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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

R. WAYNE KLEIN, as Receiver,

Plaintiff,
v.

JUSTIN D. HEIDEMAN LLC DBA HEIDEMAN & ASSOCIATES, a Utah limited liability company,

Defendant.

RECEIVER'S APPENDIX OF EVIDENCE IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

(Part 1 of 2)

**(Ancillary to Case No. 2:15-cv-00828)
(General Order 19-003)**

Civil No. 2:19-cv-00854-DN

Judge David Nuffer

Pursuant to DUCivR 56-1(b)(5), Plaintiff R. Wayne Klein, the Court-Appointed Receiver (the "Receiver") of RaPower-3, LLC ("RaPower"), International Automated Systems Inc. ("IAS"), LTB1 LLC ("LTB1"), and thirteen subsidiaries and affiliates, and

the assets of Neldon Johnson and R. Gregory Shepard,[1] hereby submits this Appendix of Evidence, which, together with Part 2 of the Appendix, includes all evidence relied upon in the Receiver's contemporaneously filed Motion for Partial Summary Judgment and Memorandum in Support.

EXHIBIT A – Findings of Fact and Conclusions of Law (Civil Enforcement Case, Dkt. No. 467, filed Oct.4, 2018)

EXHIBIT B – December 2019 Emails Between S. Fowlks and J. Heideman (H&A002197–98)

EXHIBIT C – December 2019 Email from N. Peat to J. Heideman (H&A002272)

EXHIBIT D – Heideman Deposition

EXHIBIT E – Affiliates Order (Civil Enforcement Case, Dkt. No. 636, filed May 3, 2019)

EXHIBIT F – Freeze Order (Civil Enforcement Case, Dkt. No. 444, filed August 22, 2018)

EXHIBIT G – RaPower Engagement Letter (Heideman Dep. Ex. 2)

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[1] Collectively, RaPower, IAS, LTB1, Shepard, and Johnson are referred to herein as "Receivership Defendants."

EXHIBIT H – Heideman Discovery Responses (served August 28, 2020)

DATED this 27th day of September, 2021.

/s/ Mitch M. Longson
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **APPENDIX OF EVIDENCE IN SUPPORT OF RECEIVER'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT (Part 1 of 2)** to be served on the below parties via the method indicated on September 27, 2021.

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EXHIBIT A

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, and NELDON JOHNSON Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Case No. 2:15-cv-00828 DN District Judge David Nuffer

OVERVIEW

This case was tried over 12 days in April and June 2018.[1] The United States presented testimony from 25 witnesses, both live and via deposition designation. Defendants rested their case without calling a single witness, but they thoroughly examined each witness called by the United States, including Defendants Neldon Johnson and R. Gregory Shepard. Defendants' thorough cross examination of Shepard and Johnson[2] did not lend any credibility to their case. More than 650 exhibits were received into evidence.[3] On June 22, 2018, immediately after closing arguments, partial findings of fact were delivered from the bench, concluding that Defendants engaged in a "massive fraud" for which they would be enjoined and disgorgement

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[1] *See* Minute Entries for Trial, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF Nos. 372, 374, 378, 380, 386, 388, 391-93, 396, 409, 415.

[2] The United States examined Johnson live on direct and redirect examination for a total of 272 minutes while Defense counsel cross- and recross-examined him for 590 minutes. The United States examined Shepard live on direct and redirect for 86 minutes while Defense counsel cross- and recross-examined him for 174 minutes.

[3] Bench Trial Witness and Exhibit Lists, *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 416.

(continued...)

would be ordered.[4] An interim order of injunction issued requiring that, no later than June 29, Defendants (1) post a notice on their websites that this Court found tax information Defendants provided was false and (2) remove tax information from their websites.[5] As requested, the United States submitted draft findings of fact and conclusions of law before trial, as did Defendants. Then, following trial, revisions and additional findings were delivered to the parties. The United States submitted revised draft findings of fact and conclusions of law,[6] and Defendants objected.[7] After careful consideration of all this testimony, evidence,] submissions and materials, these final Findings of Fact and Conclusions of Law are filed.

[4] Gov. Ex. BK0001, T. 2515:5-11.

[5] *United States v. RaPower-3, et al.*, 2:15-cv-00828-DN-EJF, ECF No. 413.

[6] ECF No. 463.

[7] [Defendants'] Objections re: Findings of Fact and Conclusions of Law, ECF No. 452.

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2. Defendants knew, or had reason to know, that the only way a customer has "made money" from buying a lens is from the purported tax benefits. 54

a. No customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser. 54

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3. Defendants knew, or had reason to know, that their customers are not required to pay the full down payment, much less the full purchase price for a lens. 62

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2. Defendants knew, or had reason to know, that their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income. 110

3. Defendants knew, or had reason to know, that that the full "purchase" price of the lenses was not at risk in the year a customer signed transaction documents. 114

4. Defendants knew, or had reason to know, that all of their statements were false or fraudulent in spite of the legal advice upon which they claim reliance. 116

C. While promoting the solar energy scheme, Defendants made or furnished (or caused others to make or furnish) gross valuation overstatements as to the value of the solar lenses. 119

D. An injunction and other equitable relief are necessary and appropriate to enforce the internal revenue laws of the United States. 121

ORDER 130

I. Introduction

For more than ten years, Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc. ("IAS"), LTB1, LLC ("LTB"), R. Gregory Shepard, and Roger Freeborn[8] have promoted an abusive tax scheme centered on purported solar energy technology featuring "solar lenses" (called, herein, the "solar energy scheme") to customers across the United States. The evidence shows, however, that the solar lenses were only the cover story for what Defendants were actually selling: unlawful tax deductions and credits. Defendants have repeatedly engaged in conduct subject to penalty under the Internal Revenue Code.[9] Defendants' conduct has caused serious harm to the United States Treasury and the system of honest and voluntary tax compliance. Defendants received more than $50 million dollars from the solar energy scheme at the expense of the United States Treasury. Defendants will be enjoined from promoting their abusive solar energy scheme and ordered to disgorge their gross receipts to mitigate the harm their conduct caused the Treasury.[10]

[8] Defendants filed a notice of Freeborn's death on December 17, 2017. ECF No. 267. He will be dismissed as a defendant. Fed. R. Civ. P. 25(a)(1). Facts about Freeborn's conduct are included herein, nonetheless, because his conduct helps explain the facts and circumstances described and it is relevant to whether the remaining Defendants engaged in certain penalty conduct under 26 U.S.C. § 6700(a)(2).

[9] 26 U.S.C. § 6700(a)(2)(A), (a)(2)(B).

[10] 26 U.S.C. §§ 7402(a), 7408(b).

II. Findings of Fact

A. Defendants organized (or assisted in the organization of) a plan or arrangement, and participated (directly or indirectly) in the sale of an interest in the plan or arrangement.[11]

1. Neldon Johnson

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.[12]

2. Johnson claims to have invented certain solar energy technology.[13]

3. Johnson's purported solar energy technology involves solar thermal lenses placed in arrays on towers.[14]

4. His idea is that the lens arrays will track the sun as it moves across the sky during the day.[15]

5. His idea is that radiation from the sun would hit the lens, which would then bend and intensify the radiation in a specific point called a "solar image."[16]

6. His idea is that the solar image would hit a receiver which would be suspended underneath the lenses.[17]

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[11] 26 U.S.C. § 6700(A)(1).

[12] ECF No. 22 ¶ 12; Pl. Ex. 579, Deposition Designations for Neldon Johnson, vol. 1, ("Johnson Dep., vol. 1") 36:1-39:12, 46:3-47:3, 52:20-57:1, 74:1-14, 77:4-87:12 (June 28, 2017).

[13] Johnson Dep., vol. 1, 134:19-135:2; Pl. Ex. 509 at video clip 12_4_38-5_15.

[14] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 12_4_00-4-23; Johnson Dep., vol. 1, 139:23-144:19.

[15] Pl. Ex. 504 at 14.

[16] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

[17] Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

7. Groups of 32 lenses grouped in a circular shape are attached to one receiver in his current design. Four of these collectors are attached to a single pole.

8. Many poles with receivers installed have no collector or mechanism to transmit energy from a receiver to a generator.

9. The site in Delta Utah currently has approximately 90 towers.

10. The beam of concentrated light would then heat a heat transfer fluid in the receiver.[18]

11. The heat transfer fluid – oil, molten salt, water, or another heat transfer fluid – Johnson has not decided, to date, which to use[19] – would then be pumped to a heat exchanger[20].

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[18] Johnson Dep., vol. 1, 139:23-144:19.

[19] Johnson Dep., vol. 1, 151:18-163:3.

[20] Johnson Dep., vol. 1, 139:23-144:19.

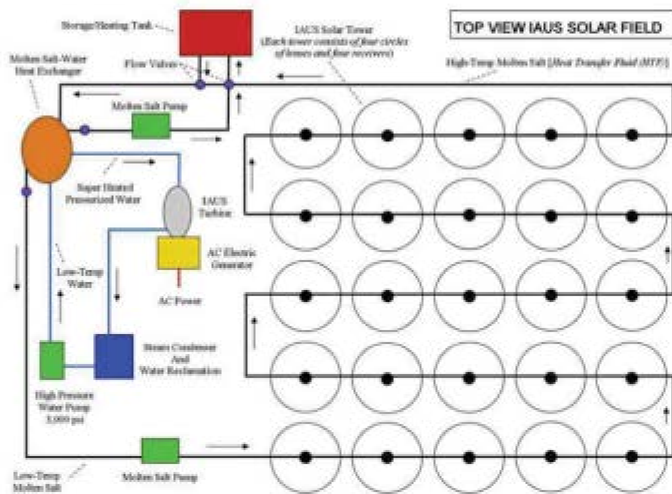
(continued...)

12. The heat exchanger would use the heat to boil water and create steam.[21]

13. Johnson's idea is that the steam would turn a turbine, which would generate electricity.[22]

14. His idea is that the electricity would then be sent onto electric wires.[23]

15. The wires would be connected to the electrical grid.[24]



16. Once the lenses were installed and "started up," the "operation and maintenance" of the lenses would be turned over to a company called LTB, LLC.[25]

17. LTB, LLC, is another entity that Johnson created and controls.[26]

[21] Johnson Dep., vol. 1, 139:23-144:19.

[22] Johnson Dep., vol. 1, 139:23-144:19.

[23] Johnson Dep., vol. 1, 139:23-144:19.

[24] Johnson Dep., vol. 1, 139:23-144:19.

[25] Pl. Ex. 94 at 2.

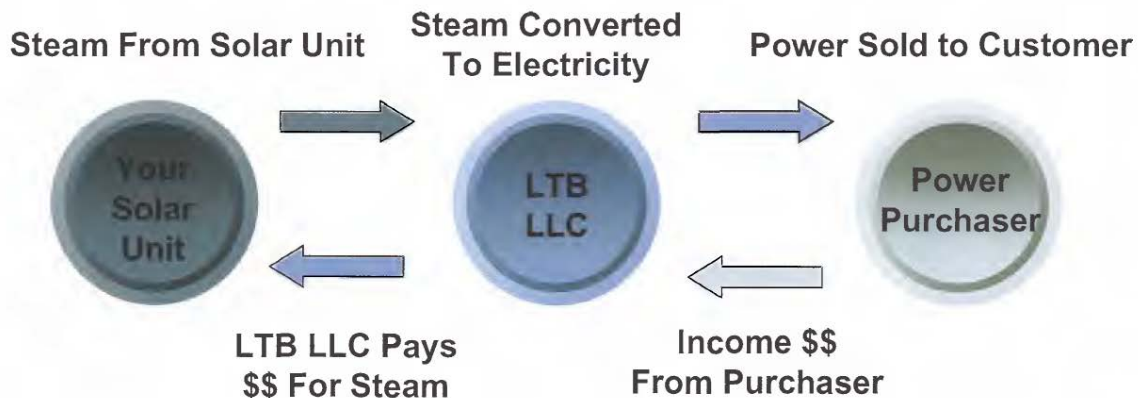
[26] LTB, LTB1, and still another entity called LTB O&M, LLC, are all Johnson-created and -controlled entities. Pl. Ex. 673, Deposition Designations for LTB1, LLC, ("LTB1 Dep.") 8:11-13:23 (July 1, 2017). The only difference between them is their names. *Id.* For all practical purposes, Johnson makes no distinction between the entities; each has come into existence because the prior LTB-entity was dissolved in its state of incorporation. *Id.* Because all contracts described herein reference "LTB," the Court will use that name going forward. *See also* Pl. Ex. 77 at 2 ("Contact info. for LTB, LLC is Neldon Johnson, 801-372-4838").

(continued...)

