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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 **DEFENDANTS' REPLY IN SUPPORT OF THEIR RULE 59(e) AND RULE 52(b) MOTION (DOC. 451)** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants respond to Plaintiff's Opposition as follows:

I. Argument

A. The Motion is Timely.

Rule 59(b) of the Federal Rules of Civil Procedure provides that "[a] motion for a new trial must be filed *no later than* 28 days after the entry of judgment." Plaintiff places emphasis on the word "after", without regard to the remainder of the sentence. This construction of the rule is inconsistent with 1995 Advisory Committee notes on the amendments of that year which states:

"The phrase 'no later than' is used—rather than 'within'—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." Accordingly, Plaintiff's timeliness argument fails.

In whole, the rule establishes an ending deadline, but does not establish a beginning. It only provides that a motion must be filed prior to 28 days after judgment has been entered.

Defendants acknowledge that a final judgment had not yet entered when the motion was first filed. However, even then, portions of the case had reached finality and the matters involved in the overall resolution were ripe for reopening then, and clearly ripe now that a judgment has entered. At the time the motion was first filed an injunction had been entered, Defendants' assets were frozen, and the Court had ordered that a Receiver be appointed. These were predicated on a finding involving electrical power generation which now ought to be reviewed. That finding has now been shown to be false. Plaintiff even acknowledges that in consideration of the Court's August 22, 2018 Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, the motion is neither premature, nor untimely.

There are two separate matters that require further evidence be taken. The first is whether the whole of the Court's decision ought to be reconsidered. The second is whether the injunction should be discontinued. Apart from every other consideration, the Court's injunction was to last "until further order of the Court." There is no need for an injunction if the Defendants produce electricity. The whole premise of the Plaintiff's case was that without electricity the sales of lenses should be stopped. Accordingly, it necessarily follows that with the generation of electricity the sales of lenses should be permitted to continue. Reopening the evidence to consider the newly proven generation of electricity is necessary for the Court to determine whether to dissolve the injunction in this case.

B. The Motion Presents "Newly Discovered Evidence."

The lenses at issue in this case have not previously been used to power a Stirling Engine, and were coupled with other technology prior to the Court-mandated necessity of producing electricity as a condition precedent to qualifying for favorable tax treatment. The results of coupling the lenses with a Stirling Engine show that the lenses can and do produce sufficient solar process heat to unquestionably create electricity. Defendants used qualified experts to measure the electrical output and to verify the viability of the lens structures. The results of the experts' tests, results, and analysis demonstrate that it is now a fact that the lenses produce solar process heat currently being used to generate measurable electricity.

Plaintiff would like to see Defendants fail. It has become obvious that Plaintiff is less interested in protecting and promoting the law and its purposes, and far more interested in putting Defendants out of business. Defendants have demonstrated the effectiveness of the solar array and the utility of coupling the solar lens technology with the Stirling engine technology. Electricity has been unquestionably generated using the solar technology created by Defendants. Plaintiff is now quibbling over the *amount* of electricity and ignoring the fact it is being produced. The Wright brothers flew only 852 feet at Kitty Hawk beach in North Carolina; yet today flight technology now circumnavigates the globe hundreds of times per day. The demand that technology produce electricity has now turned into the demand that it do so at a level that is subjectively pleasing to Plaintiff. Where is that criteria to be found in the IRC?

The code does not require the production of electricity, but solar process heat. Plaintiff has persuaded the Court that solar process heat requires the production of electricity. Now Defendants have produced solar process heat that has and does generate electricity, although not required by

the code. The Plaintiff's argument that the *amount* of electricity is now also part of the code has no validity and again attempts to take the Court far beyond the mark.

C. The Newly Discovered Evidence Requires a Modification of the Injunction, at the Very Least.

Before this Court declared otherwise, Defendants believed (based on advice of legal counsel and tax experts) that the production of solar process heat for research and development was alone sufficient to qualify individuals and businesses for tax benefits. It was not until this Court found that the lenses must produce electricity and never could, nor ever would, create electricity that Defendants realized they must focus on the immediate creation of electricity to satisfy this Court. Now, Defendants have complied with the extra-statutory hurdle and demonstrated that the lens arrays create sufficient solar process heat to generate measurable electricity. The status quo has changed.

