other sections of the Code. The Court specifically disclaimed the restrictive test of a trade or business advanced by Justice Frankfurter in *Deputy v. du Pont*, supra , as inappropriate to the purpose of section 174. 416 U.S. at 502-503 . Section 174 is intended to encourage research and experimentation by "small or pioneering business enterprises," as well as by established, ongoing businesses. A trade or business test under section 174 which depended upon the existence of production or sales of the invention "would defeat the congressional purpose somewhat to equalize the tax benefits of the ongoing companies and those that are upcoming and about to reach the market." 416 U.S. at 504 . Therefore, the Court held that the partnership was entitled to a deduction under section 174 even though it had not yet had any sales.

The hard and fast rule Plaintiff promotes is that a product must be completely beyond research and development before it can qualify for tax credits. That is inaccurate and should not be carried forward in this case.

D. Depreciation Deduction and Solar Energy Tax Credit.

Section B of the conclusions of law, subsection (c), the government writes that "Defendants knew, or had reason to know, that their customers were not allowed the solar energy credit." That

conclusion was not proven by any proof at trial, but is merely assumed by the government. The witnesses called by Plaintiff at trial that owned lenses and operated what they believed was their solar lens business testified as to their business practices. In particular Preston Olsen and Greg Shepard testified at length as to the activities they undertook in the exercise of their solar lens businesses. The conclusion of law should point to specific proof of the Defendants' knowledge that lens buyers did not qualify as business owners or state that the conclusion is merely an assumption based on conjecture of the questions involved in "placed in service" and whether Defendants representation of placed in service is sufficient for a business owner to claim depreciation. There was no evidence of that at trial and the court refused to allow Defendants' experts on tax law and procedure to testify. The only testimony at trial on the availability of depreciation to solar lens businesses came from Mr. Jameson who said that a taxpayer is allowed to rely on the statements of others that their equipment was placed in service. There was also proof of the existence of the lenses, their location at the warehouse and that the lenses were either installed on a tower, array or available for use.

Defendants did not control whether the lens buyers qualified as being in a trade or business. Defendants relied on the advice of counsel that lens buyers could be involved in a trade or business if they were the sole provider of services to the business. As the IRS has refused to allow any of the Tax Court cases to proceed to decision as to whether any of the taxpayers whose returns have been audited can qualify as in a trade or business, the position advocated by Defendants based on advice of counsel and tax professionals cannot be fraudulent and a conclusion finding "false or fraudulent" should be clarified on that point.

The conclusions of law also propagate Plaintiff's position (that is in error) that the section 48 solar energy tax credits are available only for electricity production. Section 48 clearly provides

that solar energy equipment, which provides the basis for the solar tax credit, includes equipment used to produce electricity **OR** solar process heat.[55] There was ample evidence at trial that the solar lenses create heat from sunlight and that heat has been concentrated for uses in processes to develop electricity, and other useful purposes.

The conclusions of law fail to reference that Defendants consistently advocated that buyers of lenses consult with their own legal and tax professionals. If there is a distinction between "false" and "fraudulent" then the conclusions of law need to reflect that there is no proof of fraudulent behavior because Defendants were particularly careful to suggest to their clientele that they get their own advice.

F. There Was Never a Gross Overvaluation Statement.

As this Court heard during Mr. Johnson's testimony, the development of the lenses took more than 11 years. (TR. 1830-1886). Mr. Johnson testified that during those years, in order for the lenses to be developed he invested at least $14,000,000 (TR. 1866), and that during those years they took the following steps just to be able to produce the lens:

Years of time were spent performing mathematic equations analyzing the type of plastic, heat co-efficient of the plastic in relation to cooling temperature, factors for deformation at cooling, how to avoid the "stickiness" of the plastic coming off the roller, determination of the angles for every position of the lens, and then for every position on the roller die, the rate of cooling of each location of the roller, exact angles for the lenses, and temperatures that needed to be maintained to cool effectively. (TR. 1842:13 – 1843:7).

Evaluation of multiple types of plastics for use in the modeling, how long they last, what evaluation from sunlight exposure, how they would degrade over time. (TR. 1850:13-18).

