CASE NOS. 18-4150 and 18-4119

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' OPENING BRIEF

Respectfully submitted,

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Oral Argument is requested.
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

CORPORATE DISCLOSURE STATEMENT

RaPower-3, LLC is a Utah limited liability company. Its members consist of Randale P. Johnson, a Utah resident, LaGrand T. Johnson, a Utah resident, and Neldon P. Johnson, a Utah resident.

LTB1, LLC is a Utah limited liability company. It has never established members of the entity.

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Attorney for Appellants

Dated: January 20, 2019

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None.

STATEMENT OF JURISDICTION

The United States District Court for the District of Utah, Central Division, had jurisdiction under 28 U.S.C. §1340, 1345 and 26 U.S.C. §7402. Findings of Fact and Conclusions of Law were entered on 10/4/18 (ECF 467), Judgment entered on 10/4/18 (ECF 468), and an Amended and Restated Judgment was entered on 11/13/18 (ECF 507). The Notice of Appeal was timely filed under Rule 4(a)(1)(B)(i), F.R.A.P. on 10/10/18. You have jurisdiction under 28 U.S.C. §1291 and 26 U.S.C. §7402.

STATEMENT OF THE ISSUES

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THE SOLAR ENERGY SYSTEM WAS A TAX SCHEME WHEN ALL OF THE ELEMENTS OF 26 U.S.C.A §§46 AND 48 HAVE BEEN FULLY MET .

II. DISGORGEMENT AWARD WAS IN ERROR.

III. PLAINTIFF VIOLATED THE DISCOVERY DISCLOSURE RULES.

IV. DEFENDANTS WERE DENIED THEIR RIGHT TO A JURY.

V. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A PERMANENT INJUNCTION WAS REQUIRED BECAUSE THE SYSTEM DID NOT AND WOULD NEVER WORK.

STATEMENT OF THE CASE

The IRS claimed sales of patented solar lenses that took 11 years and $35 million to develop were marketed as a tax scheme. Defendants relied on advice from lawyers and accountants to follow the law. Defendants prepared no tax returns and advised purchasers to get tax advice.

During discovery the IRS disclosed nothing about disgorgement damages and used no expert witnesses to prove damages. Defendants' objection was overruled.

The IRS claimed $5 to $37 million disgorgement. The court awarded over $50 million while denying the right to a jury.

Defendants ask the decision against them be reversed.

STATEMENT OF THE FACTS

Facts Related to Whether Defendants Complied:

Knew or Should Have Known; Lens existed.

Defendants sold patented lenses and continually advised purchasers consult with tax professionals about any tax benefits. (See: PLEX 5, p. 2; PLEX 14, p. 2; PLEX 20, p. 3; PLEX 27, pp. 1-3; PLEX 94, p. 5; PLEX 95, p. 5; PLEX 119, pp. 1-2; PLEX 174, pp. 1-2; PLEX 511, p. 1-2; PLEX 531, pp. 3-6; PLEX 533, pp. 5-6; PLEX 620, p. 6, among others). All lenses were sold from inventory. (DEX 1522; DEX 1500).

26 U.S.C. §48; Qualified Energy Property uses "solar process heat" without defining it. Government expert Dr. Thomas Mancini testified "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). He 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). He witnessed lenses concentrating solar energy to generate over 750°. (TR.199).

Witnesses of concentrated solar heat include 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). The court acknowledged "the

record is pretty clear that there has been some experimental generation of process heat." (TR.2195:12-14). Uncontested evidence proves the lenses qualify as energy property.

Advice of Counsel

Defendants trusted and shared information from two law firms with lens purchasers. (TR.1101:2-22; 1252:21-1253:7; 1643:25-1644:9; 1997:20-1998:19; 2166:1-14; 2214:24-2215:19).

Placed in Service

Witnesses testified equipment is "placed in service" when it is "on site and it works and that someone can use it. " (TR.345). CPA Oveson testified "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.* Placed in service was the biggest question his firm faced in providing an opinion, but added, "If it was determined that it was placed in service that they qualified we felt for the credit and [depreciation]." *Id.* at 346. His firm never finished researching "placed in service". (TR.348, 351, 356-357).

CPA Richard Jameson testified the IRC has three relevant comments: "[C]omment 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). He added, "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*.

RaPower lenses were "placed in service." IRS witness Cody Buck admitted he did not know the IRS definition for "placed in service" and never researched it. He did not know how courts interpreted it. (TR.306-307).

Attorney Jessica Anderson explained the IRS definition of "placed in service" only required the equipment be available for use. (TR.657).

Attorney Birrell testified equipment qualified as "placed in service" if used in research and development or marketing. (TR.702).

System works

Johnny Kraczek, MET, a 30 year Senior Engineer and Technologist with extensive experience in mechanical manufacturing, automation, process and renewable energy engineering projects, and 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, conducted a study at Defendants' site to determine whether the Fresnel lens system can be used to generate enough solar process heat to generate electricity using a Sterling Engine system. The study used lenses on existing towers. The "Colorado" Sterling engine was tower-mounted and connected to a controller, the output load wired to an Onics

35 Ohm, 6 kW resistor as the load for the test. On September 5, 2018, from 1:58pm-4:13pm, Kraczek and Jorgensen measured a steady production of electricity using the lenses.[1]

Facts Related to Expert Witness Failures:

During discovery Plaintiff failed to disclose any damage computation, failed to identify its theory of damages, and failed to supplement its initial disclosures as required by Fed. R. Civ. P. 26. Plaintiff refused to produce any witness to explain their case, and obtained a protective order to prevent depositions of their damage witnesses. Plaintiff claimed attorney work-product or attorney-client privilege protected them from discovery.[2] When Defendants tried to depose an IRS witness, Plaintiff objected it was an undue burden and involved protected materials. (ECF 177). Defendants had no intention of invading attorney-client or attorney work product, but wanted to know Plaintiff's proof. (ECF 180). The court granted a Protective Order, ruling: "Upon consideration of the United States' motion for protective order prohibiting Defendants from deposing the United States' trial counsel and related submissions, IT IS HEREBY ORDERED THAT the motion is GRANTED. Defendants shall not depose any representative of the United States Department of Justice, Tax Division." (ECF 196). Just prior to trial, Plaintiff

[1] See Appendix Exhibit 70.
[2] ECF 319, p. 7.

disclosed damage witnesses from the United States DOJ, Tax Division. Defendants filed a Motion in Limine to prevent United States DOJ, Tax Division employees from testifying because DOJ concealed them during discovery. (ECF 319). Defendants asked to exclude three surprise witnesses including DOJ, Tax Division employees Perez (ECF 364), Reinken (ECF 365), and new expert witness Roulhac (ECF 362).

The DOJ/IRS argued and the court decided Rule 26 does not require disclosure of disgorgement damages. This was an error. The plain language of Rule 26 says otherwise.

In Initial Disclosures, DOJ/IRS explained damages tersely:

> . . . disgorgement of the proceeds that all defendants received for the gross receipts (the amount of which is to be determined by the Court) that they received from any source as a result of their conduct in furtherance of the abusive solar energy scheme described in the complaint, together with prejudgment interest thereon. The amount to be disgorged will be based on income information available to the IRS, income information in the possession of all defendants, and the financial records and accounts of all defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme described in the complaint.

Government expert Mancini had no understanding of tax issues. (TR.171). He performed no tests. (TR.173). He did not understand RaPower-3 components. (*Id.*) His work on solar energy failed to produce economically viable solar power. (TR.178). He did not use common measuring equipment for accuracy. (TR.180).

He used guesses, but his "estimates" have never been peer reviewed, lack a known error rate, have no known standards, have no method to replicate his results, and he took no actual measurements on which to base his opinions. (TR.180-183). He testified only 0.04% of total US energy comes from solar, and all solar projects require natural gas to preheat or supplement when dark. (TR.185-186). All solar energy requires tax support, and solar electrical generation cannot compete economically with coal. (TR.188). A motion to strike Mancini's incompetent testimony was denied without explanation. (TR.207-208, 210).

Facts Related to Damages Issue:

In June 2017, Plaintiff quashed Defendants' deposition of the US Department of Justice, Tax Division.[3] After the order "Defendants shall not depose any representative of the United States Department of Justice, Tax Division" (ECF 196) Defendants understood no lawyer, paralegal or employee could testify.