18. According to Johnson, LTB would maintain and operate the lenses and "market the power generated by the solar units."[27]

19. LTB would pay lens owners an annual payment of $150 "[o]nce the Owner's Alternative Energy System(s) are installed and producing revenue."[28]

20. Johnson illustrated this idea as early as 2006[29] as follows:



21. Johnson took some college classes in the sciences and engineering in or before 1975 but does not have a college degree in any subject.[30]

22. Neither Johnson, nor anyone else connected with him or one of his entities, has ever operated or maintained a solar energy power plant of any kind.[31]

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[27] Pl. Ex. 531 at 2. Over the years, Defendants have used terms like "solar unit" or "alternative energy system" to mean "lens." *See* Johnson Dep., vol. 1, 185:11-186:9, 192:1-193:12, 242:25-243:5; Pl. Ex. 685, Deposition Designations for R. Gregory Shepard ("Shepard Dep."), 61:24-63:4 (May 22, 2017); Pl. Ex. 462 at 1. The only things that IAS and RaPower-3 have ever sold are "lenses." Johnson Dep., vol. 1, 185:18-19; Pl. Ex. 682, Deposition Designations for RaPower-3, LLC ("RaPower-3 Dep.") 32:25-33:3 (June 30, 2017).

[28] Operation and Maintenance Agreements, Pl. Ex. 121 (April 18, 2016), 510 (November 23, 2011), 512 (December 29, 2014), 537 (draft), 555 (August 29, 2008) and 621 (undated, unsigned).

[29] Pl. Ex. 581, Deposition Designations for International Automated Systems, Inc., ("IAS Dep."), 162:1-165:9, 171:10-173:20 (June 29, 2017); Pl. Ex. 532 at 6; *see also* Pl. Ex. 531.

[30] Pl. Ex. 681, Deposition Designations for Neldon Johnson, vol. 2, 43:23-44:1, 69:8-71:5, 81:18-23 (Oct. 3, 2017).

[31] RaPower-3 Dep. 12:25-15:12, 61:10-62:15; LTB1 Dep. 8:11-14, 19:16-31:9.

(continued...)

23. In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on "the R&D Site" near Delta, Utah, in Millard County.[32]

24. Johnson also directed that IAS install solar lenses in those towers.[33]

25. To date, those are the only towers that Johnson has built, and the only lenses that he has had installed.[34]

26. Johnson promotes this purported solar energy technology through the IAS website, radio spots, and social media.[35]

27. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[36]

28. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[37]

29. He also created a bonus incentive program for people who bought lenses, to spread the word about the solar lenses and sell them to more and more people.[38]

30. Johnson decided that the bonus program would be a cheaper and more effective way to sell lenses than doing conventional advertising.[39]

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[32] IAS Dep. 62:15-64:1; Pl. Ex. 8A at 12-13; Shepard Dep. 128:6-129:1, 172:23-173:3.

[33] IAS Dep. 62:15-64:1.

[34] IAS Dep. 62:15-64:1; Johnson Dep., vol. 1, 88:20-89:10; Pl. Ex. 509 at video clip 12_4_00-4-23.

[35] *E.g.*, Pl. Ex. 2; Johnson Dep., vol. 1, 240:2-17; IAS Dep. 242:10-247:22; Pl. Ex. 539; Pl. Ex. 731 at "JohnsonN Show - KNRS 11-18-17.mp3."

[36] *See* RaPower-3 Dep. 36:4-39:8.

[37] IAS Dep. 145:21-146:9; Pl. Ex. 463; *see* RaPower-3 Dep. 140:9-143:4; Pl. Ex. 504.

[38] Johnson Dep., vol. 1, 228:19-234:17.

[39] Johnson Dep., vol. 1, 228:19-234:17.

(continued...)

31. Johnson drafted some promotional materials to describe this arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[40]

32. Johnson showed IAS salespeople these descriptive materials about the structure of the transaction, the purported technology, and the federal tax benefits that Johnson said a customer could lawfully claim when he bought a lens from IAS.[41]

33. He told IAS's initial salespeople what he understood the tax laws to mean.[42]

2. R. Gregory Shepard

34. R. Gregory Shepard's role was not in inventing the technology, but rather the marketing, sales and disseminating false information regarding the availability of tax benefits to customers.

35. Shepard has been an IAS shareholder since the mid-1990s.[43] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[44]

36. IAS paid Shepard (and its other salespeople) a commission of 10 percent of the money generated from his sales.[45]

37. Shepard's professional background, before becoming involved with the solar energy scheme, was in sports performance as a coach and trainer.[46]

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[40] IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Exs. 531, 532.

[41] IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Exs. 531, 532.

[42] Johnson Dep., vol. 1, 240:18-241:10, 247:11-248:12; RaPower-3 Dep. 117:22-119:11; Pl. Ex. 473.

[43] Shepard Dep. 43:19-46:1.

[44] Shepard Dep. 70:14-71:22; Pl. Ex. 463.

[45] Shepard Dep. 70:14-72:8; Pl. Ex. 463.

[46] Shepard Dep. 27:2-30:24.

(continued...)

38. Shepard's information about Johnson's purported solar energy technology came from Johnson or members of Johnson's family, and Shepard's own observations on his site visits over the years.[47]

39. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[48]

40. Shepard never questioned how Johnson determined that purchasers of solar lenses were purportedly eligible for a depreciation deduction and the solar energy tax credit.[49]

41. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[50] XSun Energy,[51] and RaPower-3, LLC[52].

42. Johnson created RaPower-3 in 2010. He is its manager and the sole decision-maker for the company.[53]

43. Once formed, RaPower-3, not IAS, sold solar lenses to individuals.[54]

44. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.[55]

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[47] Johnson Dep., vol. 1, 209:11-210:3, 211:16-215:23; Shepard Dep. 36:6-40:23, 46:2-57:5, 183:14-187:13; Pl. Ex. 8A; RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[48] Johnson Dep., vol. 1, 279:19-22; IAS Dep. 162:1-165:9, 194:6-20; Pl. Ex. 531.

[49] Shepard Dep. 284:23-286:3.

[50] Johnson Dep., vol. 1, 82:8-83:6, LTB1 Dep. 78:22-79:5, 79:12-80:9, IAS Dep. 38:10-40:6, 45:4-17.

[51] *See generally* Pl. Ex. 355; IAS Dep. 47:2-19, Johnson Dep., vol. 1, 79:8-81:7.

[52] RaPower-3 Dep. 32:16-33:14, 44:4-14, 45:9-10.

[53] RaPower-3 Dep. 32:16-33:14.

[54] RaPower-3 Dep. 32:16-33:14; *see* IAS Dep. 23:22-25:22.

[55] RaPower-3 Dep. 32:16-33:14, 36:4-39:8.

(continued...)

45. If a person wants to sell solar lenses through RaPower-3, that person need only sign up to become a "distributor."[56]

46. RaPower-3 encourages distributors to bring still more people in to the multi-level marketing system and build an extensive "downline."[57]

47. RaPower-3 pays its distributors as much as 10 percent commission on lens sales in each distributor's respective downline.[58]

48. Johnson directed RaPower-3 to create a site online (https://rapower3.net) where a customer can access and sign a contract to buy lenses and sign other transaction documents that Johnson provides (described below).[59]

49. Changing from a direct-sales model through IAS to an internet-ready, multi-level marketing model through RaPower-3 led to "[h]undreds of people across the nation purchas[ing] solar lenses."[60]

50. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[61]

51. When Johnson started RaPower-3, Shepard transitioned from being an IAS salesperson to a RaPower-3 distributor.[62]

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[56] RaPower-3 Dep. 32:22-34:9.

[57] *See* RaPower-3 Dep. 36:4-39:8, 49:10-15; Pl. Ex. 683, Deposition Designations for John Howell ("Howell Dep.") 63:16-64:11, 150:2-20 (Aug. 23, 2017); Pl. Ex. 595, Pl. Ex. 596.

[58] RaPower-3 Dep. 36:4-39:8. Zeleznik Dep. 125:9-128:13; Pl. Ex. 60; *see also* Aulds Dep. 157:1-8; Pl. Ex. 398.

[59] RaPower-3 Dep. 39:9-41:2; Pl. Ex. 511; LTB1 Dep. 39:6-25; Pl. Ex. 61.

[60] Pl. Ex. 8A at 9; Pl. Exs. 669, 742A, 742B, 749;; T. 858:12-863:16.

[61] Pl. Ex. 8A at 9; Pl. Ex. 749; T. 758:10-793:2.

[62] RaPower-3 Dep. 48:8-49:1. By January 2015, Shepard had approximately one thousand people on his RaPower-3 email distribution list. Shepard Dep. 305:11-19.

(continued...)

52. Shepard considers himself and other distributors in the RaPower-3 system as "team members."[63]

53. But Shepard, who gave himself the title "Chief Director of Operations" for RaPower-3 to sell more lenses, is the team member "at the top."[64]

54. Among other things, Shepard created the website www.rapower3.com[65] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[66]

55. Shepard gets paid for his work promoting RaPower-3 through his company, Shepard Global.[67]

56. On the RaPower-3 website, Shepard describes the technology and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the site with the transaction documents.[68]

57. Shepard uses the Forum to communicate with people who have already bought lenses and who own IAS stock.[69]

58. Shepard also organizes groups of people to visit the R&D Site, the site where component parts of the purported solar technology system are manufactured (the "Manufacturing

[63] Shepard Dep. 113:8-115:3.

[64] Shepard Dep. 102:11-103:3, 113:8-115:3, 123:6-15; *see also* RaPower-3 Dep. 108:5-18

[65] Shepard Dep. 25:22-26:8; Pl. Ex. 459; *see also* Pl. Exs. 1, 5, 19, 20-21, 24-25, 34, 352, 419, 674, 676, 678-80.

[66] Shepard Dep. 286:5-24.

[67] T. 1293:8-1304:1; 1412:18-1415:10.

[68] *See* Pl. Ex. 688, Deposition Designations for Roger Freeborn ("Freeborn Dep.") 23:2-24:14 (May 31, 2017); Pl. Ex. 490; Pl. Ex. 689, Deposition Designations for Peter Gregg ("Gregg Dep.") 56:20-57:13.

[69] Shepard Dep. 286:5-289:13; Pl. Ex. 481.

(continued...)

Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[70]

59. He organized at least one "RaPower[-]3 National Convention" in 2012, at which Johnson spoke.[71]

60. When other RaPower-3 distributors have issues or questions, they look to Shepard for guidance and advice, and to be the conduit to Johnson.[72]

3. Roger Freeborn

61. Shepard told Roger Freeborn about RaPower-3, asked Freeborn if he wanted to buy lenses, and brought Freeborn into his multi-level marketing downline.[73]

62. The two men knew each other through a company Shepard used to own, Bigger, Faster, Stronger ("BFS").[74] BFS sold athletic equipment and strength and conditioning programming primarily to high schools and middle schools around the country.[75]

63. Freeborn was a teacher and football coach, and taught BFS clinics around the country.[76]

64. When Freeborn started selling lenses for RaPower-3, at the end of a BFS clinic, he would "talk to the coaches about the possibility of creating a fundraising program to raise money for their sport" through the sale of RaPower-3 solar lenses.[77]

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[70] *E.g.*, Pl. Exs. 21, 419 at 1; Johnson Dep., vol. 1, 87:23-89:10; Pl. Ex. 509 at video clip 12_4_00-4-23.

[71] Shepard Dep. 302:8-303:23; RaPower-3 Dep. 140:4-145:15; Pl. Ex. 504; Pl. Exs. 114, 270.

[72] Shepard Dep. 113:8-115:3, Pl. Ex. 469; Pl. Ex. 189 at 1-3.

[73] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18; .

[74] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18.

[75] T. 901:8-903:14; Freeborn Dep. 15:21-18:18.

[76] Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18, 28:2-11, 107:10-108:21; Pl. Ex. 503; T. 904:21-905:9.

[77] Freeborn Dep. 98:10-102:6; Pl. Ex. 246.

(continued...)

65. Freeborn was a prolific salesman for RaPower-3, especially among the teachers and coaches that he reached through BFS's customer list.[78]

66. Freeborn called himself the "National Director" of RaPower-3.[79]

67. Freeborn's information about IAS, RaPower-3, the transactions and the technology underpinning the solar energy scheme, and the tax benefits purportedly associated with buying lenses came from Johnson, Shepard, and Freeborn's own observations on his site visits.[80]

68. Freeborn used marketing materials that Shepard sent him and created his own to send or present to customers.[81]

69. Freeborn also organized webinars for people to hear from him and Shepard about RaPower-3.[82] He spoke at the 2012 "National Convention" that Shepard organized.[83]

70. Because Freeborn lacked a background in federal tax, Freeborn relied on Johnson's assurance that Johnson would pay his attorneys' fees if he ever ran into trouble because of RaPower-3.[84]

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[78] Shepard Dep. 115:11-117:10; T. 935:17-936:20; Freeborn Dep. 46:2-47:17; Pl. Ex. 493 (partial Freeborn downline list); Pl. Ex. 54; Pl. Ex. 697, Deposition Designations for Brian Zeleznik ("Zeleznik Dep.") 19:9-23, 45:16-46:11; 51:7-56:13 143:7-20, 23-145:10 (Aug. 2, 2016); Pl. Ex. 56; Pl. Ex. 62; Gregg Dep. 21:18-22:9, 34:6-25, 39:9-19 (Nov. 16, 2016); Pl. Ex. 693, Deposition Designations for Frank Lunn, IV ("Lunn Dep.")33:24-37:20 (Aug. 1, 2016).