[55] 26 U.S.C. § 48(a)3)(A)(i) & (C).

Testing and evaluation of the heat transfer of the actual metals reacted with the plastics, what temperatures needed to be maintained across the entire form in order to hold all of the plastics from pulling away at the same time on the lens roller die, what working fluid should be used in the cooling process. (TR. 1851).

Determination to use copper instead of stainless steel to facilitate uniform heat transfer. (TR. 1852).

Speed of the rollers during the time of molding had to be determined over time and use. (TR. 1852).

Purchased a small plastic extruding system used to test the lenses because they had limited access to a high speed extruding roller system. Numerous tests were made in order to understand where the efficiencies could be maintained when using the high speed roller system. (TR. 1853).

Determination of the thickness of the copper on the roller. (TR. 1858).

Building of the rollers, which occurred in Canada, Tennessee, California, and Utah.

Required the hiring of an aerospace facility to rent space and cut the mold for the roller. (TR. 1861).

Required the hiring of a machinist in California to make the mold. (TR. 1861).

It took between 8 and 9 months to complete the mold. (TR. 1861).

It took approximately 3 years for the first mold to be created in Canada, at a cost of around $3,000,000. After this time was spent, the Canadian group told Mr. Johnson they couldn't make it work. (TR. 1864).

In the creation of the original mold hours and hours of time were spent polishing each line. (TR. 1865).

The total cost for the development of the workable Fresnel lens was approximately $14,000,000, (1866) which Mr. Johnson paid for prior to the production of any Fresnel lens for sale. (TR. 1867).

Testing and determination of wind load of the plastic. (TR. 1872).

Thousands of runs on different thicknesses of plastic to see how they would change the root, the back groove, the facet. (TR. 1873).

And the following patents were awarded during this process:

Patent 8900500 “facet deformation minimizing Fresnel lens die roller and manufacturing method.”

Patent 7789650 “Fresnel lens angular segment manufacturing apparatus and method”.

Patent 7789651

Patent 7789652 “roller extruder for manufacturing Fresnel lens angular segments from raw plastic.”

Patent 20080150189 “Fresnel lens angular segment manufacturing apparatus and method.”

Patent 20080150175 “Fresnel lens angular segment manufacturing apparatus and method.”

Patent 2008050179

Patent 20120177768 “facet deformation minimizing Fresnel lens die roller and manufacturing method.”

All of the above actions were taken just in the development of the lens. Years of additional work were performed in creating the towers, tracking system for the towers, the mechanisms holding the lenses, and the development of the other components of the system.

To say that there was an overvaluation of the value of the lenses would be the same as saying that a contact lens should cost pennies, because of the actual cost of the materials used in

the contact lens. Contact lenses cost hundreds of dollars, because of the technical costs associated with their development and manufacture. The same is true of these Fresnel lenses.

G. Plaintiff Promotes An Untenable Disgorgement Calculation.

1. Plaintiff Has Not Provided a Reasonable Approximation of the Disgorgement Penalty.

Defendants object to the calculation of disgorgement and the proposed conclusions of law intended to support them. This Court has ordered that ″a claimant bears the burden of showing the disgorgement amount is a reasonable approximation of [defendants′] unjust enrichment.″ (ECF 359). Disgorgement is an equitable remedy intended to prevent unjust enrichment.[56] The government has the burden of establishing the disgorgement amount. To be entitled to disgorgement, Plaintiff must prove at least a reasonable approximation of the defendant's ill-gotten gains.[57] Once a plaintiff satisfies its obligation to prove a reasonable approximation, the burden shifts to the defendant to show that the plaintiff's estimate was not a reasonable approximation.[58]

Plaintiff has not met its burden of showing a reasonable approximation. Rather, Plaintiff presented a vast range of possibilities between $5 million and $50 million as the possible calculations of what was received by Defendants in aggregate. That is not a reasonable approximation. The difference between $50.00 and $100.00 is one matter, but a $45,000,000.00 difference is quite another. That is not a reasonable approximation.

[56] *Porter v. Warner Holding Co.*, 328 U.S. 395, 399, 66 S.Ct. 1086, 1090, 90 L. Ed. 1332 (1946))); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014) (per curiam).
[57] *See S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[58] *S.E.C. v. Lauer*, 478 F. App'x at 557.