Over Defendants' objections, DOJ employees testified. DOJ paralegal Reinken testified she reviewed bank statements, but ignored all other bank records, including checks and deposit slips.[4] Reinken made no effort to determine which receipts were related to lens sales even though that information was available to her. She made no effort to avoid double counting.[5]

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[3] ECF 170.
[4] TR.878:15-880:1
[5] TR.880:2-884:16.

DOJ paralegal Perez testified about "harm to the Treasury." But Perez could not provide a definition for any term used in her exhibit summarizing tax records. Over objections,[6] she made no effort to connect the information in the tax returns to any other documentary evidence, including RaPower-3 sales.[7]

Surprise expert witness Roulhoc could not explain and did not understand the numbers in his spreadsheet. He did not compare the spreadsheet numbers to any bank records (TR.800: 17-24), nor verify any of the numbers represented actual receipts (TR.806:15-17; 812:24-813:1), nor verify any quantity of lenses were sold (TR.813:2-4), nor verify there were any actual lens purchases. (TR.806:18-20). He could not verify any number proved payment for a lens. (TR.811:10-12; 22-24; 813:5-7). He could not explain terms in the database. (TR.822:6-8).

Defendants asked that Perez be barred for untimely disclosure under Rule 37. Perez testified as a summary witness relating 1,643 tax returns "demonstrating total depreciation and solar tax credits that the Defendants' customers claimed" as summarized in PLEX 752 and is the basis for the "harm to Treasury" theory. The court permitted Perez to testify, allowing a two-hour deposition. One business day before trial, Perez' limited deposition disclosed no specifics.

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[6] TR.840:16-841:14.
[7] TR.842:17-847:15.

During 12 days of trial, Plaintiff claimed disgorgement was: $17 million,[8] $17 to $50 million,[9] $5 million to $51,885,000,[10] $25 million,[11] $25,874,065,[12] $32 million,[13] and $175 million[14] among other amounts, before eventually settling on $32,796,196.[15]

Defendants showed $43,156,400.88 in business expenses for solar and lens research and development, sales and business costs. All money from lens sales passed through RaPower-3. RaPower-3 purchased materials to build the solar systems and pay sales commissions. All funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS,[16] identified in PLEX 735, 737, and 738 came from RaPower-3.

Facts Related to Jury Issue:

On 1/25/16, Defendants timely demanded a jury.[17] The Court later struck the jury, but permitted reinstatement "if penalties become a part of this case."[18] On

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[8] TR.887.
[9] TR.895.
[10] TR.2317.
[11] TR.2441.
[12] TR.2441.
[13] TR.2447.
[14] TR.2514.
[15] ECF 412, p. 98.
[16] IAS sold lenses in 2009, but transferred those sales to RaPower in 2010 and thereafter all sales were by RaPower alone. (TR.2441:23-2442:6).
[17] ECF 24.
[18] ECF 43 at 3.

2/9/18, Plaintiff served its pretrial disclosures, which did not contain any calculation of damages or disgorgement. The same day Defendants moved to reinstate the jury based on *Kokesh v. SEC*[19] because the disgorgement was punitive rather than remedial, entitling them to a jury. [20] On 2/28/18, Plaintiff provided its first summary of damages in PLEX 752. On 3/3/18, the court denied jury reinstatement as untimely and held *Kokesh* did not apply.[21] The court held disgorgement was only remedial.[22] The court later ordered disgorgement exceeding any requested amount, was not supported by the evidence, nor a reasonable approximation of gross receipts.[23] The judgment did not return parties to the status quo and is non-remedial.

SUMMARY OF THE ARGUMENTS

Appellants did not promote a tax scheme. Their system works and qualifies for tax credit and depreciation as solar energy equipment. The trial court ignored years of research and development, millions of dollars of investment, and patented advancements.

Plaintiff failed to present a reasonable approximation of damages. The trial court ignored evidence of Defendants' revenues and imposed an unsupported penalty over $50 million dollars.

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[19] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017)
[20] ECF 289.
[21] ECF 322.
[22] *Id*. at 4.
[23] ECF 467 at 144.

The trial court improperly admitted surprise evidence improperly withheld from discovery.

Defendants asked for and were entitled to a jury. The trial court improperly denied this.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THE SOLAR ENERGY SYSTEM WAS A TAX SCHEME WHEN ALL OF THE ELEMENTS OF 26 U.S.C.A §§ 46 AND 48 HAVE BEEN FULLY MET.

A. There Is No Solar Energy Scheme.

Energy tax credits promoted by Defendants are available to qualifying taxpayers. RaPower lenses meet the requirements of the IRC. The District Court's interpretation of the tax code is reviewed *de novo*. *Batchelor-Robjohns v. United States,* 788 F.3d 1280, 1284 (11th Cir. 2015); *see also Miller v. United States*, 38 F.3d 473, 475 (9th Cir. 1994).

An energy tax credit under 26 U.S.C. §§46 or 48 is available to qualifying taxpayers. Once qualified under §48, 26 U.S.C. §36 allows depreciation. There was no evidence Defendants misrepresented application or interpretation of those provisions. There is no "scheme" when buyers are told of potential tax benefits of solar energy development while recommending purchasers get advice from tax professionals. (See Defendants' Statement of Facts ("SOF"), p. 1-2). Nor can buyers rely on Defendants when told to get their own tax advice.

Defendants did not organize or assist in organizing an illegal tax scheme. Defendants sold solar lenses, not a tax avoidance program. The IRS is stopping a legitimate business under the false claim it is a tax avoidance scheme.

Under the IRC a court "may enjoin [a] person from engaging in . . . activity subject to penalty under this title." I.R.C. §7408(b). "Such activity includes the promotion of abusive tax shelters under I.R.C. § 6700." *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at *6 (D. Utah Mar. 9, 2012). "The government must prove five elements to obtain an injunction under these statutes: (1) the defendants organized or sold, or participated in the organization or sale of, an entity, plan, or arrangement; (2) they made or caused to be made, false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) they knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction is necessary to prevent recurrence of this conduct." *Id.*

Here, an injunction was wrongly granted under §7408 for alleged 26 U.S.C. §6700. Defendants did not know or have reason to know anything was false or fraudulent about potential tax benefits for customers. The IRS claimed false or fraudulent statements were 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.[24] Defendants advised customers to get their own tax advice about all these.

The lenses purchased by taxpayers exist. (DEX 1522). DEX 1500 is a video of the solar fields. There is a warehouse full of lenses in addition to those installed on towers. (TR.1082 (Preston Olsen); TR.1321 (R. Jameson); TR.1549 (M. Shepard)). All the RaPower-3 lenses sold to customers exist.

Relying on legal counsel's advice, Defendants represented the lenses were "placed in service" when bought. Numerous copies of the "placed in service" letters are exhibits (PLEX 103-105, 313, 321-322, 327, 466, 534). Defendants had no reason to know their statements were false.

Because the representations the lenses (1) existed and (2) were placed in service at the time of sale were true, there was no false or fraudulent statement or tax scheme.

The lenses qualified under §48. But even if they did not, there is no basis to find Defendants knew or should have known they solar lenses did not qualify. Solar energy property is defined as "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.**" 26 U.S.C. §48(A)(i) (Emphasis added.) Government

[24] ECF 467 at 87-119, 123.

expert Mancini admitted research and development qualified. (TR.200). Numerous tax preparers independently agreed.

The court wrongly concluded it was "false or fraudulent statement" for Defendants to tell customers they were involved in a "trade or business." That statement cannot make a tax scheme for at least three reasons. First, this is a true statement of the law. Second, it was supported by advice from counsel. Third, each taxpayer's circumstances uniquely determine whether they qualify—and all purchasers are told to consult with their own tax preparer about their circumstances.

The question of whether a person qualifies for the energy tax credit of §48 and whether the person is in a trade or business is circular and dependent on the same facts. 26 U.S.C. §48(C) requires energy property be depreciable.

Lawyers Anderson (PLEX 23A and 570) and Birrell (PLEX 362) explained the solar energy tax credit is for the person "doing business" who can depreciate the asset. Defendants did not misrepresent the tax provisions nor did they deceive purchasers when advising that, upon buying a lens, the purchaser was involved in a trade or business. Defendants believe this in good faith.