[79] Freeborn Dep. 44:7-45:23; Pl. Ex. 492 at 2.

[80] Shepard Dep. 117:18-118:11; Freeborn Dep. 20:15-22:23, 28:19-34:18; *see also* Pl. Ex. 109 at 1-3.

[81] Freeborn Dep. 48:2-55:1; Pl. Exs. 496, 497; *see* Pl. Ex. 492 at 2 (directing customers to www.rapower3.com); Pl. Ex. 294. Freeborn Dep. 86:10-93:7; Pl. Ex. 501; Pl. Ex. 85.

[82] Pl. Ex. 237.

[83] Pl. Ex. 504 at 5. Topic: "The Ra3 role behind the scenes."

[84] Freeborn Dep. 102:7-108:21; Pl. Ex. 412 at Response to Interrogatory No. 7 (Freeborn stated that he is "SELF-EDUCATED" in the field of federal income taxes and energy tax credits.).

(continued...)

71. At Johnson's direction, Shepard fired Freeborn from RaPower-3 in June 2013.[85]

72. Freeborn continued, however, to collect commissions on solar lens sales through his downline through at least the end of 2016.[86]

73. IAS or RaPower-3 paid Freeborn more than $230,000 in commissions for his sales of solar lenses and sales of solar lenses in his downline.[87]

74. Freeborn generated, through a "charitable foundation," approximately $75,000 more in commissions for lens sales.[88]

4. Orders Placed by Customers

75. By careful derivation of data from a proprietary database (consisting of 18 MB of data, with 13 tables)[89] maintained by defendants, Lamar Roulhac was able to extract data used in analysis of financial transactions. Extracted data was placed into three tabs in an Excel spreadsheet to which an analytical tab was added.[90]

76. The extracted data in the Excel spreadsheet was totaled to show that the total sale price of orders placed with defendants by customers was between 50,025,480.00[91] to 50,097,672.15.[92]

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[85] Freeborn Dep. 55:14-56:28; Shepard Dep. 118:12-119:14; Pl. Ex. 80.

[86] Pl. Ex. 678. The United States served these Requests for Admission on December 29, 2016. *Id.* at 6. Freeborn never responded. Accordingly, all Requests are admitted. Fed. R. Civ. P. 36(a)(3).

[87] Pl. Ex. 678. Freeborn Dep. 98:10-102:6.

[88] Freeborn Dep. 72:2-10, 98:10-102:6; Pl. Ex. 498, 499 & 500.

[89] T. 754:19-755:9.

[90] Pl. Ex. 749; T. 754:24-757:8; 758:10-759:4.

[91] Pl. Ex. 749, "Order Product" table of the Defendants' database.

[92] Pl. Ex. 749, "Order" table of the Defendants' database.

(continued...)

77. Many of those sale records show the word "full" in the comments field which would tend to show payment in full. The sum of those records is $17,911,507.[93]

78. Some of those record comments show an export to QuickBooks. But no QuickBooks data file was provided by defendants.[94]

79. Amanda Reinken testified that she made an analysis of data provided from defendants showing customers and lenses purchased and found that between 45,205[95] and 49,415[96] lenses had been purchased. At the usual sales price of $3,500 each, this represents gross sales of between $158,217,500 and $172,952,500. At the stated down payment price of $1,050 each, this would represent revenue of $47,465,250 to $51,885,750. At the lowest possible payment level of $105 per lens, this would represent revenue of $4,746,525 to $5,188,575.

Lenses purchased	**Price per lens**	**Gross sales**	**Stated down payment**	**Revenue**	**Lowest down payment**	**Revenue**
45,205	$3,500	$158,217,500	$1,050	$47,465,250	$105	$4,746,525
49,415	$3,500	$172,952,500	$1,050	$51,885,750	$105	$5,188,575

Although there was some testimony that not all customers paid the full down payment, Defendants offered no credible evidence to show the amount by which these amounts could or should be reduced.

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[93] T. 820:19-822:1.

[94] T. 785:4-11.

[95] Pl. Ex. 742A.

[96] Pl. Ex.724B.

(continued...)

5. Receipts by Lens-Selling Entities

80. By extraction from 32,000 pages of bank records for accounts of all defendant entities other than LTB, Reinken extracted the total amount of deposits to the defendants' accounts.[97]

81. From 2009 through early 2018, RaPower-3 received at least $25,874,066 from its role in the solar energy scheme.[98]

82. From 2008 through 2016, IAS received at least $5,438,089 from its role in the solar energy scheme.[99]

83. From 2011 through 2016, non-defendant XSun Energy received at least $1,126,888 from its role in the solar energy scheme.[100]

84. From 2010 through 2016, non-defendant SOLCO I received at least $3,434,992 from its role in the solar energy scheme.[101]

85. From 2005 through February 28, 2018, all lens-selling entities have received at least $32,796,196.

86. Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480.[102]

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[97] T. 863:18-875:15.

[98] Pl. Ex. 735; T. 863:18-868:24; *see also* Pl. Exs. 742B, 749.

[99] Pl. Ex. 738; T. 869:1-25; Pl. Ex. 852 at 59; T. 257:7-258:20, 271:9-272:12, 293:1-294:11, 312:5-15; Pl. Ex. 371; Pl. Ex. 507 at 20, 35; T. 1812:4-12.

[100] Pl. Ex 740; T. 871:9-872:8; Johnson Dep., vol. 1, 79:8-81:7; 82:8-10; IAS Dep. 47:2-19; Pl. Exs. 208, 355, 356, 510, 743 at 11.

[101] Pl. Ex. 739; T. 863:18-866:18; 870:3-871:8; Johnson Dep., vol. 1, 82:8-85:2; IAS Dep. 38:10-40:6; 45:4-21; LTB1 Dep. 78:22-79:5; 79:12-80:9;81:12-21; Pl. Exs. 38, 325, 495, 545..

[102] T. 758:10-777:10; Pl. Ex. 749.

(continued...)

87. While Johnson testified that substantial sums were expended in his work on the solar energy project, these sums were spent from funds received only by reason of the deceptive information on tax benefits that Defendants provided, described below. Further, the expenditures were in aid of a solar energy production system that, as described below, had and has no reasonable possibility of success.

88. Much of these "substantial sums" were paid to Johnson and his family members or entities.[103]

6. Receipts by Johnson and Shepard

89. From 2008 through 2016, Johnson, personally, received $623,449 from his role in the solar energy scheme.[104] In 2012, the year the IRS began investigating the solar energy scheme, and since, direct payments to Johnson dropped to zero or near zero.[105]

90. Johnson controls the flow of money among his entities and directs payments from their funds to himself and his immediate family members.[106]

91. From 2006-2017, Shepard has received at least $702,001 either directly or through his entities, from his role in the solar energy scheme.[107]

7. The Role of Tax Return Preparers Selected by Defendants

92. Shepard directs customers to use tax return preparers who are familiar with the Defendants' "solar energy" project and important to the solar energy scheme, like John Howell,

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[103] T. 1808:16-1814:24, T. 1816:16-1818:22.

[104] Pl. Ex. 737; T. 874:5-875:11.

[105] Pl. Ex. 737; *see* Pl. Ex. 10 at 2; Shepard Dep. 311:2-313:2.

[106] RaPower Dep. 101:19-102:15; T. 1808:16-1814:24, T. 1816:16-1818:22; Pl. Exs. 649; 743-44; 748.

[107] Pl. Ex. 411 at 16-17; Pl. Ex. 445; T. 1296:14-1304:1, 1596:5-1598:15.

(continued...)

in Wichita Falls, Texas; Kenneth Alexander in Florida; and Richard Jameson in St. George, Utah.[108] They have prepared the majority of returns for RaPower-3 customers on which solar energy credits and depreciation were claimed.[109]

93. Jameson testified at trial. His presence in the case demonstrates how Defendants rely on people with minimal qualifications, sophistication and expertise. Though the areas of science and law involved in Defendants' enterprise are complex, Defendants do not themselves have the expertise that would be expected in a legitimate enterprise of this complexity, and they do not associate with, employ or retain persons with expertise.

94. Jameson is an enrolled agent with the IRS with an office in St. George, Utah, who is not a CPA, has no degree in accounting, has a masters of science in taxation, and has worked at H&R Block, a tax preparation service. [110]

95. Jameson prepared tax returns for clients based on his review of documents such as the Equipment Purchase Agreement, O&M Agreement, and placed in service letter, and proof of the client's payment for lenses.[111]

96. The number of tax returns Jameson prepared for RaPower-3 customers increased every year from 2012 to the present.[112]

97. Jameson wrote a letter to the IRS for a client stating "As a matter of fact, I have been to the site and have seen the home that is currently being powered by the lenses in the

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[108] Pl. Exs. 242-245; Pl. Ex. 597; Gregg Dep. 121:14-25; Pl. Ex. 606; T. 826:23-830:17, 1304:4-1305:7; Pl. Ex. 334.

[109] Pl. Ex. 752 at 1.

[110] T. 1319:11-16; 1221:11-1223:23.

[111] T. 1225:13-25.

[112] T. 1228:18-1229:14.

(continued...)

testing of the units. Attached are pictures of the home that I took on site when I was there." However, Jameson admitted he had no idea if the home was actually powered by solar energy or if his client's lenses were installed at that time.[113] Jameson relied on "placed in service" letters as his sole evidence that the client's lenses were used.[114]

98. While he did not see generation of electricity, he was told that the house on site was powered by the project components.[115]

99. Jameson wrote another letter to the IRS for a different client stating that the lenses produce heat that "can be used to heat a building, a greenhouse, to produce clean drinking water and yes steam to drive a turbine that would product [sic] power."[116] But he did not know if the client's lenses did any of these things.[117]

100. Jameson never asked Johnson who would pay for electricity, heat, or water generated by solar lenses, and did not see heat captured by solar lenses used in any way other than to burn a piece of wood[118] or make "a hole in the ground that would, you know, fry things. It was pretty hot."[119]

101. Jameson never asked Shepard who would pay for electricity, heat, or water generated by solar lenses.[120]

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[113] Pl. Ex. 637; T. 1258:16-1263:20.

[114] T. 1228:11-14, 1265:21-1266:4.

[115] T. 1234:1-1235:7, 1263:11-16.

[116] Pl. Ex. 163.

[117] T. 1268:3-1269:14.

[118] T. 1232:2-1233:25.

[119] T. 1314:7-1315:1.

[120] T. 1236:15-1237:2.

(continued...)

102. Jameson recommended that he prepare a draft tax return for a person so that the person could see the potential tax liability so the person could decide whether to make a RaPower-3 purchase.[121]

103. Jameson attached the letters from Kirton McConkie[122] and The Anderson Law Center[123] (described below) to letters sent to materials he sent to IRS auditors "to establish the basis for a request for abatement [of] penalties under reasonable cause because this information was provided to the clients and they didn't know any better."[124]

104. Though Jameson was aware that LTB was not acting as a lessee on lenses at the time, Jameson testified under oath in the Oregon Tax Court that he visited the LTB facility.[125]

105. While Jameson is aware the Oregon Tax Court has ruled against his clients, his opinion has not changed.[126]

106. His hostility toward the IRS was evident during his testimony.[127]

107. Jameson's memory and credibility were shown to be deficient in his testimony by his demeanor and by specific instances of contradictions with his deposition.[128]

[121] Pl. Ex. 632; T. 1253:15-1256:21.

[122] Pl. Ex. 362.

[123] Pl. Ex. 23.

[124] T. 1252:21-1253:7.

[125] T. 1278:22-1279:18.

[126] T. 1279:19-1280:11.

[127] T. 1309:25-1310:15, 1345:9-1346:9.

[128] T. 1234:8-1235:7, 1238:2-1245:1, 1253:15-1256:21; Pl. Ex. 637, T. 1258:16-1262:22; Pl. Ex. 163, T. 1268:3-1269:14, 1278:6-1279:18, 1309:22-1312:9.

(continued...)

8. Defendants' Roles in Tax Audits of Customers

108. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[129]

109. When a customer notifies Shepard that they are under audit, Shepard typically directs the customer to Enrolled Agents John Howell or Richard Jameson to represent the customer before the IRS.[130] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[131]

110. Shepard has also advocated for customers under audit before the IRS.[132] He has given customers arguments to make before the IRS and documents to submit while under audit.[133]

111. Johnson is paying the attorneys' fees for all customers whose tax benefits have been disallowed on appeal by the IRS and who have filed petitions in Tax Court.[134]

9. Post-Litigation Conduct

112. The United States filed this injunction case in November 2015.[135]

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[129] *E.g.*, Pl. Ex. 683, Howell Dep. 211:11-213:14 (aware of 150 cases in Tax Court); Shepard Dep. 250:17-251:3.