During the 12 days of trial, Plaintiff suggested the proper amount for disgorgement was: $17 million[59], between $17 million and $50 million[60], $5 million to $51,885,000[61], $25 million[62], $25,874,065[63], $32 million[64], and $175 million[65], among other amounts. Prior to trial, the first time Plaintiff identified any damage figure was in its first Motion to Appoint a Receiver and Freeze Assets[66] in which they argued that disgorgement damages should be $47,461,050.[67] Even in its proposed findings of fact, although it apparently settled on a $50,025,480 penalty against Neldon Johnson, the support for that proposition ranges from $4,746,525 to $172,952,500. (See proposed Finding 79). Plaintiff's references this range, while also proposing that the best evidence they have to present actual payments received comes from isolating the word "full" that appears in Exhibit 749 to identify what payments have been made. Doing so, they allege gains of $17,911,507. (See proposed Finding 77). This part of the Plaintiff's case is a 'shotgun approach' and is not a reasonable approximation of "ill-gotten gains" received by Mr. Johnson.

Plaintiff carries the burden to establish the disgorgement damages to a reasonable approximation. A range of $4,746,525 to $172,952,500 is not a reasonable approximation. How could any defendant reasonably defend against this kind of wildly swinging guesstimates? Plaintiff has not met its burden and the Findings of Fact and Conclusions of Law is deficient to the extent it relies on this defective proof.

2. Gross Revenues as Measurement.

[59] TR. 887.
[60] TR. 895.
[61] TR. 2317.
[62] TR. 2441.
[63] TR. 2441.
[64] TR. 2447.
[65] TR. 2514.
[66] Doc. 252 at P 9.
[67] This Court should note, the date of this filing was well after the close of both fact and expert discovery and was based upon an inaccurate extrapolation of alleged lens sales. See additional argument in this regard below.

In SEC disgorgement cases, courts have ordered disgorgement from defendants where all of the defendant's conduct was fraudulent or the defendant's illegitimate activity is indecipherable from his legitimate activity.[68] However, in those cases the plaintiff always bears the burden of producing the disgorgement amount to a reasonable approximation. This evidence generally involves the review and presentation of banking records, defendant's tax returns showing gross revenues, and fees earned in preparing fraudulent tax returns on a taxpayer's behalf.[69] Without sufficient evidence to reach a reasonable approximation, courts have denied disgorgement requests:

In *United States v. Stinson*[70], a case involving disgorgement of fees earned from the fraudulent preparation of tax returns, the district court held that the government's proposed disgorgement amount was not a reasonable approximation of defendant's ill-gotten gains. There, the government request for disgorgement was broken down into five categories. The court refused to order all fees from all categories because:

> "...the Court cannot discern whether fees from categories (1) and (2), which includes years 2011-2014, are duplicated in categories (3), (4), (5), and (6) because those categories include fees from the same years. It is not a reasonable approximation to seek disgorgement from Stinson for twice the amount of fees for the same tax returns."[71]

In sum, the *Stinson* court held that the government had failed to carry its burden in providing a reasonable approximation of defendants' ill-gotten gains and restricted its award only to the amount proven (categories 2-3) explaining that the government had not shown that fees in

[68] *S.E.C. v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012); s*ee S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[69] *United States v. Barwick*, No. 6:17-cv-35-Orl-18TBS, 2018 U.S. Dist. LEXIS 32289, at *3 (M.D. Fla. Jan. 25, 2018) (testimony regarding review of tax returns which included an inflated EITC amount, non-existent business, and fabricated unreimbursed business expenses and fees earned by defendants in preparing these returns)
[70] 239 F. Supp. 3d 1299, 1329 (M.D. Fla. 2017).
[71] *Id*.

the later categories were distinct from categories (1) and (2) and therefore included double-counting of the alleged damages.