IRS stumbled over whether all purchasers of lenses were involved in a trade or business. This was explained in detail by Ms. Anderson on the third day of trial. Anderson scrutinized the question of "material participation" (TR.578), one of the main requirements for depreciation. (TR.591-595). She concluded "material

participation is based on the facts applicable to the individual taxpayer." (TR.595). That is what Defendants told purchasers, in addition to getting advice of their own tax advisor to confirm they qualified. (TR.660; PLEX 570). The Anderson letter given purchasers states it was provided to help them "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 the Circular 230 disclaimer that advice given was not intended to avoid paying federal tax penalties that may be imposed on a taxpayer and each taxpayer should consult their own tax advisor. (TR.701; PLEX 362, p. 16).

The RaPower3.com website warned each taxpayer should obtain his own advice on tax matters. (TR.1465, PLEX 832A[25]).

Defendants routinely instructed, advised, recommended, advocated, and promoted the potential tax benefits of buying RaPower lenses and leasing the lens for use in research, testing, demonstrations and development. There is no evidence Defendants knew their statements were false or fraudulent. What they said was true.

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[25] "It is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer."

They acted in good faith. Being mistaken is not bad faith or knowing and intending to violate the law. The tax benefits of §48 are available to qualified purchasers.

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

The IRS claims Defendants made statements about tax benefits "which Defendants knew or had reason to know were false or fraudulent." The IRS never made a distinction between "false" and "fraudulent" statements. Defendants' statements cannot be "fraudulent" because there was no proof of intent to cause reliance or anyone relying. Purchasers confirmed solar lenses were bought for reasons other than the tax benefits. At the start of trial, Defendants asked to clarify whether the Court required proof of fraud, or only false statements. The court took the question under advisement, but never returned to the issue until the conclusion of the case. The words "false or fraudulent" in the IRC has recognized meaning and require proof Defendants acted intentionally and knowingly.

Plaintiff asserted "A statement about a material matter is false in the tax law context if 'untrue and known to be untrue when made.'"[26] There was no proof Defendants said anything knowing it was untrue.

Also, "A statement about a material matter can also be false because of what a plan promoter fails to say."[27] This case is not about Defendants failing to say

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[26] ECF 467, p. 97.
[27] *Id.*

something. They produced full citations of the tax law on their website (PLEX 903) and encouraged customers to seek professional advice. (TR.1465, PLEX 832A, fn. 24). No defendant claimed to be a tax professional. They cannot be held to that standard. There was nothing they knew and left undisclosed. §6700(a)(2)(A) requires the United States prove scienter for false or fraudulent statements. *United States v. Campbell,* 704 F. Supp. 715, 726 (N.D. Tex. 1988). There is no evidence for that. There is a difference between a mistake and knowing something is fraudulent.

C. Application to Research and Development.

There is undisputed proof customer lenses 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. Under 26 U.S.C. §48 solar process heat used in research and development qualifies for tax credit.

Richter v. Commissioner, T.C. Memo. 2002-90, (04/05/2002) states: "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)."

Private Letter Rulings acknowledge that "research and development" can be a trade or business[28], acknowledge a corporate taxpayer that is "engaged in the

[28] PLR 9413035 and 9507004.

business of research and development"[29], and discuss a corporation that "is principally engaged in the business of research and development of products in the music industry"[30].

FSA 200145011 acknowledges "research and development" can be a trade or business and cites to *Snow v. Commissioner*, 416 U.S. 500 (1974); the taxpayer need not currently be engaged in selling or producing a product to qualify for a §174 deduction (the research and development credit). *Green v. Commissioner*, 83 T.C. 667 (1984), held that while the probability of a firm's going into business will satisfy §174, the mere possibility of doing so will not. The tax court required actual sales to qualify:

> The Supreme Court reversed and stated that the meaning of the phrase "in connection with a trade or business" used in §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 §174. 416 U.S. at 502-503. §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 §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 §174 even though it had not yet had any sales.

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[29] PLR 8421031.
[30] PLR 8403028.

The court required Defendants' product be completely beyond research and development before qualifying. That is wrong.

D. Legislative History Supports a Liberal Interpretation of Placed in Service.

In *Sealy Power v. Comm'r*, 46 F.3d 382 (5th Cir. 1995), the 5th Circuit considered "placed in service" by examining the legislative history of the investment credit. It dismissed the Tax Court's interpretation as too stringent in requiring a "regular achievement of anticipated production levels" when Congress created the credit.[31] "Congress enacted the investment tax credit to stimulate the economy by encouraging investment in machinery, equipment, and certain other property."[32] It continued:

> Courts have often recognized the notion that the "investment tax credit should be construed liberally in light of its purposes." The Tax Court's reading of "specifically assigned function" as achieving ideal or near ideal production levels, however, demands a hindsight approach to the success of a taxpayer's investment expenditures which undermines the very focus of the credits' incentive, the initial investment decision. ... In defining "placed in service," Treasury Regulation 1.46-3(d)(1)(ii) neither states nor implies that the property must produce an anticipated or projected amount before it may be considered ready and available for a specifically assigned function. Neither do the examples in Treasury Regulation §1.46--3(d)(2)(ii) and (iii) -- illustrating when

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[31] *Id.* at 393 ("These regulations do not require that property entitled to depreciation and credits must first meet expected output goals before it may be deemed to have been placed in service; to the contrary, these regulations reveal that defectively or disappointingly performing property may still be considered to have been placed in service.")

[32] *Id.* (citing S. Rep. No. 529, 95th Cong., 2d Sess. 1, 6-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7942, 7945-49.)

> property acquired for use in a trade or business or for the production of income is placed in service -- support the Tax Court's unduly strict construction of the statute.[33]

The *Sealy* court examined a Regulation example[34] of property placed in service justifying a less stringent approach. The example explained operational farm equipment is considered in state of readiness and availability the year it was acquired even if not used that year.[35] Equipment also qualified if acquired for a "specifically assigned function which is operational but is undergoing testing to eliminate any defects."[36] "This example acknowledges defective performance -- presumably performance below that which was anticipated or projected -- does not bar 'placed in service' designation."[37]

E. The Finding of Gross Overvaluation was in Error.

Development of RaPower solar lenses took more than 11 years. (TR.1830-1886). Mr. Johnson testified during those years he alone invested $14,000,000 (TR.1866), and performed mathematic equations analyzing suitable type of plastic,

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[33] *Sealy*, 46 F.3d at 393-94.

[34] *Id.* at 394 citing Treasury Regulation §1.46-3(d)(ii)(2)(ii) ("In the in case of property acquired by a taxpayer for use in his trade or business (or in the production of income), the following are examples are cases where property shall be considered in a condition or state of readiness and availability for a specifically assigned function: Operational farm equipment is acquired during the taxable year and it is not practicable to use such equipment for its specifically assigned function in the taxpayer's business of farming until the following year.")

[35] *Id.*

[36] *Id.* (citing Treasury Regulation §1.46-3(d)(ii)(2)(iii).)

[37] *Id.*

heat co-efficient of the plastic in relation to cooling temperature, factors for deformation at cooling, how to avoid the "stickiness" of the plastic separating from the mold, determining 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).

Johnson evaluated multiple plastics, examining useful life, effects from sunlight exposure, and degradation over time. (TR.1850:13-18). There was extensive testing and evaluation of manufacturing heat transfer of metals reacting with the plastics, temperatures needing to be maintained across the entire form to prevent plastics from pulling away on the lens roller die, and suitable fluid used for cooling. (TR.1851).

The roller die was developed in Canada, Tennessee, California, and Utah and required an aerospace facility for testing the mold (TR.1861); required a machinist in California to make the mold (*Id.*). It took 8-9 months to complete the first suitable mold. (*Id.*). Design took approximately 3 years for the first mold in Canada, at a cost of $3,000,000. Afterward, the Canadians told Johnson they couldn't make it work. (TR.1864).

Several patents were awarded: 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."

Plaintiff presented no proof on gross overvaluation. The only mention was in closing argument (TR.2332:13): "They grossly overvalued the lenses to pump up the dollar amounts that customers could claim for these unlawful benefits." (TR.2399:20). Counsel asserted the "correct valuation" of any lens was $26-$35. (*Id.*) There was no testimony of "correct valuation." Plaintiff failed to designate anyone to provide any value for the lenses. Plaintiff ignored research, development and testing costs. IRS admitted "Generally a correct valuation is a price that is agreed to by a willing buyer and a willing seller." (TR.2432:23). But contradicted that, viewing sales as a tax scheme. Because of the lack of evidence, the finding of a gross overvaluation should be reversed. The IRS did not meet its burden; offering only conclusion, inuendo and argument.