"An injunction may be dissolved or modified where the underlying facts have so changed that the dangers prevented by the injunction have 'become attenuated to a shadow.'"[1] In vacation proceedings, an injunction may be dissolved where there is a showing of "some substantial change in law or facts."[2] Here, the injunction needs to be changed to permit Defendants to make power – since they can. The Court has awarded Plaintiff a money judgment. Defendants' ability to pay requires them to continue to produce revenue. In addition to Plaintiff's claim, Defendants continue to have contractual obligations to third parties, which will be terminally frustrated if the Court disallows any further production. As this Court has also entered a disgorgement order, if

[1] *Securities and Exchange Commission v. Jan-Dal Oil & Gas, Inc.*, 433 F.2d 304, 305 (10th Cir. 1970)
[2] *Securities and Exchange Commission v. Thermodynamics, Inc.*, 464 F.2d 457, 460 (10th Cir. 1972)

Defendants are able to make power, and are subsequently able to earn income from doing so, they have a much greater ability to pay the judgment entered against them.

Grounds warranting a motion to alter or amend the judgment pursuant to Rule 59(e) "include (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."[3] Reopening the evidence is properly granted to prevent manifest injustice or review the Court's decision in light of availability of new evidence.[4]

On June 22, 2018, when this Court entered its preliminary findings of fact and conclusions of law on the record, the Court stated that Mr. Johnson has not and will not create electricity. (Trial Rec. 2521, "And because power production is not possible with any designs to date power production has never taken place and there is no revenue. The field of towers creates the illusion of effort and success.") Since that date, however, the Johnson Fresnel lenses have been successfully used to generate independently measurable electricity. Using the Fresnel lenses mounted in one of the RaPower-3 solar collector arrays, and using a model "Colorado" Stirling Engine built by Infinia, the Fresnel lenses have been used to generate measurable electricity.[5] This is certainly a case where an injunction may be dissolved where there is a showing of "some substantial change in law or facts."[6]

Three qualified technicians (Johnny Kraczek, Paul Freeman and Kerm Jackson), engineers with extensive experience in mechanical manufacturing, automation, process and renewable

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[3] *Alpenglow Botanicals, Ltd. Liab. Co. v. United States*, 894 F.3d 1187, 1203 (10th Cir. 2018) (citing *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000)).
[4] *DiPasquale v. Milin* 303 F Supp 2d 430, 432 (S.D.N.Y. Feb. 3, 2004).
[5] Krazcek, Johnny, MET, Jorgensen, Jeffrey, EE PE, *Confirmation of Electrical Power Production Using Johnson Fresnel Lens in the Field Coupled to a Sterling Engine*, September 12, 2018, attached hereto as **Exhibit 1.**
[6] *Thermodynamics, Inc*., 464 F.2d at 460.

energy engineering projects, along with Jeffrey Jorgensen, EE PE, a senior electrical engineer and a licensed professional engineer with over 40 years of experience in power generation and industrial electrical systems, have conducted a study at the Delta site to determine whether the Fresnel lens system can be used to generate enough solar process heat to generate electricity using a Stirling Engine system.

Despite Dr. Mancini's bombast, measurable electricity has been produced with the Stirling engine setup. Dr. Mancini questions the commercial viability of the Johnson Fresnel lens/Stirling Engine combination. There has never been and is not now any solar energy project in operation that produces electrical power without tax subsidies and incentives. None! If commercial viability is to be determined apart from tax subsidies and incentives, then no solar technology meets the Dr. Mancini commercial viability incentive test. That is why Congress adopted tax incentives.[7]

Dr. Mancini cites to a concern over tracking and alignment.[8] His criticism is misdirected and Mancini is not a hydraulics expert.[9] Yet Johnson has already made great progress toward both tracking and alignment with the hydraulic stabilizers on the R&D towers. (Trial Tr. 1691-1692). Any ongoing deficiencies with the tracking and alignment can be resolved and refined during operations. But again, that is not the test. There is no "floor" amount of electricity that is required to be made to qualify under the IRC. If electricity is generated, the system qualifies. Otherwise the Court will need to adopt a new statute as part of its ruling in this case to amend the Congressional enactment.