In *United States v. Mesadieu,*[72] another fraudulent tax-preparer case, the court declined to accept plaintiff's proposed disgorgement amount as a reasonable approximation of defendants' ill-gotten gains. In *Mesadieu*, the government relied on a random sampling of returns which defendant tax preparer had assisted with filing. The government then relied on ***expert testimony*** to estimate the number of non-compliant returns from the random sampling.[73] The court was unimpressed. It found that the government had access to all returns filed by defendants on behalf of taxpayers, and held that it was not inordinate or impractical for the government to review each return to determine the number of non-compliant returns, from which it could associate fees improperly earned.[74] In that case expert opinion was insufficient to justify a speculative award. Plaintiff presented no expert witness in this case to testify about disgorgement damages.

3. Net Revenues as Measurement for Disgorgement.

A court's power to order disgorgement is not unlimited. It extends only to the amount the defendant profited from his wrongdoing.[75] Any additional sum is impermissible as it would constitute a penalty.[76] Funds returned to customers or investors is a proper deduction to measure net-revenue subject to disgorgement.[77]

[72] 180 F. Supp. 3d 1113, 1118 (M.D. Fla. 2016).
[73] *Id*.
[74] *Id.* at 1122.
[75] *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).
[76] *Id.*
[77] *SEC v. United Am. Ventures, LLC*, No. 10-CV-568 JCH/LFG, 2012 U.S. Dist. LEXIS 51978, at *17 (D.N.M. Mar. 2, 2012)(deducting from disgorgement award the amount repaid to investors as "interest payments"; see also *S.E.C. v. Haligiannis*. 470 F. Supp. 2d 373, 384-85 (S.D.N.Y. 2007) ("[D]istributions must be subtracted because they did not unjustly enrich defendant.").

Generally, a defendant is not allowed to deduct business expenses from the disgorgement amount when the business was created and run to "defraud investors."[78] By extension, a defendant should be allowed to deduct business expenses to the extent that it can show that the business was not created to defraud investors.[79] There was no evidence presented that Defendants did anything to defraud investors. At every level, Defendants encouraged its customers to seek their own tax advice. Additionally, Defendants provided evidence during trial of business expenses that should also be included and discount any judgment entered against them. Exhibit Number 542 shows expenses for 2011 of $159,975. Exhibit 543 shows expenses in 2012 of $228,410.70. Exhibit Number 520 shows Plaskolite 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 a cumulative net loss of $40,156,398. There is a total of $43,156,400.88 in business expenses related to the lens sales and business. All of it is legitimate and should be included in making a final net calculation for disgorgement.

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

Plaintiff proposes that this Court find that Defendants damaged the Treasury in the amount of at least $14,207,517. This figure is allegedly calculated by adding all of the deductions used by nonparties who have purchased lenses from RaPower-3, and then, with the help of their own tax advisors, claimed depreciation and/or a solar tax credit. The calculation is not based on actual amounts deducted, but rather were calculated based upon average tax rates. There is no evaluation

[78] *SEC v. JT Wallenbrock & Assocs..*, 440 F.3d 1109, 1114 (9th Cir. 2006).
[79] *See id.* ("Neither the deterrent purpose of disgorgement nor the goal of depriving a wrongdoer of unjust enrichment would be served were we to allow these defendants — who defrauded investors ... to 'escape disgorgement by asserting that expenses **associated with this fraud** were legitimate.'") (emphasis added).

of those deductions on an individual basis. There is no attempt to identify the actual loss to the Treasury. This is not an appropriate basis for a disgorgement amount by any measure. It cannot be known, and evidence was not presented to this Court to verify whether each of the deductions and tax credits were from a taxpayer's involvement with RaPower3, or if deductions were made based upon some other investment or ownership of equipment. There was no effort to make that distinction.

5. Income of Individual Defendants as a Basis for Disgorgement.

The proper measurement of disgorgement is the amount an individual profited from wrongdoing and there must be a "relationship between the amount of disgorgement and the amount of ill-gotten gain."[80] Accordingly, the income of individual defendants is germane to a disgorgement amount only to the extent the government can show that it is income derived solely from the illicit or fraudulent activities of the individual and is not a compounding calculation of amounts already included in the disgorgement calculation for the entities.[81] Here, all amounts claimed against individual Defendants are derived from and also included in the total shown for RaPower and constitutes an improper doubling of the claim. In simple terms, all money from lens sales passed through RaPower. RaPower then uses those proceeds to purchase materials to build the solar systems and also to pay commissions due under the sales program. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS[82], identified in Plaintiff's exhibits 736, 737, and 738 came directly from RaPower. To include those disbursements to the individual defendants as well as the income to RaPower requires a double counting of the same

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

funds and a double recovery to the Plaintiff[83] – which is improper for this Court to include in any disgorgement, should disgorgement be found proper. RaPower is the only party whose gross revenues should be counted.[84] Likewise, RaPower's costs of business are permitted off-sets to reduce any claim against them as discussed above.