II. DISGORGEMENT AWARD WAS IN ERROR.

The court erroneously ordered Defendants to disgorge an excessive amount. "We review the district court's findings on damages for clear error. *See Easley v.*

Cromartie, 532 U.S. 234, 242 (2001); *Furr v. AT & T Techs., Inc.*, 824 F.2d 1537, 1547 (10th Cir.1987). To reverse under this standard requires that, based on the entire evidence, we have a "definite and firm conviction that a mistake has been committed." *Easley*, 532 U.S. at 242. We review the district court's legal conclusions *de novo*. *Dang v. UNUM Life Ins. Co. of Am.*, 175 F.3d 1186, 1189 (10th Cir. 1999).

A. Plaintiff Was Required and Did Not Provide a Reasonable Approximation of the Disgorgement Penalty.

The law is "a claimant bears the burden of showing the disgorgement amount is a reasonable approximation of [defendants'] unjust enrichment." (ECF 359). Disgorgement is to prevent unjust enrichment.[38] IRS has the burden to show the disgorgement amount. To do so they must prove a reasonable approximation of ill-gotten gains.[39] Only after a reasonable approximation is proven does the burden shift to the defendant to show it is not a reasonable approximation.[40]

Plaintiff did not meet its burden. In discovery Plaintiff failed to disclose any amount for their damage claim. At trial Plaintiff presented a vast range of $5,000,000-$51,885,000 as the possible floor and ceiling of damage. A $46,000,000.00 range is not reasonable.[41]

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[38] *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946); *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014).
[39] *See S.E.C. v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004).
[40] *S.E.C. v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012).
[41] See *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951).

During trial, Plaintiff claimed disgorgement was: $17 million,[42] between $17 million and $50 million,[43] $5 million to $51,885,000,[44] $25 million,[45] $25,874,065,[46] $32 million,[47] and $175 million,[48] among other amounts. A motion[49] stated disgorgement should be $47,461,050. (*Id.* at pg. 9.[50]) At trial Plaintiff settled on $32,796,196.[51] Plaintiff also said the best evidence of actual payments received comes from isolating the word "full" in PLEX 749 to isolate collections.[52] Doing so results in $17,911,507.[53] The court ignored this and entered judgment for $50,025,480.00, which was clearly incorrect.

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 indistinguishable from his legitimate activity.[54] Plaintiff still

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[42] TR.887.
[43] TR.895.
[44] TR.2317.
[45] TR.2441.
[46] TR.2441.
[47] TR.2447.
[48] TR.2514.
[49] ECF 252.
[50] This Court should note, 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 below.
[51] ECF 412 pg. 98.
[52] TR.886:24-888:8.
[53] TR.820:19-822:3.
[54] *S.E.C. v. Lauer*, 478 F. App'x at 557; *S.E.C. v. Calvo*, 378 F.3d at 1217.

bears the burden of showing a reasonable approximation. This generally involves reviewing banking records and tax returns showing gross revenues, or fees earned in preparing fraudulent tax returns on a taxpayer's behalf.[55] In the absence of a reasonable approximation, courts deny disgorgement.

In *United States v. Stinson,*[56] involving disgorging fees earned from preparing fraudulent tax returns, the government's proposed disgorgement was not a reasonable approximation. The government failed to carry its burden because it failed to show some fees were distinct from others and double-counting damages is prohibited.

In *United States v. Mesadieu,*[57] a proposed disgorgement was not a reasonable approximation. Like this case, the government relied on a random sampling of returns. The government used ***expert testimony*** to estimate the number of non-compliant returns from a random sampling.[58] The court found the government had access to all returns (just like in this case), and it was not inordinate or impractical to review each return for proof of fees improperly earned.[59] In that case, expert

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[55] *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)

[56] 239 F.Supp.3d 1299, 1329 (M.D. Fla. 2017).

[57] 180 F.Supp.3d 1113, 1118 (M.D. Fla. 2016).

[58] *Id.*

[59] *Id.* at 1122.

opinion did not justify a speculative award. In this case, Plaintiff failed to review any tax returns, made calculations without evaluating the actual tax treatment of RaPower-3 lenses, and presented no expert witness on damages.

C. Net Revenues as Measurement for Disgorgement.

The power to order disgorgement is limited. It extends only to the amount the defendant profited from wrongdoing.[60] Any additional sum is an impermissible penalty.[61] Funds returned to customers or investors is a proper deduction to measure net-revenue subject to disgorgement.[62]

Generally, a defendant is not allowed to deduct business expenses from the disgorgement amount if the business was created and run to "defraud investors."[63] But it is proper to deduct business expenses if the business was not created to defraud investors.[64] Plaintiff did not show Defendants intentionally defrauded investors. At

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[60] *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005).
[61] *Id.*
[62] *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.").
[63] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006).
[64] *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).

every level, Defendants encouraged its customers to seek their own tax advice. (See SOF, p. 1).

Defendants showed business expenses that should reduce any judgment. Expenses for 2011 were $159,975. (PLEX 542). Expenses in 2012 were $228,410.70. (PLEX 543). PLEX 520 shows Plaskolite purchases of $1,145,930.18. Research and development expenses for 2008 are $760,798 and for 2009 $704,889. (PLEX 371). The cumulative net loss in the 10K of IAS for 2009 is $35,334,617. (*Id.*) The IAS 2016 10K shows a cumulative net loss of $40,156,398. (PLEX 507). A total of $43,156,400.88 in business expenses related to solar research and development of lenses, and to lens sales and business. All of these are legitimate business expenses and should have been deducted from disgorgement.

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

The court found Defendants damaged the Treasury in the speculative amount of at least $14,207,517. This figure is allegedly calculated by adding all deductions of any kind used by purchasers, who, 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 an assumed average tax rate. There was no evaluation on an individual basis. This was wrong. Had the IRS reviewed actual returns, that number could have been determined. The government failed to distinguish deductions based upon some other investment or equipment. IRS did not separate energy tax credits

claimed by taxpayers for home-rooftop solar panels, home insulation, water heaters, or other qualifying purchases in their tax returns. There is no reduction for the recovery the IRS will make in the individual audits, refilings, and penalties from Defendants' purchasers.

E. Income of Individual Defendants is Basis for Disgorgement.

Disgorgement is the amount an individual profited from wrongdoing. There must be a "relationship between the amount of disgorgement and the amount of ill-gotten gain."[65] The income of individual defendants is germane to a disgorgement amount only to the extent the government can show it is income *solely from the illicit or fraudulent activities* and not a compounding calculation of amounts already included in the disgorgement calculation for the entities.[66]

All amounts claimed against individual Defendants are entirely derived from and included in the RaPower-3 total and constitutes an improper double recovery. All money from lens sales passed through RaPower-3. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS,[67] identified in PLEX 735-738 came directly from RaPower-3. To include those both to individual Defendants and as income to RaPower-3 results in prohibited double counting and

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[65] *C.F.T.C. v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999).
[66] See *Mesadieu*, 180 F.Supp. at 1122 (refusing to award disgorgement when government failed to distinguish legitimate gains from illegitimate gains).
[67] IAS sold lenses in 2009, but in 2010 those sales were transferred to RaPower and thereafter all sales were conducted by RaPower alone. (TR.2441:23-2442:6).

double recovery.[68] RaPower is the only party whose gross revenues should be counted.[69] RaPower's costs of business should reduce claims against them.

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

Testimony from two DOJ paralegals introduced summaries of voluminous evidence.[70] Perez prepared PLEX 752, which purports to summarize the contents of "at least 1,643 tax returns that Defendants' customers filed with the IRS."[71] She testified "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.[72] Determining and applying an "average tax rate" by definition requires expert opinion, involving selecting and applying a hypothetical "average" not a summary. She was not qualified as an expert witness, designated as an expert, and no attempt was made to meet the Scheduling Order deadline to disclose expert witnesses. She was an ambush witness, unqualified to offer damage testimony.

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[68] The government has also failed to reduce for other income sources for these parties. The extent of that error is impossible to determine without seeing the government's source documents and how they were selectively used to reach their calculated results, a document which the court ruled defendants could not see in ECF 376.

[69] Further, RaPower did not collect on all sales. What was "booked" and "collected" are very different. Collections were much lower.

[70] ECF 329.

[71] *Id.* at fn. 14.