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[7] See, e.g., *Solar Energy Cannot Survive Without Massive Subsidies*, Benjamin Zycher, The Hill, October 6, 2016; *Why Renewable Energy Still Needs Subsidies*, Kate Gordon, The Wall Street Journal, September 14, 2015; *The Role of Government in Subsidizing Solar Energy*, Michael D. Yokell, The American Economic Review, Vol. 69, No. 2, p. 357.

[8] See Mancini Declaration ¶ 12.

[9] See Plaintiff's Trial Exhibit 756.

Dr. Mancini also criticizes the Johnson Fresnel lens/Stirling Engine combination for its lack of stability in the wind. He does this without visiting the site or seeing what has been accomplished. He offers conjecture as if it were fact while other experts have been working at the site and have measured and witnessed the production of electricity hold fact-based contrary views. While stability has been a significant concern for the prior mirror system used by others with the Stirling engines, by suspending the Stirling engine below the solar array, the prior instability of mirrors is irrelevant. The structural array and focal point work accomplished with the Johnson system has proven much more stable, and wind issues have been minimized. As Mechanical Engineer, John T. Kraczek states in his accompanying declaration: "[T]the consideration of the idea that wind will always throw off the focal point of the lenses when used with Stirling engines, is incorrect. Because of the significant energy captured by the lenses, some inaccuracy is tolerable with the energy that does hit the target offering a significant energy contribution to the Stirling target. In addition, Dr. Mancini seems to infer that wind will move or flex the lens or lens carriage. While the lens holder and carriage may not be highly attractive, it is actually very stiff. While working at the site we noted the stability of the focal point in field conditions. It does not appear that Dr. Mancini gathered any data to opine whether (and at what level) wind actually will affect the focal point, so his comment should be considered conjecture."[10]

Dr. Mancini opines in his declaration that "[e]ven if the defendants could keep the four Stirling engine generators aligned with the four, focused solar energy beams, the new dish/Stirling System is not a viable system for producing electricity on a commercial scale."[11] Dr. Mancini is not qualified to opine as to commercial viability because he lacks any business or accounting

[10] See Kraczek Declaration filed herewith.
[11] See Mancini Declaration ¶ 14.

education, experience, or certifications.[12] At trial he testified that there are no solar energy projects that operate without government support. He confirmed that solar energy cannot compete with coal in cost and efficiency. (TR P. 188, l. 4-18.) Therefore, even if his overreaching opinion is accepted as true by the Court, the question of commercial viability is not the question before the Court and is nothing more than another misdirection. Dr. Mancini apparently assumes that the Congressional commitment of incentives to adopt solar energy is irrelevant to the consideration of "commercial viability." The Ivanpah project (about which the Court refused to allow testimony TR P. 1699, l. 4-1700, l. 2; 1745, l. 22-1746, l. 3) is not "commercially viable" on its own. It produces solar electricity at a cost in excess of $.50 per kilowatt,[13] which is only made viable by mixing it with coal and nuclear generated electricity on the grid to then sell the combined power at the more tolerable rate of $.08 per kilowatt. This is done because there are tax incentives to justify the otherwise non-commercially viable Ivanpah solar energy.

The injunction issued because the Court concluded Defendants had not and could not produce electricity. That conclusion has now been disproven. One substantial basis for the injunction does not now apply. Commercial viability was not and is not the standard for determining whether lens buyers can qualify for the energy tax credit. The language of the statute requires "**(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, excepting property used to generate energy for the purposes of heating a swimming pool[.]" See 26 USCS §48 (a)(3)(A)(i). An amount of electricity is not specified and therefore not required. Even under this Court's

[12] See Plaintiff's Ex. 756.

[13] That solar field only produces solar generated electricity on average between 3 and 4 hours a day. The $2.5 billion originally invested could never be commercially viable without the natural gas used to power the Ivanpah plant. The maintenance costs are not disclosed, but the mirror field requires constant cleaning and adjusting. Their costs also include constant water usage to suppress dust.

standard that in order for the equipment to provide solar process heat it must produce electricity – the lenses now qualify and the injunction must be dissolved.