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

The government relied on the testimony from two Department of Justice paralegals to testify regarding summaries of voluminous evidence.[85] Ms. Perez prepared Pl. Ex. 752, which purports to summarize the contents of "at least 1,643 tax returns that Defendants' customers filed with the IRS."[86] Her testimony included "the total depreciation and solar tax credits that the Defendants' customers claimed, applied the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government)" and the tax credits taken as a reduction to the taxpayers' liability.[87] Determining and applying an "average tax rate" by definition requires the opinion of an expert, involving selecting and applying a hypothetical "average" rather than a mere summary.

Worse still, the government blocked Defendants' efforts to glean the information that would have led to an understanding of Plaintiff's proof of disgorgement. In June, 2017, Plaintiff successfully moved to quash Defendants' deposition notice to The US Department of Justice, Tax Division[88]. After being told that "Defendants shall not depose any representative of the United States Department of Justice, Tax Division" [Doc. 196 – Order Granting Motion for Protective

[83] The government has also failed to account (reduce) for other sources of income for these parties during the relevant time period. The extent of that error, however, is difficult to determine without seeing the government's source documents and how they were selectively used to reach their calculated results.
[84] Further, RaPower did not collect on all sales. What was "booked" and what was "collected" are decidedly different numbers. Collections were much lower.
[85] ECF Doc. 329.
[86] *Id*. at fn. 14.
[87] *Id*.
[88] Doc. 170.

Order] Defendants believed no lawyer would be allowed to testify in this case about any aspect of liability or damages. Defendants expected DOJ personnel would argue Plaintiff's legal position, but not testify substantively. Instead, Plaintiff presented two paralegals—representatives of the US Department of Justice, tax division—to testify as to the DOJ's work-product in accumulating, analyzing and calculating the amounts for Plaintiff's claim of disgorgement. Defendants were given no notice, and provided no discovery of their calculations, summaries or conclusions. Defendants were not provided any opportunity to question the methodology employed by Plaintiff's paralegals; could not have their own expert dissect the summaries to determine whether they were accurate; could not retain an appropriate expert to address and counter the assumptions, calculations or analysis done by Plaintiff's DOJ employees – because they were not provided until the eve of trial and after expert witness discovery had already concluded.

7. $50,025,480.00 is Not a Reasonable Approximation of Neldon Johnson's Gains.

Plaintiff proposes in fact 76 that the "total sales price of orders placed with defendants by customers was between $50,025,480.00 to $50,097,672.15." This information was taken from Plaintiff's Exhibit 749, prepared by Mr. Roulhoc. Exhibit 749 was never purported to be a damage calculation. The evidence is that Exhibit 749 is an excel spreadsheet created from a database maintained by Defendants to track lens sales, payments, and other information. It is pure data. The Court showed great dexterity and familiarity with the Excel program. Roulhoc could not explain and did not understand the numbers he put into this spreadsheet. He did not compare the spreadsheet numbers to any bank records. (TR.800: 17-24). He did not verify any of the numbers represented actual receipts. (TR.806:15-17; 812:24-813:1). He could not verify any quantity of lenses were sold. (TR.813:2-4). He did not verify there were any actual lens purchases. (TR.806:18-20). He could not verify any number represented an actual payment for a lens

purchase. (TR.811:10-12; 22-24; 813:5-7). He could not explain how terms were used in the database. (TR.822:6-8). The best Mr. Roulhoc's testimony could be used for is to establish that the information contained in Exhibit 749 came from Defendant's database. There is a paucity of evidence about the significance of Exhibit 749.