[72] *Id.*

As set out in ***Facts Related to Expert Witness Failures***, and ***Facts Related to Damages Issue***, supra, the IRS blocked all discovery to obtain information about disgorgement. Because it could not be discovered, Defendants concluded no lawyer, paralegal or employee of DOJ would be allowed to testify. Defendants were surprised and unprepared at trial when ambushed by DOJ witnesses and exhibits and had no opportunity to obtain experts for the defense. Defendants were cheated out of having their own expert dissect the summaries to challenge accuracy and to address and counter the clearly erroneous assumptions, calculations and analysis done by Plaintiff's DOJ employees. Hiding until the eve of trial, long after expert witness discovery had already concluded, was unfair abuse.

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

Finding of Fact 76 states that the "total sales price of orders placed with defendants by customers was $50,025,480.00 to $50,097,672.15." This was from a column in PLEX 749, prepared by Roulhoc and never offered as a damage calculation. It is an Excel spreadsheet created from a database maintained by Defendants to attempt to internally track lens sales, payments, and other information. Its raw data included "test" transactions and posted "sales" that did not result in any revenue for Defendants. Roulhoc could not explain and did not understand the numbers on 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), any quantity of sales (TR.813:2-4), there were any actual lens purchases (TR.806:18-20), nor 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). He ignored all of the comments in the document about whether actual payments were received. (TR.805-807:5). Roulhoc's testimony only shows the information in PLEX 749 came from defendant's raw database. There was no attempt to interpret PLEX 749 by any witness. Plaintiff could have deposed or called Glenda Johnson, who entered the raw data, to explain it but instead chose to use unexplained raw data and present speculation through a witness who did not know if it included actual revenue, actual lens purchases, what quantity of lenses were reliably counted, or what any comment in the database meant.

The court relied upon PLEX 749 to enter judgment against Johnson in the inflated amount of $50,025,480. This apparently came from summing a column in PLEX 749 purporting to be lens sales then multiplied by a hypothetical cost of those lenses – despite clear evidence this amount was never received by RaPower and certainly not by Johnson. This number far exceeds PLEX 749 totals for amounts identified as received. It exceeds all deposits in company and personal bank accounts. It is punitive.

Plaintiff acknowledged in open court PLEX 749 does not support $50,025,480 as either gross receipts or the increase in net assets.[73] The court acknowledged "[t]here was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought." (ECF 467, p. 126). Despite this, the court entered a finding "Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480." (See ECF 467, ¶86). Earlier, Plaintiff identified that number as the "total sale price of orders." (*Id.*, ¶76). Orders are not payments. In fact, Plaintiff's counsel admitted the amount of gross receipts for payments made identified in PLEX 749 was $17,911,507.[74] Plaintiff admitted "there is evidence that not everybody paid for every single lens in the amount of $1,050."[75] The amount awarded is more than triple the amount shown as paid in the very same exhibit. The Plaintiff has the burden to prove a reasonable approximation and has repeatedly admitted on the record their guesstimates are neither accurate nor reasonable. Plaintiff argued that because most of the lens purchasers did not pay the full contract amount this was indicia of the false tax scheme.[76] The amount of disgorgement was grossly overstated.

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[73] ECF 412, p. 98; Transcript at 2447:15-2448:2.
[74] TR.821:7-822:2; 887:11-8.
[75] TR.892:16-17.
[76] TR.2422:20-25.

Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities,"[77] its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts,[78] $5,438,089 in IAS accounts,[79] and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196.[80] (See ECF 467, pp. 81-85). These may have been double or triple counted. Plaintiff's witness was not a CPA (TR.877:8-9) or 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 any deposit to lens sales. (TR.877:16-878:22). She did not use any available information on checks or deposit slips to isolate 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 other Defendants may have been labeled "gross receipts" but none of the exhibits make any attempt to limit to lens sales. (PLEX. 735-TR.881:11-16; PLEX 737-TR.881:25-882:6; PLEX 738-TR882:8-14; PLEX 739-TR.882:21-883:1; PLEX 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 attempt to exclude deposits from the purchase of IAS stock, despite the Plaintiff

[77] ECF 467, 80.
[78] ECF 467, 81.
[79] ECF 467, 82.
[80] ECF 467, 85.

clearly knowing the stock purchases happened. (TR.1812:4-12).[81] These numbers are inherently unreliable. The court relied on unreliable numbers. (ECF 467 86). Plaintiff is not entitled to one penny more than the actual gross receipts or increase in net assets. (ECF 359). Plaintiff did not prove a reasonable approximation.

The court found, "It is reasonable, based on the facts of this case and Defendants' extensive promotion of the solar energy scheme, to conclude that customers have used their 'purchases' of all, or nearly all, of those lenses to claim a depreciation deduction and a solar energy credit. Because of the manner in which Defendants promoted the scheme, the Court concludes that $50,025,480 in gross receipts from the solar energy scheme came from money that rightfully belonged to the U.S. Treasury. Defendants – who are the ones in possession of the best evidence of a reasonable approximation of their gross receipts – failed to rebut the United States evidence of this reasonable approximation, and introduced no credible evidence of their own on the point." (ECF 467, pp. 126-127). The court bases this on three factors: that some of RaPower's customers claimed a depreciation deduction and a solar energy credit, that because of its promotional activity $50,025,480 of money that rightfully belonged to the U.S. Treasury was received by

[81] The court told Plaintiff this was impermissible double counting, but made no effort in its findings to correct it. (TR.2443:2-2444:24).

Defendants, and Defendants failed to present credible evidence to rebut the point. These conclusions are unsupportable.

There was no evidence Defendants actually received $50,025,480. Plaintiff submitted evidence upon "review of 32,000 pages of bank records for accounts of all defendant entities,"[82] its paralegal extracted total deposits of $25,874,066 in RaPower-3 accounts,[83] $5,438,089 in IAS accounts,[84] and amounts deposited in other non-party accounts with the total of all deposits being $32,796,196.[85] Much of this was double-, perhaps triple-counted. This evidence directly contradicts the court's conclusion.

Plaintiff proposed the harm to the Treasury was the speculative amount of $14,207,517. (PLEX 752). This figure was allegedly calculated by adding all of the deductions used by RaPower-3 customers claiming depreciation and/or a solar tax credit. The calculation is not based on actual amounts deducted for lens purchases, but were calculated using "average tax rates". There was no evaluation of those deductions on an individual basis. There was no attempt to identify an actual amount of deductions and therefore any actual loss to the Treasury. Nevertheless, even the

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[82] ECF 467, 80.
[83] ECF 467, 81.
[84] ECF 467, 82.
[85] ECF 467, 85.

speculative number asserted by Plaintiff does not support the court's ultimate judgment.

The best evidence of what the harm to the U.S. Treasury would be contained in the tax returns of Defendants' customers who actually claimed a deduction or a credit. Plaintiff was in possession of those tax returns, Defendants were not. The judgment is unsupportable.

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

Plaintiff argued the total deposits into RaPower-3 bank accounts may be the appropriate amount for disgorgement. Plaintiff's witness did not use any available information on checks or deposit slips to identify lens sales. (TR.879:1-14). The witness' exhibits include all bank statement transfers, not gross revenues from lens sales. (TR.880:3-25). Her exhibits may be titled "gross receipts" but none limit totals to lens sales. (PLEX 735-TR.881:11-16; PLEX 737-TR.881:25-882:6; PLEX 738-TR882:8-14; PLEX 739-TR.882:21-883:1; PLEX 740-TR.883:2-7.) The revenue from lens sales were not isolated from redeposits or inter-account transfers. (TR.883:25-884:16). The numbers are overstated and unreliable.

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

RaPower purchased $3,077,000 in stock from IAS. (PLEX 852, 507; TR.1812:4-12). That is included in the disgorgement. It is double-counted and

included in both the amount for RaPower-3 and for IAS, despite the court's opposition to do so at closing argument. (TR.2441-2444). This is a double recovery, double-counting, and an overstated and unreasonable approximation of funds received.

All lenses sold by IAS were re-purchased by RaPower-3. (TR.2181:3-8, 2288:22-2289:3). There is no justification for $5,438,089. IAS has no gain from lens sales.

III. PLAINTIFF VIOLATED THE DISCOVERY DISCLOSURE RULES.

A. Damage Evidence Was Not Disclosed.

Plaintiff failed to provide evidence regarding damages prior to trial. The court should not have admitted that evidence, nor relied on it. This Court must review decisions to admit evidence for abuse of discretion. See *United States v. Boeing Co.*, 825 F.3d 1138, 1145 (10th Cir. 2016). "Under this standard, we will not reverse unless the district court's decision exceeded the bounds of permissible choice in the circumstances or was arbitrary, capricious or whimsical." *Id.* (internal quotation marks omitted).

