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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.	**UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND FINDINGS, ORDERS, AND JUDGMENT** Civil No. 2:15-cv-00828 DN Chief Judge David Nuffer Magistrate Judge Evelyn J. Furse

On September 14, 2018, Defendants filed a motion under Fed. R. Civ. P. 59(e) to alter or amend the court's current orders and pending findings[1] based on "new evidence and the need to prevent manifest injustice."[2] Defendants also ask the Court to "reopen the matter to take additional evidence of electrical power production which has occurred since the close of evidence."[3] In support of their motion, Defendants submitted three exhibits: (1) "Confirmation of Electrical Power Production Using Johnson Fresnel Lens in the Field Coupled to a Sterling Engine" by Johnny Kraczek, Jeffrey Jorgensen, Kerm Jackson, and Paul Freeman;[4] (2) "Sterling Engine Power Production Data,;"[5] and (3) "Exhibit Resume of John Kraczek."[6]

Almost three month after they chose to rest their case without calling a single witness,[7] Defendants claim these three exhibits constitute "newly discovered evidence." Defendants' belated attempt to submit unverified, unsworn statements of a purported expert, adds to the string of questionable maneuvers they have made sine trial.[8] However, Defendants are not free to

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[1] ECF Doc. No. 451, at 1. Defendants specifically reference the Initial Order and Injunction after Trial, ECF Doc. No. 413, and the Court's Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, ECF Doc. No. 444.

[2] ECF Doc. No. 451.

[3] ECF Doc. No. 451, at 1-2.

[4] ECF Doc. No. 451-1.

[5] ECF Doc. No. 451-2.

[6] ECF Doc. No. 451-3.

[7] Tr. 2379:21-2380:4.

[8] In the almost three months since trial concluded, Defendants have engaged in a variety of questionable procedural maneuvers. For example, Defendant RaPower-3 filed a bad faith bankruptcy, *In re RaPower-3*, Case No. 18-cv-000608-DN (D. Utah), to try and collaterally attack this Court's potential asset freeze and receiver order. Recently, Defendant Neldon Johnson has sued Judge Nuffer, the IRS and the DOJ based on frivolous allegations. *See Johnson v. Internal Revenue Service, et al.*, Case No. 18-cv-62-TS (D. Utah). Additionally, Defendants have potentially violated this Court's order freezing assets by conducting the test that is the subject of their motion. *See* ECF Doc. No. 444; ECF Doc. No. 451, ECF Doc. No. 451-1; ECF Doc. No. 451-2; ECF Doc. No. 451-3. It is not clear how

ignore Court deadlines and procedure until they realize they could have, or should have put on a better case.[9] Defendants' motion should be denied because: (1) it is untimely; (2) does not present "newly discovered evidence," and; (3) even if the "evidence" is considered, it does not require any change in the orders or findings made in this case or any orders, findings or judgment this Court intends to enter.

I. Defendants' motion is untimely.

Defendants styled their motion as a motion under Rule 59(e) and 52(b), but their motion does not satisfy the literal language of the Rules. Fed. R. Civ. P. 59(e) specifies that a motion to alter or amend a judgment must be filed no later than 28 days *after* entry of the judgment.[10] Similarly, Fed. R. Civ. P. 52(b) requires a motion for amended or additional findings to be filed no later than 28 days after the entry of judgment.[11] The Court has not yet entered a final judgment in this case. As such, Defendants' motion is premature. [12]

If Defendants' motion is not premature, it is still untimely with respect to the June 22, 2018 findings and Initial Order and Injunction after Trial.[13] The findings and Initial Order and

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Defendants paid for the experts or the Stirling engines or when those payments were made. Further, even merely installing the Stirling engines on the towers could have constituted a violation of the asset freeze if done after August 22, 2018, the date of the order.

[9] *Ryder v. City of Topeka*, 814 F.2d 1412, 1426 (10th Cir. 1987) (quotation omitted).

[10] Fed. R. Civ. P. 59(e).

[11] Fed. R. Civ. P. 52(b).