Plaintiff relies upon Exhibit 749 to propose that a judgment should enter against Neldon Johnson in the amount of $50,025,480. Plaintiff derives this number from the sum of a column purporting to be lens sales and them multiplied by $1050 – despite clear evidence this amount was never received by Neldon Johnson. This Court has ordered that "unjust enrichment may be shown by gross receipts or increase in net assets." (ECF 359). The number proposed by Plaintiff is not established by gross receipts or increase in net assets. It is a guess.

Plaintiff acknowledged in open court that Exhibit 749 does not support $50,025,480 as being either the actual gross receipts or the increase in net assets.[89] Nevertheless, they proposed a finding that says "Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480." See Finding ¶ 86. Earlier, Plaintiff identified that number as the "total sale price of orders". See Finding ¶ 76. Those were established not to be the same thing. In fact, Plaintiff's counsel acknowledged that the amount of gross receipts for payments made identified in Exhibit 749 was $17,911,507.[90] Plaintiff's counsel further stated on the record that "there is evidence that no everybody paid for every single lens in the amount of $1,050."[91] The amount proposed is more than triple the amount identified as paid in full in the very same exhibit. Plaintiff has gone to great lengths to use the fact that most of the lens purchasers did not

[89] TR. 2447:15-2448:2.
[90] TR. 821:7-822:2; 887:11-8.
[91] TR. 892:16-17.

pay the full contract amount, as an indicia of the false nature of the alleged scheme.[92] This Court already found that "few have paid the $1050 down payment which is equal to the first full year tax credit."[93] They cannot have it both ways. Either the $1,050 down payment was fully paid for every single lens (in which case there was nothing false about statements they made in their contractual agreements) or they were not, and the amount proposed for disgorgement is grossly overstated.

Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities"[94], its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts[95], $5,438,089 in IAS accounts[96], and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196[97]. See proposed Findings 81-85. Plaintiff's witness was not a CPA. (TR.877:8-9). She was not a lawyer. (TR.877:10-11). She used a term "gross receipts" but included in that category anything and everything on bank statements, without tying the deposit to lens sales. (TR.877:16-878:22). She did not use any available information on checks or deposit slips to attempt to identify lens sales. (TR.879:1-14). Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits for RaPower and all the other Defendants may be titled "gross receipts" but none of them limit her total to lens sales. (Ex. 735-TR.881:11-16;Ex. 737-TR.881:25-882:6; Ex. 738-TR882:8-14; Ex. 739-TR.882:21-883:1; Ex. 740-TR.883:2-7.) She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no mention or attempt to include the deposit from the purchase of IAS stock, despite the Plaintiff

[92] TR. 2404:20-22; 892;
[93] TR. 2522:17-22.
[94] Finding, 80.
[95] Finding, 81.
[96] Finding, 82.
[97] Finding, 85.

clearly knowing the purchase had been made. (TR.1812:4-12). These numbers are inherently unreliable.

Nonetheless, Plaintiff relies on this defective proof and asks the Court to add an additional $17,229,284 to the unreliable total of gross deposits into all bank accounts and order disgorgement of $50,025,480. Id., 86. Plaintiff is not entitled to one penny more than the actual gross receipts or increase in net assets.[98] Defendants object to the amounts proposed as disgorgement penalties against RaPower-3, IAS, and Greg Shepard, as more fully explained below, but even if the Court were to consider those numbers as a reasonable approximation, an additional $17 million is unsupported and would be a penalty that disqualify this case from being an equitable proceeding and convert the penalty phase into a legal proceeding entitled Defendants to a jury panel as was demanded.

8. $25,874,066 is Not a Reasonable Approximation of RaPower-3's Gains.