The study performed by Mr. Kraczek and his team demonstrates that the Fresnel lenses mounted on the existing towers directs solar process heat that has been and can be captured using the Stirling engine.[14]

Dr. Mancini is free to visit the site in Delta and witness the progress for himself. The Court should require him to do so before he is allowed to express an opinion about events that are occurring wholly outside his observation. During the trial the Court allowed him to express opinions without taking any measurements and using his untested approximations. (TR P. 173, l. 1-7; *Id*, l. 21-24; P. 180, l. 10-P. 181, l. 18; P. 182, l. 5-23; P. 207, l. 1-P. 208, l. 4.) The Court ought to set some limit on this man's competency. How can his competence include the ability to tell from Albuquerque, New Mexico what has been achieved and is now underway in Delta, Utah? What, exactly, does the Court find qualifies him to do that?

Dr. Mancini's opinions must be questioned as to viability of the lenses to function with the Stirling engine. He has now greatly qualified his opinion about Defendants' solar energy technology. This extraordinary limitation of his opinion should not go unnoticed by the Court. Instead of saying Defendants' lenses will never produce electrical energy from the sun, he now is claiming Defendants' technology will not "produce useable energy from the sun *as a commercialized system that sells electrical power*."[15] This is a far different opinion than the one he offered at trial. At trial he opined that the IAS solar dish energy technology comprises separate component parts that do not work together in an operating solar energy system to produce

[14] See Kraczek Declaration filed herewith.
[15] See Mancini Declaration ¶ 17 (emphasis added).

electricity or other useable energy from the sun.[16] Additionally, he concluded that the IAS solar dish technology is not now nor will it ever be a commercial-grade dish solar system converting sunlight into electrical power or other useful energy.[17] Those opinions were used to convince the Court that the Defendants' efforts were altogether bogus, with no meaningful use available for their years of effort. Now that the lenses have been coupled with Stirling Engines and produced electricity, the Plaintiff and Dr. Mancini have changed their position, moved the goalpost and remain insistent that even when they meet the electrical generation test, they must pass another test that no other solar power generation company has ever met: Defendants, unlike all others, must do so in a commercially viable way that ignores Congressionally established tax incentives intended to support this effort. The Court ought not be misled. Defendants have achieved what any of the other subsidized solar energy projects have achieved. Plaintiff does not want Defendants to be treated equally under the law.

In light of the new evidence of electricity generation by Defendants' solar energy technology, amending or altering the trial court's findings and conclusions is necessary to prevent manifest injustice.[18] The proof, as supported by outside technical experts vindicate Defendants' representations and position that it was possible to produce electricity using the Fresnel lenses sold by RaPower-3. This specific evidence was not available at the time of trial and therefore is properly considered by granting this motion.[19]

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[16] See Dr. Mancini Trial Testimony, Tr. at pp 74:20-25; 86: 5-8 and 112: 1-10.
[17] Id. See also Trial Transcript at pp 50: 4-7; 111: 21-25; 112: 1-10 and 162: 21-24.
[18] *Id.* (Reconsideration is properly granted to correct clear error, prevent manifest injustice, or review court's decision in light of availability of new evidence.)
[19] *Servants of the Paraclete,* 204 F.3d at 1012. ("It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.").

Conclusion

For the reasons stated above, Defendants request that the June 22, 2018 Ruling[20] and any subsequent order, findings or judgment be altered and amended on the basis of the new evidence now available to avoid manifest injustice prior to any further order or injunction entering in this matter. Defendants invite Dr. Mancini to again visit the test site and examine the installation of the Stirling engine and observe the results of electricity generation himself. Defendants further invite the Court to visit the site and observe the generation of electricity and proof of the solar process heat being utilized by Defendants to generate measurable electricity.

Dated this 9th day of October, 2018.

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[20] See prior footnotes 1 and 2.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' REPLY IN SUPPORT OF THEIR RULE 59(e) AND RULE 52(b) MOTION** was sent to counsel for the United States in the manner described below.

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