[130] Gregg Dep. 151:7-25; Pl. Exs. 333-34; Howell Dep. 183:11-184:8, 211:11-212:10; Pl. Ex. 348.

[131] *See, e.g.,* Howell Dep. 221:16-223:18; Pl. Exs. 605, 608; T. 1221:20-25, 1247:17-1249:9; Pl. Ex. 637.

[132] *E.g.* Pl. Ex. 10.

[133] Pl. Ex. 49; Zeleznik Dep. 184:18-185:17, 211:4-214:4 and *compare, e.g.*, Pl. Ex. 81 (document written by Brian Zeleznik to the IRS in response to his audit) *with* Pl. Ex. 89 (email from Shepard to Zeleznik with a sample document to use with the IRS); *see also* Pl. Ex. 163 at 1-2; Pl. Ex. 231; Pl. Ex. 340 (*id.* at 2 ("You can hand write notes or even copy the above [arguments] down by hand and read it word for word [to an auditor]. Just don't give [an auditor] this email.")).

[134] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23; Zeleznik Dep. 142:7-143:1.

[135] ECF No. 2.

(continued...)

113. Johnson is paying for Shepard's and Freeborn's attorneys' fees to defend this case.[136]

114. To date, Johnson, Shepard, IAS, and RaPower-3 continue to organize sales of solar lenses, and participate (directly or indirectly) in the sale of solar lenses.[137]

115. They are not deterred from promoting the scheme, not by the IRS' disallowance of their audited customers' depreciation deductions and solar energy tax credits or by the complaint filed in this case.[138]

116. Shepard testified that the only change in his behavior since the United States filed this case is that he "bowed [his] back and [is] fighting harder."[139]

[136] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23.

[137] Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Ex. 539; ; Pl. Exs. 424, 426, 679, 731-33, 901, 903.

[138] Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

[139] Shepard Dep. 314:1-5.

B. In connection with organizing or selling any interest in a plan or arrangement, Defendants made or furnished (or caused another person to make or furnish) statements regarding the allowability of any deduction or credit because of participating in the plan or arrangement.[140]

117. While they sold solar lenses, and organized efforts to sell solar lenses, Defendants told their customers that, if they bought a solar lens and signed the transaction documents Defendants provide, their customers were in the "trade or business" of "leasing" solar lenses.[141]

118. According to Defendants, because their customers are in the trade or business of leasing solar lenses, their customers are allowed to claim on their federal income tax returns a business tax deduction for depreciation on the solar lenses and a solar energy tax credit.[142]

119. According to Defendants, one of the reasons their customers may claim these tax benefits is that their customers "materially participated" in their purported solar lens leasing business.[143]

1. Defendants told customers, and prospective customers, about the structure of the transactions.

120. The structure and pricing of the transactions that purportedly create the customers' solar lens leasing business have changed over time.

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[140] 26 U.S.C. § 6700(A)(2)(a).

[141] *E.g.*, Pl. Ex. 32. Occasionally, Shepard has claimed that customers have been "in the solar energy business." Shepard Dep. 243:11-244:3; Pl. Ex. 43 at 1 ("AM I REALLY IN THE SOLAR ENERGY BUSINESS? Yes."). But in recent years, Shepard has made it clear that "We should not consider ourselves in an 'energy' business. We are buying lenses and leasing them – THAT is our business – LEASING – NOT producing energy . . . ." Pl. Ex. 32.

[142] Pl. Ex. 1 at 2-3 ("Tax Question" Nos. 4-5). A collection of Johnson's statements: IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 531 at 3; *see also* Pl. Ex. 532 at 7-10. A collection of Shepard's statements: Pl. Ex. 93 (as a result of purchasing a lens, "the investor gets his $9,000 back in the form of a Tax Credit, plus the depreciation which adds extensive value over a six year period plus the income from power produced by the Solar Pod."); Shepard Dep. 148:21-149:25; *e.g.*, Pl. Ex. 125 (letter from Shepard telling a customer that he is "qualif[ied] . . . for the Internal Revenue Service solar energy tax credit" because RaPower-3 "put [their lenses] into service"). A collection of Freeborn's statements: Freeborn Dep. 47:24-53:18; Pl. Exs. 214, 294, 492, 496, 499, 501.

[143] *E.g.*, Pl. Ex. 1 at 3; Pl. Ex. 43.

(continued...)

121. As early as 2005, Johnson directed that IAS "lease" the solar lenses to customers.[144]

122. Customers paid $9,000 for leasing the lenses from IAS.[145]

123. Shepard leased lenses from IAS in 2005.[146]

124. According to the lease agreement, IAS would build solar towers and install the customers' lenses at a specific site – in the case of Shepard's lenses, Yermo, California.[147]

125. At the same time a customer leased the lenses from IAS, he signed a sublease agreement with LTB.[148]

126. The idea was that, once IAS had installed (for example) Shepard's lenses in Yermo, California, LTB would take over operation and maintenance of Shepard's lenses to generate revenue for Shepard.[149]

127. Shepard's lease agreement states that IAS will provide him "plans, specifications and other documentation and engineering as required to obtain approval" to operate the lenses from "local state and federal agencies" at an "undetermined" time.[150]

128. IAS set benchmarks for additional approvals and for installation of Shepard's lenses based on that "undetermined" date for plans.[151]

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[144] Shepard Dep. 57:7-59:3; Pl. Ex. 462; LTB1 Dep. 43:16-46:24; T. 914:6-916:13; Pl. Exs. 91-92.

[145] Pl. Ex. 462 at 2.

[146] Pl. Ex. 462.

[147] Pl. Ex. 462.

[148] Shepard Dep. 57:7-59:3, 73:1-74:2; Pl. Exs. 462, 464.

[149] LTB1 Dep. 43:16-46:24; Pl. Ex. 464 at 2.

[150] Pl. Ex. 462 at 1.

[151] Pl. Ex. 462 at 2.

(continued...)

129. In 2006, Johnson changed the transaction's structure. Instead of a customer leasing lenses from IAS, the customer would buy lenses.[152]

130. At that time, the total price for a lens was $30,000, but the customer paid only $9,000 in down payment."[153]

131. IAS financed the remaining $21,000, interest free.[154]

132. According to the 2006 contract, the $21,000 would be paid by the customer in $700 annual payments over 30 years.[155]

133. But the obligation to start paying $700 annually would only begin five years *after* IAS installed and began operating the customer's lens at a specific "Installation Site" in Delta, Utah.[156]

134. Shepard's contract, which he signed on December 22, 2006, required IAS to install and "startup" his lenses within seven days: on or before December 29, 2006. [157]

135. According to the contract, if IAS failed to "furnish, deliver, install and startup" the lenses by December 31, 2007, it would refund the Shepard's down payment of $9,000.[158]

136. IAS continued to sell lenses with, generally, the same or similar transaction terms through 2009.[159]

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[152] Pl. Ex. 8A at 7; Pl. Ex. 93; Pl. Ex. 94.

[153] Pl. Ex. 93; Pl. Ex. 94 ¶ 3; *see also* Pl. Ex. 532 at 7-8.

[154] Pl. Ex. 531 at 2.

[155] Pl. Ex. 94¶ 3.

[156] Pl. Ex. 94¶ 3.

[157] *E.g.*, Pl. Ex. 94 ¶ 3.

[158] Pl. Ex. 94 ¶ 7.

[159] IAS Dep. 182:16-183:4; Pl. Ex. 533; *see also* Pl. Exs. 95, 181, 535; IAS Dep. 196:21-198:19.

(continued...)

137. Freeborn bought his first lenses from IAS under these terms in August 2009.[160]

138. With the transition to RaPower-3 in 2010, Johnson changed the price of a lens to $3,500.[161]

139. Customers also started purchasing lenses via the internet at rapower3.net.

140. On that site, a potential customer enters the number of lenses he wishes to purchase, and the website "figures" the amount the customer owes and the amount of the customer's down payment.[162]

141. The site also provides all transaction documents for customers to sign electronically: an Equipment Purchase Agreement, an Operations & Maintenance Agreement ("O&M"), and, at times in the past, a bonus contract.[163]

142. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[164] The lack of price negotiation is because the customer is not focused on buying a lens but on buying a tax benefit package. A high price results in large tax benefits. Testimony to the contrary from lens purchasers is not credible because they face serious tax consequences from the adjudication of the truth of this solar energy scheme.

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[160] Pl. Ex. 533.

[161] Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition Designations for Robert Aulds ("Aulds Dep.") 141:3-13, 146:17-147:5 (March 14, 2017). For a time, the price for a lens was $3,000. *E.g.*, Pl. Ex. 346 at 1 ("Kevin purchased 10 systems. Each system costs $3,000. Therefore his total purchase price is $30,000.")

[162] Aulds Dep. 141:3-13.

[163] RaPower-3 Dep. 39:18-41:2; Aulds Dep. 141:3-13.

[164] RaPower-3 Dep. 39:9-41:2; *e.g.* Pl. Exs. 119, 181, 511. Aulds Dep. 141:3-13, 146:17-147:5; Gregg Dep. 55:19-56:13; Howell Dep. 39:17-40:4, 95:3-5, 134:14-135:22; T. 1247:7-9; Lunn Dep. 114:11-115:4; T. 1078:17-1079:2; T: 987:3-12; Zeleznik Dep. 67:3-12.

(continued...)

143. The Equipment Purchase Agreement states the number of lenses the customer purportedly purchases from RaPower-3.[165]

144. The contract states that RaPower-3 will install and "startup" the lenses the "Installation Site," which is "a site yet to be determined."[166]

145. The Installation Site is "any place that Neldon [Johnson] wants it to be."[167]

146. There is no date-certain in the Equipment Purchase Agreement by which the customer's lenses must be installed in a tower and producing revenue.[168]

147. Instead, the "Installation Date" is defined as "the date the [lens] has been installed and begins to produce revenue."[169]

148. RaPower-3 commits that each lens will sustain a specific "energy production rate" for the first five years from the "Installation Date."[170]

149. If the lenses do not sustain the promised "energy production rate," the buyer may terminate the Equipment Purchase Agreement and is not obligated to pay any remaining balance for his lenses.[171]

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[165] Pl. Ex. 25 at 1; Pl. Ex. 511. The contract uses the term "Alternative Energy System," which is undefined in the contract itself. *See generally* Pl. Ex. 511. It means "solar lens." IAS Dep. 181:9-182:5; Pl. Ex. 181; T. 914:13-919:24 ; Pl. Exs. 92, 94; *see* Shepard Dep. 57:7-59:6; Pl. Ex. 462.

[166] Pl. Ex. 511 at 1.

[167] Shepard Dep. 157:18-24; Pl. Ex. 119 at 1.

[168] *See generally* Pl. Ex. 511.

[169] Pl. Ex. 511 at 2.

[170] Pl. Ex. 511 at 4-5.

[171] Pl. Ex. 511 at 5; Shepard Dep. 234:14-235:4; Pl. Ex. 475.

(continued...)

150. At the same time the customer electronically signs the Equipment Purchase Agreement, the customer electronically signs an Operation and Maintenance Agreement ("O&M") with LTB. [172]

151. According to Defendants, by signing the O&M, the customer is "holding out for lease" his solar lenses to LTB.[173]

152. The O&M states that once a customer's lenses are installed at a "Power Plant" on the "Installation Site" (defined only by reference to the Equipment Purchase Agreement), LTB will operate and maintain the customer's lenses to produce revenue.[174]

153. According to the O&M, LTB is "entitled to receive all revenue" from sales, but will make a quarterly "rental payment" to the customer for using that customer's lens(es) to produce the energy it will sell.[175]

154. In a single year, the total rental payments to any customer for a single lens may not exceed $150.[176]

155. There is no date-certain in the O&M by which a customer's lenses are required to begin producing revenue.[177]

156. Defendants told customers that IAS, RaPower-3, or LTB "placed in service" or "put into service" their solar lenses in the year that the customers purchase the lenses.[178]

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[172] Pl. Ex. 121; Pl. Ex. 25 at 1. Defendants maintain that LTB is the committed entity on the O&M, despite the contract being on RaPower-3 letterhead and being signed by "Seller," "Neldon Johnson," Director of "RaPower-3." Johnson Dep., vol. 1, 219:2-223:23; *e.g.*, Pl. Exs. 511, 512. *See also* ECF No. 22 ¶ 25, ECF No. 23 ¶ 25.

[173] Pl. Ex. 121; Pl. Ex. 25 at 1; Pl. Ex. 557 at 1; Pl. Ex. 473; Pl. Ex. 533 at 2.

[174] Pl. Ex. 121 at 1, 2, 4.

[175] Pl. Ex. 121 at 4.