[12] Because the Court has made preliminary findings and indicated which action it intends to take, the Court can deem the motion timely even though formal judgment has been entered. *See Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989) and the cases cited therein. As discussed below, Defendants are not entitled to relief under the standards for a Rule 59(e) motion. However, if the Court considers the merits of Defendants' motion and rules against them, Defendants are prohibited from making another Rule 59(e) motion on the same grounds. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

[13] ECF Doc. No. 413.

Injunction after Trial were entered on June 22, 2018, making any motion under Rule 59(e) due on July 20, 2018, 28 days later.[14] Defendants do not discuss timeliness in their motion nor provide any reason for the delay or any precedent that would support the late-filing.

To the extent that Defendants claim that the intervening bad faith bankruptcy filing by RaPower-3 somehow tolls the time within which to file a motion under Rule 59(e) or 52(b), such a tolling would only apply to a motion made by RaPower-3. Even assuming that a tolling occurred, seven days had already elapsed before RaPower-3 filed bankruptcy. The remaining 21 days would then run from the date the bankruptcy case was dismissed, August 22, 2018. To be timely filed within 28 days (assuming tolling occurred), RaPower-3's motion was due September 12, 2018 – two days before it was actually filed. As such, it was untimely with respect to the order and findings of June 22, 2018.

Defendants filed their motion on September 14, 2018 which was within the 28 days after the Court's August 22, 2018 Memorandum Decision and Order Freezing Assets and to Appoint a Receiver ("the Memorandum Decision and Order"). However, even though Defendants' motion is timely in that respect, Defendants are not entitled to relief under Rule 59(e) or 52(b), as discussed below.[15]

[14] Fed. R. Civ. P. 59(e), 52(b). A court cannot extend the time to act under Fed. R. Civ. P. 52(b), 59(e) or 60(b). *See* Fed. R. Civ. P. 6(b)(2).

[15] On August 27, 2018, Defendants filed a notice of appeal with respect to the Memorandum Decision and Order. This Court may still however, proceed to rule on Defendants' motion with respect to the Memorandum Decision and Order. *Free Speech v. Federal Election Commission*, 720 F.3d 788, 791-92 (10th Cir. 2013) ("Ordinarily an interlocutory injunction appeal under [28 U.S.C.] § 1292(a)(1) does not defeat the power of the trial court to proceed further with the case.") (quoting 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure*, § 3921.2).

II. Defendants are not entitled to relief under Rule 59(e).

The decision to grant or deny a motion under Rule 59(e) is committed to the Court's discretion.[16] Under Rule 59(e), a court may alter or amend a judgment it has entered if there is "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice."[17] However, a Rule 59 motion is not appropriate to revisit issues that have already been addressed or to advance arguments or new supporting facts that could have been addressed in prior briefing. [18]

Defendants do not claim an intervening change in controlling law. Rather, Defendants claim to have "newly discovered evidence" which shows that a manifest injustice will occur if the Court does not alter or amend its current orders and findings and any orders, findings and judgments it intends to enter. However, Defendants' have not shown that the "evidence" is "newly discovered," that the "evidence" is admissible, or that such evidence requires findings in their favor.

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[16] *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

[17] *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). The Court has the discretion to review the substance of the motion to ensure that it is appropriately considered a Rule 59(e) motion as opposed to a motion under Rule 54(b) or 60(b). *See, e.g.*, *Balding v. Sunbelt Steel Texas, Inc.*, 2017 WL 1435719, at *4 (D. Utah. 2017); *FDIC v. Arciero*, 741 F.3d 1111, 1117 (10th Cir. 2013); *Hannon v. Maschner*, 981 F.2d 1142, 1144 n.2 (10th Cir. 1992). In this case, because Defendants are asking for the Court to alter or amend orders and findings that have occurred as well as any subsequent orders, findings, and judgment the Court issues, Defendants are asking for relief under Rule 59(e). Defendants have not requested a new trial or an opportunity to supplement the record. Rather, Defendants ask this Court to accept the exhibits as the basis for altering or amending their motion. The standards under Rules 52(b), 54(b), 59(e) and 60(b) are similar, but even under the most lenient standard, Defendants' motion must be denied.

[18] *Driessen v. Sony Music Entertainment*, 2015 WL 5007927 at *2 (D. Utah), (quoting *Van Skiver v. United States*, 952 F.2d 1241, 1242-44 (10th Cir. 1991)).