"[B]y its very terms Rule 26(a) requires more than providing-without any explanation-undifferentiated financial statements; it requires a 'computation'

supported by documents."[86] Because Plaintiff provided a description of the damages it intended to pursue, it had an obligation under Fed.R.Civ.P. 26(e) to supplement its disclosure of damages and elaborate on the "income information available to the IRS, income information in the possession of all Defendants, and the financial records and accounts of all Defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme."[87]

Rule 26(e) mandates supplementation of initial disclosures throughout the case. "A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—**must** supplement or correct its disclosure"[88] The timing of supplementation is critical as to whether it is allowable.[89]

Plaintiff over-generalized damages in its Initial Disclosures and never supplemented to enable Defendants to analyze the claim and prepare to confront it at trial. The plaintiff in *Design Strategy*, infra, was barred from putting on trial evidence when it relied on generalized initial disclosures using a broad categorical

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[86] *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).
[87] See Appendix Exhibit 7.
[88] Rule 26(e) (emphasis added).
[89] *AVX Corp. v. Cabot Corp.*, 252 F.R.D. 70, 79 (D. Mass. 2008) (finding a supplemental calculation untimely when made after the close of discovery because the opposing party was without the means to explore and challenge it).

description such as "all monies paid to [Defendant] . . . based upon breach of fiduciary relationship".[90] That description did not satisfy Rule 26 and was not supplemented before trial.[91] The Plaintiff provided nothing to equip Defendants to respond at trial, and robbed Defendants of the opportunity to hire an expert witness to rebut Plaintiff's calculations.

Plaintiff cannot circumvent Rule 26(a) by referring to documents as the basis for calculations claiming damages are merely "summary calculations."[92]

The remedy for untimely disclosure is excluding evidence, particularly when disclosed on the eve of trial.[93] Late disclosure prejudices the opposing party even when there are scheduling changes, reopening discovery or other delays and increased costs of litigation.[94]

The DOJ/IRS was allowed to introduce untimely exhibits and undisclosed witnesses and Defendants were denied the time, ability, or opportunity to investigate the summaries and calculations and obtain expert witnesses. Had Defendants known of the dubious damage evidence during discovery, they would have retained expert

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[90] *Design Strategy*, 469 F.3d at 292.
[91] *Id.* at 293. See also, *Silicon Knights, Inc., v. Epic Games, Inc.*, 2012 WL 1596722 (E.D.N.C. May 7, 2012) (the court held a description of "several million dollars" was not the specific computation required by Rule 26 because it lacked precision and analysis.)
[92] *See Design Strategy,* 469 F.3d at 292 (finding inadequate the disclosing party's assertion that calculating damages was "simple arithmetic").
[93] *See CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 280 (5th Cir. 2009).
[94] *Id.*; *see also Bean v. Pearson Educ., Inc.*, 949 F. Supp. 2d 941, 953 (D. Ariz 2013).

witnesses to challenge the assumptions and conclusions. Once the ambush was revealed, all discovery had closed.

B. Expert Witness Testimony Was Not Properly Disclosed or Admitted.

Rule 26(a)(2)(B) requires experts and their proposed testimony be disclosed. DOJ/IRS failed to identify any expert on financial calculations, summaries, charts, or explanations. DOJ/IRS claimed their surprise evidence was not expert testimony; only reviewed and compiled deposits from Defendants' accounts and depreciation, and solar tax credits from customers' tax returns.[95] But Defendants were robbed of their opportunity to have an expert witness examine the surprise material and refute the DOJ/IRS's "summary calculations" and "arithmetic." The trial court's decision to admit or exclude expert testimony is reviewed for an abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

DOJ/IRS claimed the surprise evidence was "a reasonable approximation of the Defendants' gross receipts"[96] and "the harm to the government that resulted from the Defendants' scheme."[97] The witness testified to much more than tallying numbers. They provided summaries and summaries of summaries.[98] There are mathematical comparisons of different summaries (gross receipts vs. harm to

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[95] ECF 332, p. 4.
[96] ECF 329, p. 4.
[97] *Id.*
[98] *Id.* fn 11.

government),[99] which necessarily entailed making assumptions and drawing conclusions as expert witnesses. The testimony and documentation went beyond the ken of a layman. Plaintiff was allowed to use Perez to testify about 1,643 tax returns, including the total depreciation and total solar tax credits, then "appl[y] the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government) from Defendants' scheme."[100] The tax loss (harm to the government) was not disclosed despite Rule 26. The calculations were not mentioned during discovery. There was no hint of the theory of "harm to government."

Because Plaintiff never disclosed its damages, Defendant was never made aware of how disgorgement was calculated. Plaintiff accomplished an ambush leaving Defendants unable to confront Plaintiff's witnesses' calculations and computations. Until trial, Defendants never knew the tax rates applied by Perez. Defendants never knew the individual tax situation for those 1,643 taxpayers. Tax returns are not simple math. They are complex. To address the alleged harm to the Treasury, each individual tax return would have to be compared to a hypothetical tax return recalculated without the solar business deductions. Plaintiff did not do that and Defendants could not use an expert to accomplish it before trial. Plaintiff took tax refunds received by taxpayers and lump-summed those numbers into a

[99] *Id.* fn 13
[100] *Id.* fn 14.

summary of "harm" to the Treasury and attributed that harm to Defendants. Common sense dictates that if the solar energy equipment is withdrawn from the tax calculations, there would be taxes owed or taxes overpaid with refunds owed or deficiencies paid by each taxpayer based on their unique return.

Those complex calculations were missing and assumed numbers were put in summaries and charts. Plaintiff avoided its duty to disclose expert witnesses and produce expert reports timely to surprise Defendants and prevent designating rebuttal experts. The tax code and its implication in this case requires specialized knowledge subject to Fed.R.Evid. 701 and 702 and the Plaintiff was allowed to avoid compliance.

Mancini was not qualified to offer opinion testimony under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). His personal views are meaningless, and non-scientific. He does not meet any of the criteria (see ***Facts Related to Expert Witness Failures***, *supra*): (1) his techniques cannot be and have not been tested; (2) his methods have not been subjected to peer review; (3) he has no known error rate; (4) there are no standards controlling his methods; and (5) nothing he has done has attracted widespread acceptance within a relevant scientific community. His testimony ought to have been excluded.

IV. DEFENDANTS WERE DENIED THEIR RIGHT TO A JURY.

The lower court imposed a legal penalty, not an equitable remedy. Defendants

were entitled to a jury, requested a jury and were denied that right. It was an error to remove the jury at the start of the case and an error to deny the motion to reinstate the jury. Entitlement to a jury trial is a question of law which this court must review de novo. *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. 1995); *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1221 (10th Cir. 2013).

A. Defendants are entitled to a jury because under the reasoning of *SEC v. Kokesh*, the disgorgement sought by Plaintiff is a penalty.

1. *Kokesh v. SEC*; an overview.

The United States Supreme Court unanimously resolved a disagreement among the Circuits over whether disgorgement claims in SEC proceedings are subject to the 5-year statute of limitations.[101] The limiting statute was only implicated if SEC disgorgement is a fine, penalty, or forfeiture.[102] The controlling question decided by the Supreme Court was whether SEC disgorgement constituted a penalty thereby invoking the 5-year limitation statute.[103] The decision reviewed state actions that were a penalty,[104] reasoning "[a] 'penalty' is a 'punishment', whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws."[105] This definition rests on two principles:

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[101] *Kokesh,* 137 S. Ct. at 1641.
[102] *Id.* at 1642.
[103] *Id.*
[104] *Id.*
[105] *Id.*

> (1) "whether a sanction represents a penalty turns in part on 'whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual'"
>
> and;
>
> (2) "a pecuniary sanction operates as a penalty only if it is sought 'for the purpose of punishment, and to deter others from offending in like manner'—as opposed to compensating a victim for his loss."[106]

The Court then discussed *Brady v. Dal*, and held damages under copyright law are not penal in nature because the statute gives the right of action solely to the private individual (the copyright owner), rather than the public to enforce a wrong.[107] Second, the Court observed because "the whole recovery is given to the proprietor, and the statute does not provide for a recovery by any other person," the damages recoverable were not a penalty.[108] Accordingly, a compensatory remedy for a private wrong was not a "penalty."[109]

Next, the Court discussed how it utilized the same principles in the past in construing the statutory predecessor to the limiting statute at issue. In *Meeker v. Lehigh Valley R. Co.*, the Court refused to apply a 5-year limitations period to an order that required a railroad company to refund and pay damages to a shipping company for excessive shipping rates.[110] The Court held that the "words 'penalty or

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[106] *Id.*
[107] *Id.* (citing *Brady v. Dal,* 175 U.S. 148, 154 (1899).)
[108] *Id.*
[109] *Id.*
[110] *Id.* at 1642 (citing *Meeker v. Lehigh Valley R. Co.*, 236 U.S. 412, 421-422 (1915)).

forfeiture' in [the statute] refer to something imposed in a punitive way for an infraction of public law."[111] The Court in *Meeker* further reasoned that a penalty does "[n]ot include a liability imposed [solely] for the purpose of redressing a private injury… Because the liability imposed was compensatory and paid entirely to a private plaintiff, it was not a 'penalty' within the context of the statute of limitations."[112]

a. SEC disgorgement constitutes a penalty when applying the foregoing principles.