[176] Pl. Ex. 121 at 4.

[177] *See generally* Pl. Ex. 121, 512.

[178] Pl. Ex. 1 at 3 ("Tax Question" No. 7); Pl. Exs. 44, 57, 104-105, 123-125, 176, 185, 313, 588; *see also* Pl. Ex. 472.

(continued...)

157. The Equipment Purchase Agreement states that the full price of a single lens is $3,500.[179]

158. But a typical solar lens customer does not pay the full price upon signing the Equipment Purchase Agreement.

159. Instead, a customer pays for his lenses in the following stages.[180]

160. First, he pays $105 per lens at the time he signs the Equipment Purchase Agreement, often near the end of the calendar year.[181]

161. Second, he pays an additional $945 on or before June 30 of the following year, for a total of $1,050.[182]

162. This leaves $2,450 remaining on the $3,500 lens purchase price.

163. The Equipment Purchase Agreement states that the customer will begin paying off the remaining $2,450 once the customer's lens has been installed and producing revenue for five years.[183]

164. For the first five years of revenue production, the customer will receive $150 yearly rental payment per lens.[184]

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[179] Pl. Ex. 511 at 2.

[180] Pl. Ex. 511 at 2.

[181] Pl. Ex. 511 at 2.

[182] Shepard Dep. 150:17-153:21; Pl. Ex. 119 at 2, Pl. Ex. 511 at 2.

[183] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[184] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

(continued...)

165. After the first five years, LTB will take the customer's $150 annual rental payment and divide it between the customer and RaPower-3: $82 per year for RaPower-3 to pay off the outstanding balance and $68 for the customer/lens owner.[185]

166. LTB will make these payments for 30 years.[186]

167. RaPower-3 provides nearly interest-free financing for the $2,450 debt remaining on each lens.[187]

168. The only security for the customer's promise to pay is the lens itself.[188]

169. Defendants do not check customers' credit.[189]

170. At times, the Equipment Purchase Agreement has provided that, if the tax laws change after the date the customer signs the contract in a way that "materially reduce[s] any tax benefit" of the agreement to the customer, the customer may retroactively reduce the number of lenses he bought on the date of signing.[190]

171. Also, if a solar lens customer no longer desires to "own" lenses, Johnson will refund the person's money and let them out of the contract.[191]

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[185] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[186] Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

[187] *E.g.*, $82 per year times 30 years is $2,460. Thus, according to the Equipment Purchase Agreement, RaPower-3 would collect $10 per lens in interest, for financing $2,450 for at least 30 years.

[188] Pl. Ex. 511 at 3.

[189] Pl. Ex. 677 at 2.

[190] Pl. Ex. 511 at 4 (2014 contract); Pl. Ex. 119 at 4 (2012 contract); Pl. Ex. 174 (2010 contract).

[191] Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468; Pl. Ex. 282 (In January 2015, Shepard told customers being audited that "[w]e . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction.").

(continued...)

172. From time to time in the past, a solar lens customer could also sign a "bonus referral contract."[192]

173. The bonus contracts, over time, varied in the amount a customer could purportedly earn, and the basis for the customer's payout – either the first billion dollars in IAS gross sales or the second billion dollars in IAS gross sales.[193]

174. If a customer signed a bonus contract before May 23, 2011, the bonus contract states that the customer will be paid a maximum of $6,000 per lens the customer bought based on a percentage of IAS's first billion dollars in gross sales.[194]

175. If a customer signed a bonus contract between May 24, 2011 and February 29, 2012, the contract states that the customer will be paid a maximum of $2,000 per lens the customer bought during that time period based on a percentage of IAS's first billion dollars in gross sales.[195]

176. If a customer purchased lenses and signed a bonus contract between March 1, 2012 and July 31, 2014, the contract states that the customer will be paid a maximum of $2,000 per lens the customer bought during that time period based on a percentage of IAS's second billion dollars in gross sales.[196]

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[192] Johnson Dep., vol. 1, 228:19-234:17; Pl. Ex. 185 at 3; *compare* ECF No. 2 Compl. ¶ 25 *with* ECF No. 22 ¶¶ 25 & 32; Pl. Ex. 1.

[193] ECF No. 22 ¶ 32.

[194] ECF No. 22 ¶ 32; *see also* Pl. Ex. 297.

[195] ECF No. 22 ¶ 32.

[196] ECF No. 22 ¶ 32.

(continued...)

177. Defendants told customers that the bonus contract was the key to being able to claim a depreciation deduction related to the solar lenses because the promise of the bonus made the "system . . . profitable in order to meet IRS requirements."[197]

178. Johnson told a customer in 2010 that "[t]his bonus program makes certain that each purchase was made for an economic reason. This reason would be such that anyone would see the value of the transaction as to its economic values beyond just a tax savings."[198]

179. But Johnson has not offered bonus contracts since July 2014.[199]

2. Defendants told customers, and prospective customers, about Johnson's purported solar energy technology.

180. Defendants told customers, and prospective customers, about Johnson's purported solar energy technology.[200]

181. Over the years, Shepard touted "[g]reat progress"[201] having been made on component parts of the technology through "[e]laborate testing"[202] and "research and development"[203] of "technologies needing refinement"[204].

[197] Johnson Dep., vol. 1, 234:18-237:15; Pl. Ex. 185 at 1; IAS Dep. 203:7-204:6; Johnson Dep., vol. 1, 235:17-25; Shepard Dep. 261:17-262:7; Pl. Ex. 1 at 3 ¶ 5; Pl. Ex. 340.

[198] Pl. Ex. 185 at 1; *see also* Pl. Ex. 34.

[199] ECF Doc. 22 ¶ 32.

[200] *E.g.*, Pl. Ex. 185 at 1; Johnson Dep., vol. 1, 173:11-177:16; Pl. Exs. 16 & 17. Johnson gave these white papers to Shepard. Johnson Dep., vol. 1, 185:15-23; Shepard Dep. 126:9-128:5. Shepard made them available to the public (including Freeborn) on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Ex. 491; T. 1351:19-1352:24, 1398:4-1399:18; Pl. Ex. 441. RaPower-3 Dep. 140:4-143:17; Pl. Ex. 504; Shepard Dep. 199:10-204:14; Pl. Ex. 471; Shepard Dep. 250:13-252:21; Pl. Ex. 72; Pl. Ex. 109 at 1-3; *see also* Freeborn Dep. 95:3-98:1; T. 1381:1-1387:12; Pl. Ex. 425 at 1. Johnson Dep., vol. 1, 211:16-215:23; Shepard Dep. 36:6-40:23, 183:14-187:13; Pl. Ex. 8A; Pl. Ex. 676; Gregg Dep. 57:18-59:12; Pl. Exs. 298-299; Pl. Ex. 26.

[201] Pl. Ex. 8A at 10.

[202] Pl. Ex. 8A at 10.

[203] Pl. Ex. 8A at 7.

[204] *E.g.*, Pl. Ex. 8A at 8; Pl. Ex. 504 at 5-7, 10-22.

(continued...)

182. Shepard and Freeborn also told customers and prospective customers to expect construction of new towers, beyond the 19 towers on the R&D Site.[205]

183. As early as November 2006, Shepard said that IAS had "a goal of finishing 50 Solar Pods before the end of the year for those who were previously on the lease program. . . . For new investors, [IAS] has a goal to put up 50 additional Solar Pods before year's end."[206]

184. Freeborn stated, in June 2010, "Neldon Johnson of IAUS and [R. Gregory] Shepard are hard at work bringing [the rental] income stream into operation. We are very close to making putting [*sic*] everything together and becoming fully operational perhaps before the end of the summer."[207]

185. Then, in February 2012, Freeborn told customers that "the IAUS energy fields are about to be erected."[208]

186. In June 2012, Defendants told participants in the "RaPower[-]3 National Convention" about "what's been accomplished in the last year" with respect to research and development, manufacturing, and construction.[209]

187. In July 2012, Shepard wrote to customers "[n]ow that the R&D is done and the Manufacturing Plant is completed along with the manufacturing of so many components is done [*sic*], CONSTRUCTION WILL BEGIN THIS MONTH."[210]

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[205] *E.g.*, Pl. Exs. 216, 246, 270.

[206] Pl. Ex. 93.

[207] Pl. Ex. 246.

[208] Pl. Ex. 216 at 1.

[209] Pl. Ex. 504 at 5-4.

[210] Pl. Ex. 270.

(continued...)

188. In November 2012, Shepard told a customer that there were “21,000 lenses in inventory” and “150 towers ready to install” with “$15M” in the bank.”[211]

189. In July 2013, Shepard told one customer “I THINK ALL 19 TOWERS ARE UP NOW. WE ARE JUST ABOUT READY TO FLIP THE SWITCH”.[212] But in August 2013, Shepard told customers being audited by the IRS that a photo attached to his email showed “the main tower. There will be 17 to 18 satellite towers that will feed the main tower’s turbine and heat exchanger producing 1.5 megawatts of power.”[213]

190. In November 2013, Shepard told customers “[w]e are doing great down in Delta.”[214]

191. He identified one tower as “fully completed,” “another ten satellite towers nearly completed,” and an additional four towers “not yet complete.”[215]

192. Shepard told customers that “[t]hese fifteen towers will complete the first project. Probably in two weeks, the 2d project will begin. It will consist of 150 towers. All towers and trusses have already been delivered. All the lenses have been framed and many other components have already been made.”[216]

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[211] Shepard Dep. 172:9-179:17 *and* Pl. Ex. 141.

[212] Pl. Ex. 329 at 1.

[213] Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1.

[214] Pl. Ex. 348 at 1

[215] Pl. Ex. 348 at 1

[216] Pl. Ex. 348 at 1

(continued...)

193. Shepard also told customers that "[t]he dual axis hydraulic tracking systems were working with the new Ram. The lenses heated up our molten salt storage container to over a thousand degrees."[217]

194. As of June 2014, Shepard wrote to customers "[t]wenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014."[218]

195. In December 2015, Shepard heard from a customer who was "a little worried about the amount of time that it is taking to get those lenses on towers and generating rental income."[219]

196. Shepard assured the customer that "The extra time was getting the mass production and installation capabilities up to 25 towers a day. That has pretty much been completed. I'm pretty sure that the first quarter of 2016 will be a very good one for us. It will all work out."[220]

197. When the customer asked if Shepard could say if he thought "the lenses will be on towers and generating rental income in 2016," Shepard responded "I very much think so!"[221]

198. Defendants have also told customers about progress toward obtaining a contract to sell power to a third party purchaser.[222]

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[217] Pl. Ex. 348 at 1

[218] Shepard Dep. 179:21-183:8; Pl. Ex. 420 at 1.

[219] Pl. Ex. 159.

[220] Pl. Ex. 159.

[221] Pl. Ex. 159.

[222] Pl. Exs. 157, 185 at 2, 292.

(continued...)

199. In 2010, Johnson assured a customer that "[w]e do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service."[223]

200. In August 2013, Shepard told customers that 18 or 19 towers would be producing 1.5 megawatts of power which would "soon be put on power poles going to Rocky Mountain Power which is Utah's largest utility company."[224]

201. In April 2015, Shepard told customers that "we are now in the process of negotiating a [power purchase agreement] for the first set of towers that will be going up,"[225] such that rental income from their lenses could start soon.

202. Over the years, Shepard and Freeborn also told customers to expect bonus contract payouts "soon."[226]

3. Defendants sold solar lenses by emphasizing the purported tax benefits.

203. From the start, Defendants have told their customers that they can "zero out" their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and solar energy tax credit for the lenses.[227]

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[223] Pl. Ex. 185 at 2.

[224] Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1; *see also* RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267 at 1 ("The first project will consist of 15 towers that will produce about 1.5 Megawatts for Rocky Mountain Power. We are almost done.").

[225] Shepard Dep. 204:15-209:11; Pl. Ex. 292.

[226] *E.g.*, Pl. Ex. 61 at 1 (In 2010, "They have really started putting an emphasis on the bonus contract which seems to indicate that we are close."); Pl. Ex. 48 at 1 (In 2012, "Rental income & Bonus payments are expected to begin soon."); Pl. Ex. 49 at 1 ("Rental and bonus income should start in 2014.").

[227] Johnson Dep., vol. 1, 247:11-248:12; Pl. Ex. 490 at 9-10; *see also* IAS Dep. 162:1-165:9, Pl. Ex. 531. According to Shepard, "the greater one's tax liability, the greater will be the depreciation benefit." Pl. Ex. 24 at 1; *see also* Pl. Ex. 20 at 2; *See* Lunn Dep. 188:18-189:20.

(continued...)