A. Defendants do not present any "newly discovered evidence."

When supplementing a Rule 59(e) motion with additional evidence, the movant must show either that the evidence is newly discovered and if the evidence was available at the time of the decision being challenged, that counsel made a diligent yet unsuccessful effort to discover the evidence.[19] Furthermore, newly discovered evidence must be *admissible* and credible to support relief under Rule 59(e).[20] But, Rule 59(e) motions are not to be used as a second chance when a party has failed to present its strongest case in the first instance.[21] The key is that the evidence must be "newly discovered" and not evidence that Defendants could have been presented to the Court at trial. Here, Defendants' motion fails because the evidence is not admissible or credible and is not "newly discovered."

To support their motion, Defendants submitted three exhibits: (1) "Confirmation of Electrical Power Production Using Johnson Fresnel Lens in the Field Coupled to a Sterling Engine" by Johnny Kraczek, Jeffrey Jorgensen, Kerm Jackson, and Paul Freeman;[22] (2) "Sterling Engine Power Production Data,;"[23] and (3) "Exhibit Resume of John Kraczek."[24] The exhibits submitted are unverified and unsworn statements of individuals who have not been subjected to

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[19] *Estate of Herrick v. United States*, 2016 WL 2939145, at *1 (D. Utah) (citing *Committee For the First Amendment v. Campbell*, 962 F.2d 1517, 1523 (10th Cir. 1992)).

[20] *FDIC v. Arciero*, 741 F.3d 1111, 1118 (10th Cir. 2013) (citing *Goldstein v. MCI WorldCom*, 340 F.3d 238, 257 (5th Cir. 2003).

[21] *Sec., Serv. Fed. Credit Union v. First Am. Mortgage Funding, LLC*, 906 F.Supp.2d 1108, 1111 (D.Colo.2012), overruled on unrelated grounds in *Sec., Serv. FCU v. First Am. Mortg. Funding, LLC*, 771 F.3d 1242 (10th Cir. 2014).

[22] ECF Doc. No. 451-1.

[23] ECF Doc. No. 451-2.

[24] ECF Doc. No. 451-3.

cross-examination or other questioning. Defendants have not even attempted to lay the foundation for the documents to be admissible. Defendants have essentially attempted to submit an expert report well past the expert deadlines in this case and only *after* expert disclosures, expert discovery, trial, and the Court's oral ruling. Defendants have the burden to establish the admissibility of the documents and have failed to meet it.

Even if the documents were admissible, they are not "newly discovered." Defendants claim to have run a test on September 5, 2018, more than two months after trial concluded and almost two full weeks after the Court issued its Memorandum Decision and Order Freezing Assets and to Appoint a Receiver. Defendants essentially claim that the Court's oral ruling was what prompted their efforts to "end their research and begin electrical production."[25] This is simply one more instance of Defendants' worn-out "WE ARE JUST ABOUT READY TO FLIP THE SWITCH"[26] under the guise of "newly discovered evidence."[27] However, Defendants have been on notice of the claims in this case relating to their technology since we filed the Complaint. Defendants were further put on notice at the Rule 26(f) meeting, throughout over two years of discovery, and at the trial of this case where the United States' expert, Dr. Thomas Mancini, testified about the state of Defendants' technology. The timing of these purported tests and "newly discovered evidence" was wholly within Defendants' control. Defendants have

[25] ECF Doc. No. 452, at 1-2.

[26] Pl. Ex. 329 at 1.

[27] ECF Doc. No. 452 at 2.

provided no justification for the lateness of the "evidence" or attempted to explain why this testing or demonstration was impossible before trial.

Defendants chose to proceed with the case and chose to rest without calling a single witness when it was time to present their case-in-chief after resisting discovery in this case, including about their technology.[28] "Unlike the Emperor Nero, litigants cannot fiddle as Rome burns. A party who sits in silence [and] withholds potentially relevant information … does so at his peril."[29] The Court should not now grant a new trial or reopen evidence merely because Defendants realize that they could have presented a better case.[30]

B. Even if Defendants submitted "newly discovered evidence," nothing in the submission requires the altering or amending of any finding, order, or any subsequent order, finding or judgment.