Applying this to SEC disgorgement, the Court held such disgorgement constitutes a penalty within the meaning of the limiting statute.[113] First, the "SEC disgorgement is imposed by the court as a consequence for violating what we described in *Meeker* as public laws" because the violation "is committed against the United States rather than an aggrieved individual."[114] The Court also stated that an enforcement action may proceed "even if the victims do not support or are not parties to the prosecution."[115] The Court also relied on the Government's concessions that

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[111] *Id.* (brackets in original).
[112] *Id.* (brackets in original); *see also Gabelli v. SEC,* 568 U.S. 442, 451-52 (2013) ("[P]enalties" in the context of §2462 "go beyond compensation, are intended to punish, and label defendants wrongdoers").
[113] *Id.* at 1643.
[114] *Id.*
[115] *Id.*

"[w]hen the SEC seeks disgorgement acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties."[116]

Second, the Court found SEC disgorgement is imposed for punitive purposes. The earliest case emphasized the need "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations."[117] In the years that followed the first case, the Court observed, "it has become clear that deterrence is not simply an incidental effect of disgorgement. Rather courts have consistently held that '[t]he primary purpose of disgorgement orders is to deter violations of security laws by depriving violators of their ill-gotten gains.'"[118]

Finally, the Court stated in many cases SEC disgorgement is not compensatory because the "disgorged profits are paid to the district court, and it is

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[116] *Id.* at 1643; see, e.g., *SEC v. Rind,* 991 F.2d 1486, 1491 (9th Cir. 1993) ("[D]isgorgement actions further the Commission's public policy mission of protecting investors and safeguarding the integrity of the markets"); *SEC v. Teo,* 746 F.3d 90, 102 (3rd Cir. 2014) ("[T]he SEC pursues [disgorgement] 'independent of the claims of individual investors' in order to 'promot[e] economic and social policies'").

[117] *Id.* at 1643 (quoting *SEC v. Tex. Gulf Sulphur Co.,* 312 F. Supp. 77, 92 (S.D.N.Y. 1970)).

[118] (quoting *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir. 1997); see also *SEC v. First Jersey Securities, Inc.,* 101 F.3d 1450, 1474 (2nd Cir. 1996) ("The primary purpose of disgorgement as a remedy for violation of the securities laws is to deprive violators of their ill-gotten gains, thereby effectuating the deterrence objectives of those laws"); *Rind,* 991 F.2d, at 1491 ("'The deterrent effect of [an SEC] enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits'").

'within the court's discretion to determine how and when and to whom the money will be distributed."[119] Indeed, "Courts have required disgorgement 'regardless of whether the disgorged funds will be paid to such investors as restitution.'"[120] The Court could not identify any statutory command requiring district courts to distribute the funds to victims.[121] To support this conclusion, the Court relied on prior precedent: "when an individual is made to pay a non-compensatory sanction to the government as a consequence of a legal violation, the payment operates as a penalty.[122]

2. Under the principles articulated in *Kokesh*, the IRS disgorgement sought here is penal in nature.

Applying the foregoing principles shows the type of disgorgement in this case imposed by the IRS constituted a penalty. IRS disgorgement is imposed by the courts as a consequence for Defendants' alleged violation of public laws. The Plaintiff's pleadings and motions undeniably made this justification for the remedy here. In the motion to freeze assets, the United States argued repeatedly the "public interest in enforcing the internal revenue laws" justifies its request for an asset freeze, and any disgorgement order would be worthless without an order freezing

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[119] *Id.* at 1644 (citing *Fischbach Corp.*, 133 F.3d at 175).
[120] *See Fischbach Corp.*, 133 F.3d at 176.
[121] *Id.* at 1644.
[122] *Id.* (citing *Porter v. Warner Holding Co.*, 328 U.S. at 402 (distinguishing between restitution paid an aggrieved party and penalties paid the government).

assets necessary to satisfy such an order.[123] In its reply memorandum to strike Defendants' jury demand, the United States stated it brought this action "to disgorge the defendants' ill-gotten gains" under the authority in 26 U.S.C. §§7408, 7402 to issue orders of injunction and disgorgement "as may be necessary or appropriate for the enforcement of the internal revenue laws."[124] Plaintiff has no other legal basis to seek disgorgement other than as a penalty for Defendants' alleged violation of public laws. Like an SEC action, the United States may prosecute this current action even if, as here, the alleged victims "do not support or are not parties to the prosecution."[125]

Second, Plaintiff's disgorgement claim is imposed for punitive purposes. The government seeks to deprive Defendants of their alleged "ill-gotten gains" to provide an effective deterrent to future violations.[126] The deterrent effect of SEC disgorgements is identical to the IRS disgorgement here. Like an SEC action, the deterrent effect sought by the IRS imposing disgorgement would be undermined if violators were not required to disgorge profits. Since sanctions imposed "for the

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[123] ECF 252 at pgs. 8-9.
[124] See ECF 33 at pgs. 3-4 (emphasis added).
[125] *See Kokesh,* 137 S. Ct. at 1644.
[126] *See Barwick,* 2017 U.S. Dist. LEXIS 191626 at *11 (citing *Stinson*, 239 F.Supp.3d at 1326) ("Disgorgement in the amount of a defendant's 'ill-gotten gains' constitutes a 'fair and equitable' remedy as it reminds the defendant of its legal obligations, serves to deter future violations of the Internal Revenue Code, and promotes successful administration of the tax laws.").

purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objection," the disgorgement sought by Plaintiff here is not remedial but instead punitive.[127]

Third, the disgorgement here is not compensatory. In its motion and pleadings, Plaintiff has repeatedly stated disgorged funds shall be paid to the United States.[128] In this case, Defendants are to pay disgorgement directly to the government.

Finally, Plaintiff's disgorgement claim is not remedial because it does not return the parties to the status quo. "The court's 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." *United States SEC v. Kahlon*, 873 F.3d 500, 509 (5th Cir. 2017) (citation omitted). Accordingly, disgorgement beyond the reasonable approximation of a defendant's gains it is no longer remedial but punitive.

Here the disgorgement went millions beyond a reasonable approximation and is punitive. Plaintiff, at the close of trial, limited its disgorgement request to

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[127] See ECF 31, p. 2; ECF 33, pp. 1, 3, 5.

[128] See ECF 2, p. 43 ("That this Court, under §7402(a), enter an order requiring all Defendants to disgorge to the United States the gross receipts (the amount of which is to be determined by the Court) that Defendants received from any source as a result of the abusive solar energy scheme described herein, together with prejudgment interest thereon.")

$32,796,196.[129] This is the aggregate sum of both non-party XSun and Solco and the named Defendants' banking records.[130] However, the court added $17,229,284 for a total of $50,025,480, nearly doubling Plaintiff's request. This fantastic leap involved manipulating RaPower3's customer database, despite the court's finding that "[m]ost customers have never paid the $3500 cost of a lens and *few have paid the $1050* down payment which is equal to the first full year of tax credit."[131] This is contrary to evidence using the same database showing the total revenue "paid in full" was $17,911.507.[132] The court double counted $3,077,830 because RaPower purchased stock from IAS.[133] The court imposed on Johnson joint and several liability for all amounts despite receiving only $623,449.00.[134] The disgorgement order punishes, not returns to *status quo ante*, and therefore entitles Defendants to a jury.