204. In the materials he wrote in 2006, Johnson included four pages on the tax benefits of buying a lens, due to depreciation and the solar energy tax credit.[228]

205. Defendants tell customers to calculate both the deduction and the credit based on the full price of a lens, not the amount the customer actually pays.[229]

206. Defendants also tell customers that they may use deductions related to solar lenses to offset the customers' active income, like W-2 wages from employment.[230]

207. Johnson wrote that "[t]he person buying a [lens] receives a $9,000 tax credit from the IRS for each [lens] purchased. . . . The retail value of IAUS's [lens] is $30,000. The federal tax credit at 30% of $30,000 is $9,000."[231]

208. Johnson connected the amount of depreciation a purchaser could take to the impact of the tax credit: "Half of the tax credit ($4,500) must be subtracted from the $30,000 purchase amount when using it to calculate depreciation of the equipment. Therefore, only $25,000 of the $30,000 value can be depreciated."[232]

209. Johnson presented tables for purchasers who were in different tax brackets to illustrate the tax-reducing effect of buying lenses and claiming a depreciation deduction and the solar energy tax credit for them.[233]

210. At the same time, Johnson told people they could[234]:

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[228] Pl. Ex. 531 at 3-6.

[229] *E.g.*, Pl. Ex. 24 at 1; Pl. Ex. 43 at 1; Pl. Ex. 531 at 2-3 (using prices Johnson established in 2006).

[230] Pl. Ex. 181 at 2 ¶ 6; Pl. Exs. 30, 40 at 4, 146, 147 at 1, 205, 346.

[231] Pl. Ex. 531 at 3.

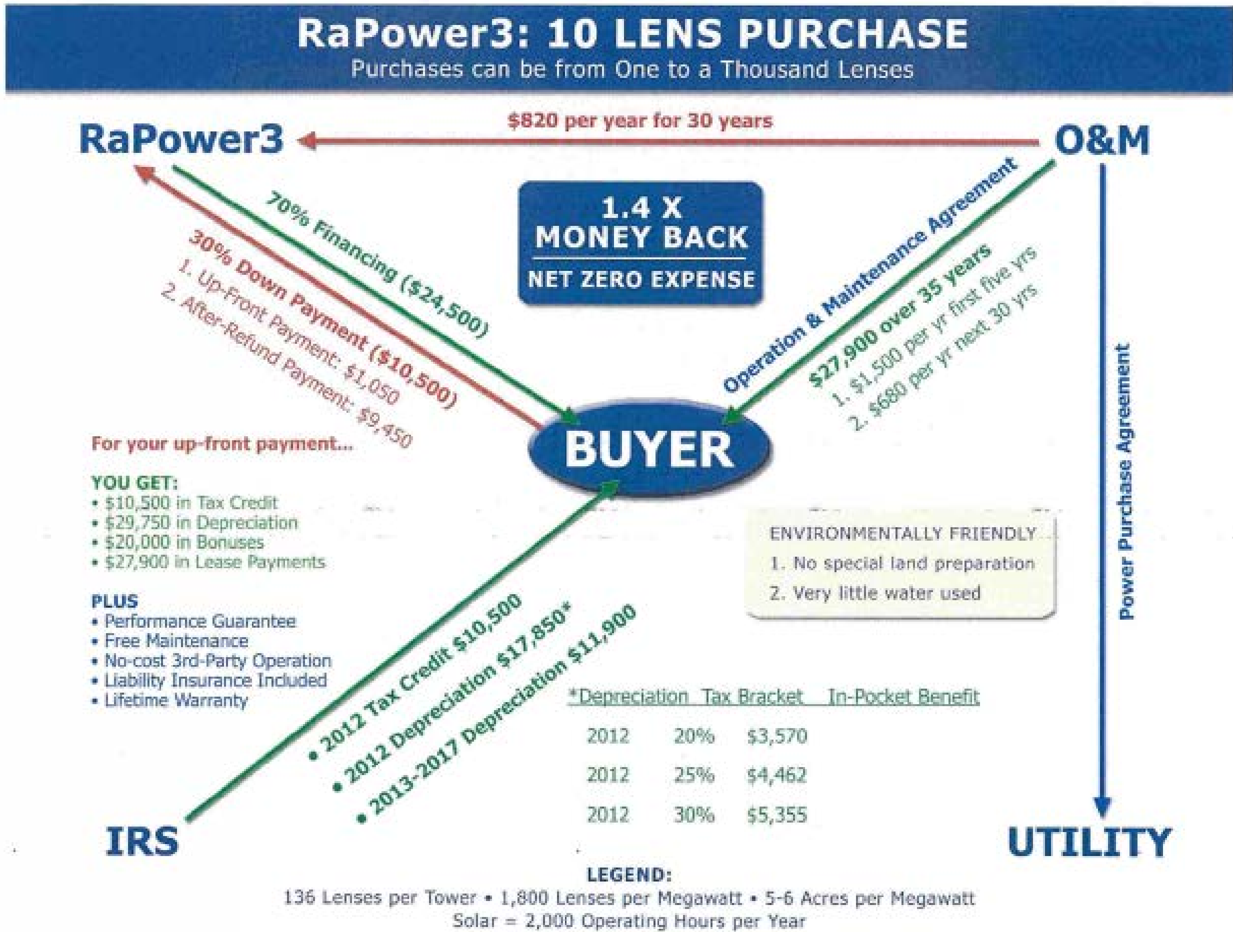
[232] Pl. Ex. 531 at 3.

[233] Pl. Ex. 531 at 4-6.

[234] Pl. Ex. 532 at 12.

Earn $$ From Your Federal Income Tax
0% of Your Own $$ Invested

211. Defendants also illustrated the tax benefits and flow of money this way:[235]



212. Shepard offered a way for a prospective or returning customer to "determin[e] how many solar lenses you should buy": "look at the taxes you paid last year and what you expect to pay this year."[236]

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[235] Pl. Ex. 496; *see also* Pl. Exs. 497, 777 at 1-2.

[236] Shepard Dep. 232:4-234:10; Pl. Exs. 20, 24, 474; *see also* Pl. Ex. 597.

(continued...)

213. According to Shepard, the "objective" is to "zero out your taxes while maximizing your ability to bring clean, renewable energy to our country."[237]

214. To accomplish this objective, Shepard gave prospective customers the formula to decide how many lenses to buy: take the customer's anticipated tax liability for the current year and multiply it by a number that "has been designed to give most taxpayers 1.5 times their money back in relation to their total down payment. For example, for a $10K down payment . . . you may get back at least $15K in tax benefits."[238]

215. Shepard showed customers and prospective customers how to calculate those tax benefits[239]:

Example: Taxable 2014 Liability is projected to be $10,000 plus there was $10,000 paid in 2013 taxes. (10,000 + 10,000 X .00085 = 17.

Purchase Price: 17 systems X $3,500 = $59,500.

Down Payment: 17 systems X $1,050 = $17,850.

Tax Credit: $59,500 X 30% = $17,850.

Depreciation (Net Operating Loss): One half of the tax credit is $8,925. Subtract that from the purchase price of $59,500 = $50,575.

216. Shepard showed the financial bottom line for a prospective lens buyer[240]:

Money Details:
1. You purchased 9 systems and paid $9,450 as a down payment.
2. After your tax refund of $10,000 in 2014, you will have made $550 thanks to your RaPower3 purchase plus you will make about another $4,800 over the next four years.
3. Your profit is created by your depreciation.
4. Don't forget the rental income of $150 X 9 X five years = $6,750 and $68 X 9 X 30 years = $18,360 (for a total of $25,110).

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[237] Shepard Dep. 232:4-234:10; Pl. Ex. 20 at 2; Pl. Ex. 24 at 1; T. 1130:2-23; Pl. Ex. 158.

[238] Pl. Ex. 20 at 2.

[239] Pl. Ex. 24 at 1; *see also id.* at 2.

[240] Pl. Ex. 24 at 1; *see also* Pl. Ex. 20 at 2.

(continued...)

217. Put more simply, Shepard showed customers exactly where and how, on a federal individual income tax return, to enter numbers to "zero out" their tax liability[241]:

Form 1040 Department of the Treasury—Internal Revenue Service (99) U.S. Individual Income Tax Return 2011 OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.

For the year Jan. 1–Dec. 31, 2011, or other tax year beginning , 2011, ending , 20 See separate instructions.

Your first name and initial: RAPOWER 3 | Last name: TEAM MEMBER | Your social security number

If a joint return, spouse's first name and initial | Last name | Spouse's social security number

Home address (number and street). If you have a P.O. box, see instructions. | Apt. no. | Make sure the SSN(s) above and on line 6c are correct.

. . .

1099-R if tax was withheld.

If you did not get a W-2, see instructions.

11 Alimony received | 11

12 Business income or (loss). Attach Schedule C or C-EZ DEPRECIATION | 12 2,973 Per System

13 Capital gain or (loss). Attach Schedule D if required. If not required, check here | 13

14 Other gains or (losses). Attach Form 4797 | 14

15a IRA distributions | 15a | b Taxable amount | 15b

. . .

Get this number low enough for zero taxes

Form 1040 (2011) Page 2

Tax and Credits

38 Amount from line 37 (adjusted gross income) | 38

39a Check if: You were born before January 2, 1947, Blind. Spouse was born before January 2, 1947, Blind. Total boxes checked 39a

b If your spouse itemizes on a separate return or you were a dual-status alien, check here 39b

Standard Deduction for— • People who check any box on line 39a or 39b or who can be claimed as a dependent,

40 Itemized deductions (from Schedule A) or your standard deduction (see left margin) | 40

41 Subtract line 40 from line 38 | 41

42 Exemptions. Multiply $3,700 by the number on line 6d | 42

43 Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0- | 43 GOAL IS ZERO

44 Tax (see instructions). Check if any from: a Form(s) 8814 b Form 4972 c 962 election | 44

. . .

widow(er), $11,600 Head of household, $8,500

52 Residential energy credit. Attach Form 5695 | 52

53 Other credits from Form: a 3800 b 8801 c | 53 TAX CREDIT IF NEEDED

54 Add lines 47 through 53. These are your total credits | 54

55 Subtract line 54 from line 46. If line 54 is more than line 46, enter -0- $1,050 | 55

Other Taxes

56 Self-employment tax. Attach Schedule SE PER SYSTEM | 56

57 Unreported social security and Medicare tax from Form: a 4137 b 8919 | 57

58 Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5329 if required | 58

59a Household employment taxes from Schedule H | 59a

b First-time homebuyer credit repayment. Attach Form 5405 if required | 59b

60 Other taxes. Enter code(s) from instructions | 60

61 Add lines 55 through 60. This is your total tax | 61 GOAL IS ZERO

Payments 62 Federal income tax withheld from Forms W-2 and 1099 | 62

. . .

[241] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 13; Lunn Dep. 164:12-171:1; *see also* Shepard Dep. 241:18-243:8; T. 1130:2-23; Pl. Ex. 158; Pl. Ex. 490 at 9-10.

	72	Add lines 62, 63, 64a, and 65 through 71. These are your total payments	72	
Refund	73	If line 72 is more than line 61, subtract line 61 from line 72. This is the amount you overpaid	73	
	74a	Amount of line 73 you want refunded to you. If Form 8888 is attached, check here	74a	GOAL IS ALL TAX WITH HELD
Direct deposit? See instructions	b	Routing number ▶ c Type: ☐ Checking ☐ Savings		
	d	Account number		
	75	Amount of line 73 you want applied to your 2012 estimated tax ▶ 75		
Amount You Owe	76	Amount you owe. Subtract line 72 from line 61. For details on how to pay, see instructions	76	
	77	Estimated tax penalty (see instructions) 77		

218. Shepard encouraged customers to sell lenses to others by emphasizing the tax benefits. He wrote, in one promotional document, "Remember, if your people are happy, meaning they received all their tax benefits, then they will purchase even more systems. That means you make commissions all over again. . . . Have your people make a copy of their refund check so the both of you can use it as a valuable tool in your presentations."[242]

219. Freeborn told customers "you can be tax free like GE for 15 years" by buying lenses.[243] Freeborn gave customers the following calculations[244]:

Fourth, there are certain numbers that all RaPower3 team members need to have down per system:
1. Retail Price - $3500;
2. Full Down Payment - $1050;
3. Up Front/Enrollment Cost - $105;
4. Federal Energy Credit - $1050;
5. Bonus - $2,000;
6. Residual Income - $150/year first 5 years, $68/year the next 30 years;
7. Depreciation - $2,975, 50% Bonus depreciation the first year;
8. Rule of thumb - multiply Line 55 of From 1040 by 6, and then multiply that sum by .0007 to determine the number of systems to be purchased to offset federal income taxes through 2016. Remember, your client can always purchase more systems to extend his tax free status beyond 2016 since the tax credits may be forwarded 20 years.

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[242] Pl. Ex. 504 at 8; T. 1603:1-1604:7

[243] Pl. Ex. 220; *see also* Pl. Ex. 207 ("With this program you are awarded the . . . tax privileges that General Electric gets, i.e., pay no federal taxes. In fact, full [par]ticipation makes you tax free till [*sic*] 2020.").