Defendants' three exhibits demonstrate their continued evolution to promote their scheme. The United States' expert, Dr. Thomas Mancini, reviewed Defendants' motion, the three related exhibits, and their website.[31] As Dr. Mancini concludes, this is the first instance, and after more than a decade of promoting the scheme and causing millions of dollars of harm to the U.S. Treasury, where Defendants have indicated that they used a dish/Stirling engine in conjunction with their solar lenses to generate electricity.[32] This was not the system described by Defendants

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[28] Tr. 2379:21-2380:4.

[29] *Vasapolli v. Rostoff*, 39 F.3d 27, 36 (1st Cir. 1994); *MacArthur v. San Juan County*, 405 F.Supp.2d 1302, 1305-06 (D. Utah 2005) (citation omitted).

[30] *Ryder v. City of Topeka*, 814 F.2d 1412, 1426 (10th Cir. 1987) (quotation omitted).

[31] Declaration of Dr. Thomas Mancini in support of United States' Opposition (hereinafter "Declaration of Dr. Mancini"), ¶¶ 5, 6.

[32] Declaration of Dr. Mancini, ¶ 10.

in discovery or at trial.[33] Using a dish/Stirling engine is a fundamentally different process than the previous information which suggested they intended to use the Rankine cycle to generate electricity.[34] Defendants' newest submissions have not changed Dr. Mancini's opinions or the testimony he offered at trial.[35] Specifically, Dr. Mancini still holds the opinion that the new design is not a viable system for producing electricity on a commercial scale.[36]

Defendants' submissions further show that they have failed to address technical and practical issues with this new design such as a tracking and alignment mechanism.[37] Defendants have also failed to provide any pricing information and appear to have only procured one engine.[38] This suggests that Defendant procured one dish/Stirling engine merely to demonstrate so-called "measurable energy" in one more attempt to delay the result in this case. Similar to the system and technology described in discovery and trial, this "new" design will not produce usable energy from the sun, particularly as a commercialized system that sells electrical power.[39] As such, Defendants are not entitled to the relief requested under Rule 59(e).

III. Conclusion.

Defendants' claims that they didn't understand that their system needed to produce electricity until the Court issued its oral findings and Initial Order and Injunction after Trial ring

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[33] *Id.*

[34] *Id.*

[35] Declaration of Dr. Mancini, ¶ 17.

[36] Declaration of Dr. Mancini, ¶¶ 14, 17.

[37] Declaration of Dr. Mancini, ¶ 12.

[38] Declaration of Dr. Mancini, ¶ 16.

[39] Declaration of Dr. Mancini, ¶¶ 14, 17.

hollow. For more than ten years, Defendants have made false or fraudulent statements to their customers about the state of their technology and the tax benefits the customers could claim if they invested in Defendants' technology all while using money from the U.S. Treasury to fund their scheme. Defendants crafted statement upon statement that appeared to show success in their technology and success with the IRS by customers claiming tax benefits. And they altered those statements to their benefit all in an effort to zero out their customers' tax liabilities. For example, the facts proven at trial show that Defendants continually changed what the lenses would be used for when the customers' tax benefits were called into to question –customers were told their lenses would (1) produce electricity; (2) be used in research and development; (3) be used for advertising, and; (4) be used to produce solar process heat. Defendants' motion further exemplifies their egregious conduct by recycling past statements about producing electricity albeit now with a fundamentally different system.

Defendants miss the mark once again. The United States filed suit against Defendants to put a stop to their conduct of making false or fraudulent statements regarding tax benefits and to disgorge them of their ill-gotten gains. For more than 10 years, Defendants have engaged in this conduct and essentially robbed the U.S. Treasury of tens of millions of dollars in promoting this scheme which has all the hallmarks of an abusive tax shelter. Defendants' conduct clearly necessitates an injunction and disgorgement. Nothing about their "newly discovered evidence" changes that fact. Therefore, regardless of whether the Court considers Defendants' motion untimely or that it presents "newly discovered evidence," the analysis does not change. The Court need not alter or amend any findings, orders, or judgment. Defendants' motion should be denied.

Dated: September 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2018, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin R. Hines
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