Because of *Kokesh*, the IRS recognized SEC disgorgement is punitive. IRS prohibits deducting penalties paid under 26 U.S.C. §162(f) and §1.162-21(b)(1), Income Tax Regs.[135] *Kokesh* is broader than a statute of limitations, and establishes disgorgement is a penalty.

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[129] ECF. 412, p. 98.
[130] TR.2440-2452.
[131] TR.2522.
[132] TR.820:19-822:1; TR.886:24-888:8.
[133] TR.2441-2444; PLEX 507, p. 20, 35; TR.1812:4-12.
[134] PLEX 737.
[135] IRS Memorandum No. 201748008.

3. Because the disgorgement sought here is punitive, Defendants are entitled to a jury.

Prior to the *Kokesh* decision, the court struck the jury because "relief sought is equitable in nature."[136] But the Court stated that "'[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[137] If entitlement to a jury is a close call, then the court should err on the side of caution.[138] The court stated, "[b]ased upon this timeless principle in our jurisprudence the court will allow Defendants to make a motion for a jury trial if penalties become part of this case."[139]

The right to a jury is whenever a case involves rights and remedies traditionally enforced in action at law, rather than in equity or admiralty.[140] "A civil penalty was a type of remedy at common law that could only be enforced in courts of law."[141] Like *Kokesh*, here disgorgement is a penalty because (1) it is imposed here for violation of public laws, (2) it is intended to have the punitive effect of

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[136] ECF 43, p. 2.
[137] See *Id.*
[138] *C.f. Jacob v. New York City,* 315 U.S. 752, 62 S. Ct. 854, 854 (1942) ("the Supreme Court noted that '[a] right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.'").
[139] *Id.* at pp. 2-3 (citing *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).
[140] *SEC v. Commonwealth Chem Sec., Inc.*, 574 F.2d 90, 95 (2d Cir. 1978)
[141] *Tull v. United States*, 481 U.S. 412, 422 (1987)

deterring future wrongdoing, (3) fails to return the parties to the status quo by impermissibly ordering payment in excess of gross receipts. This case involves a common law damage claim and a right to a jury.

4. Solco and XSun Energy Are Non-Parties and Should Not Be Included as Evidence for Damages.

Plaintiff was aware of both entities before suing. Plaintiff used exhibits involving both nonparties. Summary exhibits were based on bank records of Solco I and XSun. Plaintiff deliberately chose to exclude Solco I or XSun as parties.

No evidence proved funds of Solco or XSun came from named Defendants. There is no evidence of Defendants transfering funds into Solco I or XSun's accounts. The only evidence is Solco and XSun funds are not related to the Defendants. The Plaintiff needed separate exhibits (Solco I-PLEX 739, XSun-PLEX 741) to account for these independent funds.

There was no evidence Solco I or XSun participated in the "tax scheme" in this case. Neither maintained a website, participated in multi-level marketing. They have no burden to prove they should be allowed to keep their property. The IRS has the burden to show they have the right to take their property. There is no such proof.

a. The Trial Court Violated Solco and XSun's Due Process Rights.

The US Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) provides a relevant discussion about due process. "Parties whose rights are to be affected are

entitled to be heard; and in order that they may enjoy that right they must first be notified."[142] The right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[143]

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for hearings "at a meaningful time." *Id*. Neither statute provided for notice or an opportunity to be heard *before* seizure. The issue is whether procedural due process requires an opportunity for hearing *before* the State authorizes its agents to seize property upon the application of another. *Id*, citing *Lynch* v. *Household Finance Corp*., 405 U.S. 538, 552. *Stanley* v. *Illinois*, 405 U.S. 645, 647.

This is not a novel principle of constitutional law. The right to a prior hearing has long been recognized under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane* v. *Central Hanover TR.Co.*, 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie* v. *Connecticut*, 401 U.S. 371,

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[142] *Id*. at 80 (citing *Baldwin* v. *Hale*, 68 U.S. (1 Wall.) 223, 233 (1864). See *Windsor* v. *McVeigh*, 93 U.S. 274; *Hovey* v. *Elliott*, 167 U.S. 409; *Grannis* v. *Ordean*, 234 U.S. 385.)

[143] *Id*. (citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552.)

378, the Court has insisted, whatever its form, opportunity for hearing must be provided before the deprivation occurs.[144]

Without due process, their assets should not be frozen. In *United States v. 51 Pieces of Real Property Rosell, N.M.,* 17 F.3d 1306 (10th Cir. 1994), an action was initiated, the complaining party was named as a defendant, and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id.* Although proceeding under a federal forfeiture statute specifically void of any due process requirements, the Court recognized "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest." *Id.* (citing *Fuentes*, 407 U.S. at 81-82). No such hearing has taken place here. The assets of these parties (and others similarly situated) were

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[144] *See e.g. Bell* v. *Burson*, 402 U.S. 535, 542; *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437; *Goldberg* v. *Kelly*, 397 U.S. 254; *Armstrong* v. *Manzo*, 380 U.S., at 551; *Mullane* v. *Central Hanover TR.Co., supra*, at 313; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152-153; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, 463; *Londoner* v. *City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut, supra*, at 378-379 (emphasis in original).

simply frozen by court order and then confiscated by the Receiver without any proof or hearing. There was no due process provided these parties.

V. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A PERMANENT INJUNCTION WAS REQUIRED BECAUSE THE SYSTEM DID NOT AND WOULD NEVER WORK.

A. Finding that system will not ever work – when it now does.

On 6/22/18, the lower court stated Defendants had not and will not create electricity. (TR.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 then, Johnson Fresnel lenses have successfully generated independently measured electricity. Using the Fresnel lenses mounted in one of the RaPower-3 solar collector arrays, and using a model "Colorado" Sterling Engine built by Infinia, the RaPower Fresnel lenses have generated electricity.[145]

As set out in ***System Works***, supra, several engineers tested and verified the lenses currently produce power.[146] Because the injunction was justified by finding it was "false or fraudulent" to sell solar energy equipment that could never create

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[145] 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, included in Appendix as Exhibit 69.

[146] Minute by minute readings of electricity generation, attached as Exhibit 70.

electricity, and now evidence shows the opposite, the injunction should be lifted. The permanent injunction is wrong.

There is no decision defining the appropriate standard for injunctive relief under §7402, particularly one abandoning the four-part test applied in the 10th Circuit. The lower court relied on factually and procedurally inapposite authority to this case. *United States v. Latney's Funeral Home* involved appointment of a receiver as a remedy in a civil contempt, not a violation of 26 USC § 6700, and only after the defendant repeatedly failed to comply with an injunction.[147] *United States v. Bartle*,[148] also civil contempt, appointed a receiver only after the defendant failed numerous times to comply with court orders. *Florida v. United States* appointed a receiver only after substantial tax liability appeared and the Government's collection of the tax appeared jeopardized if a receiver was not appointed.[149] Notably, they dealt with civil contempt, where a litigant's non-compliance was properly before the court. None of these relied solely on a statutory grant of authority, but instead considered factors included in or analogous to the four-part tests of the 10th Circuit.

The trial court reached an erroneous conclusion when it required a certain amount of electricity to be created when the statute is silent. As such, remand is appropriate of the issues of enjoinable conduct and the injunction dissolved.

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[147] *United States v. Latney's Funeral Home, Inc.*, 41 F.Supp.3d 24, 37 (D.D.C. 2014).
[148] *United States v. Bartle*, 159 F.App'x 723, 725 (7th Cir. 2005).
[149] *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the novel issue involving application of the *Kokesh* decision to IRS disgorgement and how it relates to the right to jury trial in this case, counsel believes oral argument will be helpful to the Court. A unanimous US Supreme Court in *Kokesh* reversed the 10th Circuit Court concerning the penal nature of SEC disgorgement. Because disgorgement was a penalty, the statute of limitations had run. Treating disgorgement as a penalty, the IRS has ruled such penalties are not tax-deductible. Disgorgement here is also a penalty, entitling Defendants to a jury trial. The IRS has audited and assessed taxes, interest, and penalties against the lens purchasers and want an additional penalty imposed on Defendants.

CONCLUSION

Disgorgement should be disallowed. Judgment and Injunction should be reversed. Further proceedings, if any, should be on remand before a jury with witnesses Mancini, Reinken, Perez and Roulhoc barred from testifying and their exhibits excluded.

Respectfully submitted,

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I, Denver C. Snuffer, Jr. hereby certify that on the ____ day of January, 2019, I served a copy of the foregoing **APPELLANTS' OPENING BRIEF,** to the following in manner indicated:

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