Plaintiff proposes that the total number of deposits into RaPower-3 bank accounts is the appropriate amount for judgment entered against it. This number was provided by simply adding up deposits. Accepting this method of determining disgorgement so would require this Court to ignore that Ms. Reinken did not use any available information on checks or deposit slips to attempt to identify lens sales. (TR.879:1-14). Her exhibits identify only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits for RaPower and all the other Defendants may be titled "gross receipts" but none of them limit her total to lens sales. (Ex. 735-TR.881:11-16;Ex. 737-TR.881:25-882:6; Ex. 738-TR882:8-14; Ex. 739-TR.882:21-883:1; Ex. 740-TR.883:2-7.) She made no effort to isolate the revenue from lens sales by avoiding redeposits

[98] *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1121 (M.D. Fla. 2016) (citing *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).

or inter-account transfers. (TR.883:25-884:16). She made no effort to isolate the total number by avoiding redeposits or inter-account transfers. (TR.883:25-884:16). She made no mention or attempt to include the deposit from the purchase of IAS stock, despite the Plaintiff clearly knowing the purchase had been made. (TR.1812:4-12). These numbers are inherently unreliable.

9. $5,438,089 is Not a Reasonable Approximation of IAS's Gains.

At least $3,077,000 was transferred from RaPower-3 to IAS as a stock purchase Ex. 852, 507. That number is included in the amount proposed, and not identified in any other place as being transferred. That amount is included in both the amount proposed for RaPower-3 and the amount proposed for IAS. This is a double recovery, double counting, and demonstrates that neither is a reasonable approximation of the amounts received. There is absolutely no justification for the $5,438,089 figure.

10. Amounts Attributed to Solco I, LLC and X Sun, LLC are Unreasonable and Unreliable.

The government relies upon exhibits that do not provide adequate foundation for the amounts claimed to be obtained by SOLCO. Plaintiff proposes a disgorgement order of $3,434,992.29 based upon "sales of lenses" between 2010 and 2016. PLEX 38 does not provide evidence of any actual income. It is a proposal only. PLEX 325 is an email exchange between Peter Gregg and Greg Shepard. It does not even mention Solco I, LLC or any funds. PLEX 495 is a sales diagram. It does not provide evidence of any actual numbers. Those are the only exhibits that demonstrate transactions from Solco related to sales of lenses. There is no evidence that any deposits in Solco bank accounts was from the sale of lenses.

Similarly, the government relies upon exhibits that do not provide adequate foundation for the amounts claimed to be obtained by XSun. Plaintiff is asking for $1,126,888.18 for its gross

receipts between 2011 and 2016. PLEX 208 identifies Xsun Energy as a parallel company to RaPower3, but does not provide evidence of any numbers. PLEX 355 is advertisement and promotion - no real numbers. PLEX 356 identifies Xsun Energy as the marketing arm for RaPower3 - no real numbers. PLEX 510 is an agreement between Richard Rowe and Xsun Energy. Shows a check to Xsun for $3,570. PLEX 743, p. 11 is a check written by Xsun Energy to Glenda Johnson for $2,000, dated 1/3/2013. Those are the only exhibits that demonstrate transactions from XSun related to sales of lenses. There is no evidence that any deposits in XSun bank accounts was from the sale of lenses.

IX. OBJECTIONS TO THE TERMS OF THE PROPOSED ORDER

1. With regard to paragraph 1: The proposed order requires a permanent injunction. A permanent injunction is inequitable. The basis for the injunction is that Defendants' solar energy system "is not and never will be commercially viable." If Defendants' solar energy system were putting electricity on the grid, it would automatically qualify for both the tax credit and depreciation. If Defendants' solar energy system were currently providing heat within a process that, for example, heated a greenhouse, it would qualify. Defendants currently have other systems in place that qualify. The permanent injunction prevents Defendants from promoting these alternative systems, or from promoting the system at issue in the event it becomes operational. Any injunction should be conditioned upon the viability of the system, and should not be permanent.

It further requires a specific statement to be made on "every webpage, subpage of rapower3.com, iaus.com, rapower3.net, the IAUS & RaPower3 forum, and any other website controlled by any Defendant and used in relation to marketing lenses; and included in any other communication (written or verbal)[.]" While that may seem possible if written, how could every verbal communication include the required statement? In essence, Plaintiff wants this Court to order that anytime any of these Defendants speaks about the solar lens and/or any solar energy system or component, they have to premise every conversation with the proposed language. That is an untenable requirement.

2. With regard to paragraph 2: In the event Defendants have other systems that qualify, they should not be permanently enjoined from promoting tax benefits offered by the Federal Government. Any injunction entered should be conditioned upon the viability of the system.

3. With regard to paragraphs 4, 5: The value of the lenses has not been adequately addressed by the trial of this case. The Court should either order further proceedings to determine what the reasonable cost of the development was, and how those costs are amortized in the price of the lens, or leave this issue as undecided. Since the damages portion of this case was tried by an ambush, without government disclosure of their proposed calculations, and with no expert witnesses for either Plaintiff or Defendants providing the Court any economic analysis of the appropriate pricing model for the patented Fresnel lenses. The Court also sustained an objection to a question intended to inform the Court that for a single 18 foot diameter array circle of lenses, a comparable sized Fresnel lens would require in excess of $500,000.00 to manufacture:

> Q (by Mr. Snuffer): Has anyone challenged or resisted or pushed back on the price that you've charged for the lenses?
> A. No. We feel it's a fair market price.
> Q. Are there other Frensel lenses for sale on the

> market today?
> A. Yes, there is.
> Q. How does the price you charge compare with the prices others charge for Frensel lenses?
> MS. HEALY-GALLAGHER: Objection; relevance.
> THE COURT: Sustained. (TR. 2090 l. 19-2091 l. 3.)

This would have been useful information and still is useful information although excluded by the Court from the record during trial. Before the Court should attempt to decide a correct pricing for the lenses to establish if there was any overpricing of the lenses, the Court ought to take more evidence. Otherwise it should decline to comment on an entirely speculative matter.

4. With regard to paragraph 10: There is no time limit associated with this paragraph. It should not be indefinite.

5. With regard to paragraph 11: This order requires each Defendant to certify that the contact information and related lens purchase information of all purchasers of lenses be provided within 56 days. Only RaPower-3, LLC has this information. Mr. Shepard has no access to this information and could not certify.

6. With regard to paragraph 12: This information is only available to RaPower-3, LLC. Other Defendants should not be required to certify.

7. With regard to paragraph 13: The certification requirement is provided as 30 days from the entry of the injunction, when the information is not required to be provided until 56 days after the entry of the injunction. These dates should be the same.

8. With regard to paragraph 14: The requirement to provide a more than 150 page complaint and more than 150 page Opinion and Injunction, requires mailing almost a ream of paper to thousands of people. It is environmentally offensive, and unnecessary when there is email

contact information available for each of the intended recipients. If there is not email contact information, then mailing should be the second option.

9. With regard to paragraph 17: This is a cumbersome and impractical burden that is more likely calculated to cause nothing to happen than to spur economic activity and repayment of any sum. There will be no further lens sales by any of the Defendants under the circumstances now existing. However, as the evidence supporting the accompanying Defendants' 59(e) Motion demonstrates, the RaPower lenses can now be used to produce electricity, and a potential market for them as solar energy equipment now exists. They meet the requirement established by the Court in its preliminary ruling, and therefore if the lenses produce solar process heat because they are used to generate electrical power, then these onerous reporting requirements are unnecessary and should not be imposed. These proposed reporting requirements are a transparent method to flag customers for an IRS audit. No customer will want to do business with a company that is flagging them for an audit. This requirement is an attempt to put Defendants altogether out of business. In any event, this demand is also inconsistent with the appointment of a Receiver. There is no need for this demand if the Defendants are under the control of a Receiver. Adopting this burdensome reporting would be an expensive and ill-advised burden for the Court to impose on the Receiver. Finally, there is nothing illegal about selling lenses to the public, only in making false tax representations. If the Court does impose a reporting burden, it would make more sense to require reporting of sales representations annually rather than sales numbers.

10. With regard to paragraph 20: This paragraph identifies what persons are bound by the proposed injunction. It includes attorneys. There is no basis nor reason to include attorneys for these Defendants within the scope of this order. To the extent an attorney is acting as an agent

and not as legal counsel for one of the Defendants, that is already covered by including Defendants' agents.

11. With regard to paragraph 22: Defendants should be able to reserve the right to object to the reasonableness of the costs and expenses incurred in this suit. This is customary and language to that effect should be included in the order.

Dated this 14th day of September, 2018.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OBJECTION RE: FINDINGS OF FACT AND CONCLUSIONS OF LAW** was sent to counsel for the United States in the manner described below.

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