[244] Pl. Ex. 501 at 2; *see also* Freeborn Dep. 71:2-20; Pl. Ex. 499. Freeborn and his brother created a charity that they used to sell solar lenses. Pl. Exs. 498, 499, 500. The "charity" sold at least 450 lenses. Pl. Ex. 498.

(continued...)

220. Freeborn told people in his downline to start with the following pitch if they wanted to sell more lenses[245]:

1. Listen for the tax return complaining conversations
2. Ask the M A G I C Question: "Do you like figuring (Paying) taxes?"
3. Explain to them your experience: "Well neither do I; that's why I DON'T pay any. Would you like to learn how not to as well?"

221. Shepard and Freeborn also assisted customers with preparing their federal income taxes to claim a depreciation deduction and solar energy tax credit as a result of buying solar lenses.[246]

222. Shepard told people how to complete their tax returns "properly" to claim the tax benefits purportedly associated with buying solar lenses.[247]

223. As Shepard told other RaPower-3 "leadership" team members in 2011, "I have someone from Florida that is FAXING his 1040 return to me. I told him that I can tell him in two minutes if his CPA did it right."[248]

224. Shepard has corresponded with tax professionals to give them information and instruction about the transactions and the technology that purportedly qualify their customers for the tax benefits Defendants promote.[249]

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[245] Pl. Ex. 85 at 3; *see also* Pl. Ex. 214.

[246] *E.g.*, Pl. Exs. 88, 109, 674 ("TAX TIME SUCCESS STORIES" note customers having received help from Shepard and Freeborn to complete taxes). Pl. Ex. 323; Gregg Dep. 127:19-128:8; *see also* Pl. Ex. 218 (offering information from RaPower-3 to support claimed tax benefits on customers' returns); Pl. Ex. 217 (offering instructions on how to use TurboTax to claim tax benefits).

[247] *E.g.* Shepard Dep. 243:11-244:14; Pl. Ex. 43 at 1.

[248] Shepard Dep. 241:1-14; Pl. Ex. 112.

[249] Shepard Dep. 210:20-211:24; Pl. Ex. 471; Pl. Ex. 346.

(continued...)

225. Shepard also advises customers under audit on how to respond to the IRS to defend disallowed and lens-related depreciation deductions and solar energy tax credits.[250] Shepard advised customers not to answer the IRS's questions for information about the solar energy scheme.[251]

226. RaPower-3 has touted "success stories" on its website. None of the "success stories" involved the actual production of solar energy.[252]

227. Rather, all of the so-called "success stories" involved customers receiving the substantial tax benefits that Defendants promote. [253]

228. Defendants have not changed their promotion in any appreciable way since 2005, with one exception.[254]

229. In mid-2016, after this lawsuit was filed, Johnson changed the way RaPower-3 and Shepard promoted the tax benefits purportedly connected with solar lenses.[255]

230. According to Shepard and Johnson, a customer may still buy lenses on the same terms described above, and claim depreciation and the solar energy tax credit.[256]

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[250] *E.g.*, Pl. Ex. 70 at 1-2; Pl. Ex. 71; Pl. Ex. 325; Gregg Dep. 136:4-6; 10-14; 137:3-12; Pl. Ex. 330 at 2; Gregg Dep. 147:5-148:10, 149:1-7.

[251] Gregg Dep. 57:18-58:4; Pl. Ex. 298 ("**Solar Energy Tax Scheme Interview Questions:** Some of you may have been asked to fill out this questionnaire with 11 questions. . . . Simply say that you don't believe RaPower[-]3 is a tax scheme and then ask for written facts as to why they think that it is a scheme." (emphasis in original)).

[252] *E.g.* Pl. Ex. 674.

[253] *E.g.* Pl. Ex. 674.

[254] Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

[255] Shepard Dep. 244:22-250:11. Recently, Defendants also began promoting a "home system" for solar energy production. Pl. Ex. 680. They tell customers that they can get the home system "for free" if customers "use[] the federal tax solar credit program correctly." *Id.* at 1.

[256] Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

(continued...)

231. But the customer may instead pay a lower price, *not* claim depreciation, and still claim the solar energy tax credit.[257]

232. Customers are likely still claiming depreciation for lenses they bought after Johnson made this change.[258]

C. Defendants knew or had reason to know that their statements were false or fraudulent as to material matters.[259]

233. Defendants knew, or had reason to know, that their customers were not in a trade or business of leasing out solar lenses and, therefore, that their customers were not allowed the depreciation deduction or solar energy tax credit.[260]

234. This is because Defendants knew, or had reason to know, the following facts throughout the entire time they promoted the solar energy scheme:

1. Defendants knew, or had reason to know, that Johnson's purported solar energy technology did not work, and would not work to generate commercially viable electricity or other energy.

235. Johnson testified that he has "generated electricity" using lenses on the R&D Site a "hundred times,"[261] but no one other than him has seen it happen[262].

236. Johnson testified that he could have "put power on the grid" at "any time since 2005" and he "could have done that easily"[263].

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[257] Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

[258] Howell Dep. 233:9-234:3; Pl. Ex. 749 (showing lens sales made as recently as February 2018); Pl. Ex. 752; T. 824:19-837:25.

[259] 26 U.S.C. § 6700(A)(2)(a).

[260] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 8.

[261] Johnson Dep., vol. 1, 164:3-165:17.

[262] Johnson Dep., vol. 1, 164:3-165:17; Shepard Dep. 129:17-131:18; Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

[263] RaPower-3 Dep. 163:15-166:18

(continued...)

237. But Johnson testified that, since 2005, he has made a "business decision" not to put electricity on the grid.[264]

238. Johnson also testified that every time he thinks he is finished and ready to connect to a third-party purchaser, he finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system.[265] So he has never been finished.[266]

239. Johnson has not produced data (for example, from testing the components alone or as a purported system), research, or third-party validation, to support his ideas of how he claims his system would work, or records of it working.[267]

240. Johnson has no records of electricity production or of any other application of energy to a useful purpose.

241. In 2005, when he first began selling solar lenses, Shepard knew that IAS was "still a long ways away" from generating electricity for a third-party purchaser[268] and that "more research and development had to be done . . . to make the technology economically viable"[269].

242. To date, Shepard has never seen the lenses in the towers at the R&D Site generate electricity.[270] He testified at trial that he was "not sure that [he had] seen everything work right

[264] RaPower-3 Dep. 163:15-166:18.

[265] RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[266] RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[267] *E.g.*, Johnson Dep., vol. 1, 69:8-10, 109:10-16, 151:18-153:4, 164:3-165:17, 177:13-179:24.

[268] Shepard Dep. 46:2-47:12.

[269] Shepard Dep. 54:17-24.

[270] Shepard Dep. 129:17-131:18.

(continued...)

now simultaneously to produce electricity"[271] and that "that "no solar lens is putting electricity on a grid."[272]

243. Johnson has told Shepard that they have done so "for R&D purposes."[273]

244. As of December 2013, Shepard advised customers that Defendants' "intention . . . is to produce electricity."[274] Nonetheless, as recently as February 19, 2016, Shepard admitted having "no proof that [the purported solar] towers are up and running."[275]

245. Freeborn never saw the lenses in the towers that currently stand at the R&D Site generate electricity.[276]

246. Nonetheless, Freeborn believed that because he saw lenses concentrate heat on an early site visit, he had "proof of concept" that they would be used in a system to generate electricity.[277]

247. Freeborn thought that the other components of the system "would all be added later."[278]

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[271] T. 1693:1-5.

[272] T. 1729:19-25.

[273] Shepard Dep. 129:17-131:18.

[274] Pl. Ex. 602.

[275] Pl. Ex. 279 at 1; *see also* Shepard Dep. 187:14-195:3 (noting that a prospective lens purchaser in or around 2013 "wanted to see a project up and running before they committed," which Shepard could not show them); Pl. Ex. 470 at 6-7; Pl. Ex. 602.

[276] Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

[277] Freeborn Dep. 28:19-34:18.

[278] Freeborn Dep. 28:19-34:18. In early 2010, Freeborn told customers he would be sending out a "video [he] shot with Neldon while [he] visited the site last week." Pl. Ex. 213 at 1.

(continued...)

248. Freeborn testified that getting the “individual parts” of Johnson’s purported technology to “work in concert . . . seems to be the hurdle.”[279]

249. Johnson has no concrete plan to connect his purported solar energy technology to the electrical grid, such that a third party could purchase electricity generated.[280]

250. There are extensive requirements Defendants must meet before “putting electricity on the grid,” particularly through Rocky Mountain Power, a component of PacifiCorp.[281]

251. PacifiCorp would require Defendants to obtain an “interconnection agreement,” which would give Defendants permission physically connect their purported energy generating facility to PacifiCorp’s equipment.[282]

252. Defendants do not have an interconnection agreement with PacifiCorp.[283]

253. As of April 2017, there was no grid connection to the IAS system to the power grid. Instead, there is a brown pole with wires dangling from the top.[284] There is no transmission line or power substation near Defendants’ site with sufficient capacity to carry the power Johnson claims his system can generate.[285]

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[279] Freeborn Dep. 95:3-13; *see also* Pl. Ex. 412 at Response to Interrogatory No. 10 (“I am unaware of the status of production [of energy], whether or in what form and measurements.”).

[280] Johnson Dep., vol. 1, 111:11-114:3; Pl. Ex. 509 video clip 18_2_27-2_39 at timestamp 14:21:28; Johnson Dep., vol. 1, 115:24-120:13.

[281] *E.g.*, Pl. Ex. 713, Deposition Designations for PacifiCorp (“PacifiCorp Dep.”) 15:22-16:15, 68:1-69:8, 71:2-76:22, 78:6-81:15, 82:1-18, 83:2-95:23, 97:1-12, 107:18-114:8 (Nov. 15, 2016); Pl. Ex. 196; Pl. Ex. 198B; Pl. Ex. 199.

[282] PacifiCorp Dep. 73:13-17.

[283] PacifiCorp Dep. 115:4-117:15.

[284] Exhibit 509 video clip 18_0_4_09-4_25 at 14:23:16; T. 108:5-109:11.

[285] T. 109:12-111:5.

(continued...)

254. Johnson has never sold power to Rocky Mountain Power, the only power company in the area of the test site.[286] No power purchase agreements have ever been signed with any end-user.[287] This did not stop Johnson from telling a lens purchaser, in March 2010, that "we do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service."[288]

255. The IAS website contains intentional misrepresentations about the laws obligating power producers to buy power from generators of renewable energy and the status of agreements between IAS and PacifiCorp/Rocky Mountain Power.[289]

256. Dr. Thomas Mancini testified as the United States' expert witness on concentrating solar power ("CSP"). Dr. Mancini earned his Ph.D. in Mechanical Engineering from Colorado State University in 1975. For ten years thereafter, Dr. Mancini was a professor at New Mexico State University, where he taught courses on thermodynamics, heat transfer, fluid mechanics and solar energy. From January 1985 to July 2011, Dr. Mancini worked at Sandia National Laboratories, in Albuquerque, New Mexico. Among other job titles, Dr. Mancini was the CSP Program Manager at Sandia. Dr. Mancini has been consulting on solar energy projects since 2011 through his own business, TRMancini Solar Consulting. He engages in work similar to what he did at Sandia, reviewing system and component designs for concentrating solar

[286] T. 1779:9-11

[287] T. 2238:15-21.

[288] Pl. Ex. 185.

[289] Pl. Ex. 901; 1781:2-1786:23.

(continued...)

energy projects and advising clients on the likely performance and costs of their proposed technology.[290]

257. At the United States' request, Dr. Mancini reviewed the documents Defendants produced in this case and information on www.rapower3.com, along with information and documents provided by third parties. He reviewed patents Johnson has obtained. Dr. Mancini attended two site visits to view Defendants' purported solar energy technology, its components, and the places where Defendants manufacture and claim to use such components. During both visits, Dr. Mancini heard from Neldon Johnson about Johnson's purported solar energy technology and its components as he conducted Dr. Mancini around the sites. [291]

258. Dr. Mancini credibly testified that Johnson's purported solar energy technology does not produce electricity or other useable energy from the sun.[292]

259. Johnson's purported solar energy technology consists, and has always consisted, of separate component parts that do not fit together in a system that will operate effectively or efficiently.[293] For example, there is no evidence the turbine will work in the system.[294]

260. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate marketable electricity.[295] There is no evidence they ever have orever will.[296]

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[290] T. 40:21-43:18.

[291] T. 69:1-73:12

[292] T. 49:23-50:2.

[293] T. 86:4-86:8, 119:5-120:19.

[294] T. 140:21-141:5.

[295] T. 75:14-24, 86:1-16, 90:11-97:4, 106:13-22, 162:17-25.

[296] T. 162:17-25 .

(continued...)

261. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to heat or cool a structure.[297] They never have and they never will.[298]

262. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to provide hot water for use in a structure.[299] They never have and they never will.[300]

263. The solar lenses do not, either on their own or in conjunction with other components, use solar energy to generate solar process heat.[301] "Solar process heat" is heat from the sun that accomplishes some function or application, like heating potash to speed the process of turning it into fertilizer. Shepard testified that that the lenses produce heat and the only application that he heard of for that heat was to burn wood, grass, shoes, a man, and a rabbit.[302] These are not examples of using heat from the sun for a useful application. The lenses never have been used to generate heat for some function or application, and they never will.[303]

264. Johnson's purported solar energy technology is not now, has never been, and never will be a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy.[304]

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[297] *See* T. 49:23-50:7. .

[298] T. 161:17-162:24.

[299] *See* T. 49:23-50:7..

[300] T. 161:17-162:24.

[301] *See* T. 49:23-50:7.

[302] T. 1735:24-1737:5.

[303] T. 161:17-162:24, 105:13-106:9..

[304] T. 49:23-50:7, 111:17-112:10.

(continued...)

265. The project does not have the numbers of people with intellectual capacity in terms of training and background sufficient to produce or develop a commercial system.[305] Johnson has no documentation of the credentials of any persons working on the project, except his own, which shows he has no degree.[306] There is no evidence that anyone involved in the project has experience needed for the regulatory compliance required to place power on market.[307]

266. Johnson's project has none of the documents which would be typical of a solar power project, including a detailed analysis of each of the components; computer models of the different components; computer models of a proposed system or multiple systems; tests that showed the performance of the individual components; systems tests that showed the actual power output solar energy input, what the issues were and identified; a complete suite of engineering drawings and component interface documents; documents reflecting how the project as a whole would conduct operations or be monitored during operations; a list of materials for all of the components and for the system itself; and the cost estimate of the components in the system.[308] If a system was close to being operational, these documents would be in place.[309]

267. Dr. Mancini's qualifications, his demeanor on the witness stand and answers during direct and cross examination, and the comprehensive fit of the whole of his testimony

[305] T. 112:4-119:4.

[306] T. 115:10-116:25.

[307] T. 115:10-116:25.

[308] T. 75:25-78:19, 123:23-124:2, 157:22-159:7.

[309] T. 78:10-78:13.

(continued...)

together show that he is credible and his conclusions and observations are reliable, without any significant exception or question.

268. Further, Defendants did not have a present a qualified to testify as an expert under Fed. R. Evid. 702 to rebut Dr. Mancini's testimony. They proffered Johnson, but he was excluded because his testimony was not based on sufficient (and verifiable) facts or data and was not the product of reliable and accepted principles and methods.[310] There was insufficient proof that he reliably applied scientific or engineering principles and methods to the facts of this case.[311]

269. Although Johnson has claimed to have received evaluations of his technology from people like the Dean of Electrical Engineering at Stanford University and other experts, Johnson could not identify any of them by name.[312] Defendants offered no evidence from them.

270. The complete lack of third party verification of any of Johnson's designs, in light of the unconventional design of his systems, demonstrates that Johnson does not have the capability of designing a system that can produce usable products from solar energy, that his claims of capability are not credible, and that he misrepresents the truth about his systems, their viability and third party confirmation of his skills and systems.

271. Further, Johnson claims to have done the work himself to test all of the components of his purported solar energy technology thousands of times and that they work. But he has no data from those tests, other than videos.[313] No such videos were presented at trial.

[310] T. 2104:5-2107:16.

[311] T. 2104:5-2107:16.

[312] T. 1756:16-1768:13; Pl. Ex. 553.

[313] T. 1773:13-1774:9.

(continued...)

272. Johnson has no record that his system has produced energy. There are no witnesses to his production of a useful product from solar energy. He testified that when he tests, he "will do it usually on the weekends when no one was around because [he] didn't want people to see what [he] was doing with it."[314] This explanation of a lack of witnesses is not credible and indicates his statements regarding testing are false. Johnson's statements about the experiments are fabricated in order to create an impression of success which is not based in fact.

273. The complete lack of records or witnesses to any useful production of energy, combined with the unconventional design of his systems, demonstrates that Johnson does not have the capability of designing a system that can produce usable products from solar energy, and that his claims to the contrary are not credible. Further, it is logical to conclude that his system cannot produce usable products from solar energy.

274. Johnson appeared confused during some of his testimony and exhibited difficulty in comprehending questions and responding to them. More than most witnesses, he shuffled pages in exhibits because he had difficulty finding materials at issue. He also exhibited confrontational behavior on direct and cross-examination. He found it very hard to be responsive to questions.

275. For example, Johnson gave an unintelligible explanation of why he has not put power on the grid since 2005:

> Q. BY MR. SNUFFER: Mr. Johnson, you have testified that you could have produced power at any time since 2005. Do you recall making that statement?
> A. That's correct.
> Q. On what basis do you make that statement?
> A. All I'd have to do is raise the temperature of the water and drive it through the turbines. That isn't the problem.
> MS. HEALY-GALLAGHER: Objection; foundation.

[314] T. 2024:3-17.

> THE COURT: Well, he's trying to get it. He said on what basis. So I'm overruling that objection.
> Q. BY MR. SNUFFER: You said that wasn't the problem. What is the problem?
> A. The problem with a business program over just fun and games is making money. And up until now the whole project relies upon the cost of developing a power plant. And the cost and the maintenance still wasn't overcome in 2005 on the heat exchangers that now which we didn't even know in 2005 we could do it, and that's why we went solar. But solar turned out to be a 20-hour thing. And that paper kind of shows what you're talking about. You see what I'm saying?[315]

276. Johnson's inability to communicate coherently or answer questions posed challenges for his counsel but also demonstrates his lack of coherent thought. [316] His conclusions are not supported by valid reasoning, rendering his tax analysis, engineering analysis, financial analysis, marketing analysis, and business analysis, all suspect. Johnson's failure to put energy on the grid or to have an agreement to do so, demonstrates the lack of viability of his designs and construction.

277. Johnson's methodology and lack of overall plan or predictability render his conclusions about the status of his work unreliable, and in many cases false. His statements are particularly false when they pertain to more than a single component or a single element of a component. His work pattern moves from one detail to the next, without a comprehensive strategy for conclusion, except to keep working. This method renders unreliable any statements about the capacity of his overall system to create any useful production. His statements about his overall system do not have supporting facts, but are merely opinions, goals and aspirations. But he and Shepard, as communicator, amplifier and marketer, speak in conclusory absolutes, deceiving customers and prospective customers.

[315] T. 2013:13-2014:8.

[316] T. 1928:15-1931:13, 2275:18-2277:11.

2. Defendants knew, or had reason to know, that the only way a customer has "made money" from buying a lens is from the purported tax benefits.

278. Shepard and Freeborn sold the lenses by telling people "There's three ways you can make money [from owning a lens]. You can do it through tax benefits, you can do it through the rental program, and you can do it through the bonus program."[317]

279. But they both knew that the only way a customer has ever "made money" from buying a lens is through the tax benefits; no customer has earned money from rental income or income from a bonus contract.[318]

a. No customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser.

280. The only towers that currently exist are the same towers that Johnson built in 2006: the (at most) 19 towers on the R&D site.[319]

281. Assuming 19 towers, at most 2,584 lenses have been installed.[320]

282. According to Johnson, he owned the lenses that were originally installed in the towers in 2006.[321]

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[317] Shepard Dep. 92:17-94:13, 241:1-14; Pl. Ex. 112 ("The first way to make money at RaPower[-]3 is with taxes. So we need to make sure everyone is maximizing their return."); Freeborn Dep. 82:16-83:19; Pl. Ex. 246; *see also* Freeborn Dep. 48:2-55:1; Pl. Exs. 48 at 1, 496, 497.

[318] T. 1734:9-1738:23; Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commissions on solar lens sales is also "functional." Freeborn Dep. 82:16-85:17; Pl. Ex. 246. But the multi-level marketing component of RaPower-3 is not connected to lens ownership. RaPower-3 Dep. 33:8-34:9. A distributor need not buy a lens in order to sell lenses for RaPower-3. *Id.*

[319] RaPower-3 Dep. 80:16-18.

[320] *See* Shepard Dep. 129:17-131:2 (assuming 18 towers installed rather than 19).

[321] IAS Dep. 63:24-67:3.

(continued...)

283. Since that date, Johnson testified, as customers purchased lenses, ownership of different lenses in the towers transferred from him to the customer.[322]

284. Johnson testified that he created another entity, Cobblestone Centre, LLC (“Cobblestone”), to construct towers and install lenses.[323]

285. His idea is that once the towers are constructed and the lenses installed, he would have LTB take over operation and maintenance of the towers and lenses.[324]

286. No customer has authorized Cobblestone to install his lenses.[325]

287. Shepard knows that an entity named Cobblestone exists, but does not know anything else about it.[326]

288. Hundreds, if not thousands, of customer “lenses” are *not* installed in towers.[327] They are in undifferentiated stacks of pallets of uncut plastic sheets in a warehouse in Millard County, Utah.[328]

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[322] IAS Dep. 63:24-67:3.

[323] LTB1 Dep. 32:8-34:6.

[324] LTB1 Dep. 32:8-24.

[325] LTB1 Dep. 38:25-39:5.

[326] Shepard Dep. 123:16-124:6.

[327] *See* Shepard Dep. 39:13-42:5, 60:21-61:17; Pl. Ex. 460.

[328] T. 102:2-21; Pl. Ex. 460.

(continued...)

289. Plaskolite ships IAS rectangular sheets of grooved plastic, in pallets wrapped in still more plastic.[329]

290. Before any rectangular sheet of plastic can be installed on a tower, Cobblestone must cut the rectangle into triangles and add frames to the plastic triangles.[330]

291. Whether a customer's plastic lens is purportedly on a tower or in a pallet inside a warehouse, Defendants do not know which customer owns which lens.[331]

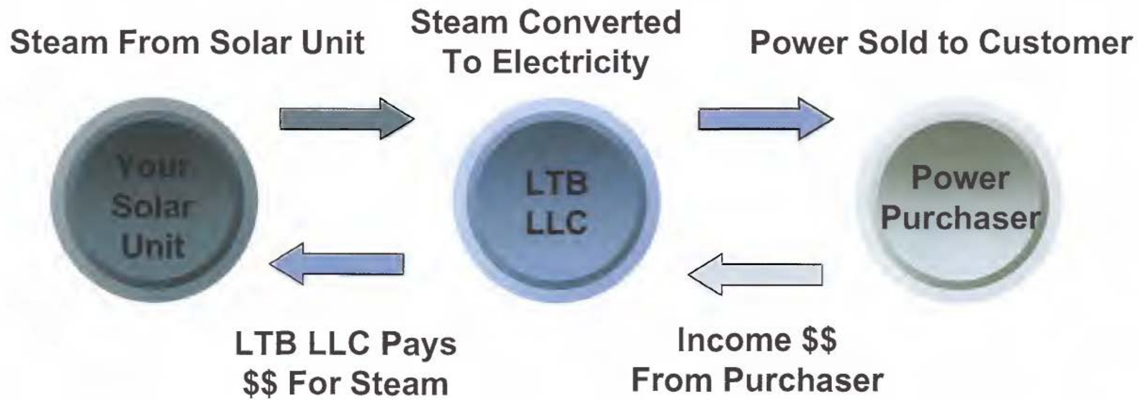
[329] Johnson Dep., vol. 1, 192:15-197:1; *compare* Pl. Ex. 2 *with* Pl. Ex. 460.

[330] Johnson Dep., vol. 1, 52:20-53:2, 74:11-14, 192:15-197:1; LTB1 Dep. 32:8-24.

[331] Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; Pl. Ex. 669, at 1 ("RaPower[-]3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17.

(continued...)

292. After 11 years of selling lenses, Johnson's technology has never generated energy for which a third-party "power purchaser" has paid[332] according to Johnson's vision from 2006[333]:



293. In fact, LTB has never done anything; it has never had a bank account, any employees, or any revenue.[334]

294. Shepard first heard about LTB when he obtained his first lenses in 2005.[335]

295. At that time, he did not ask about LTB's experience with operating and maintaining solar energy equipment.[336]

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[332] Johnson Dep., vol. 1, 164:3-165:17, 167:22-168:3, 172:4-17. Johnson testified that he or RaPower-3 (and not a third party power purchaser) paid a single customer a single check for having used her lenses to generate electricity that was used at Johnson's former grocery store in 2010. (RaPower-3 Dep. 6:18-7:23; Pl. Ex. 188.) The United States disputes that this customer was paid for the production of electricity, and instead submits that Johnson sent the customer a check because her CPA inquiring about the promised income from "energy sales." (RaPower-3 Dep. 18:9-19:3; Pl. Ex. 690, Deposition Designations for Roger Halverson ("Halverson Dep.") 43:22-53:24 (Oct. 18, 2016); Pl. Exs. 185, 186). Even if the Court were to credit Johnson's testimony, it does not change the analysis herein.

[333] IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531; LTB1 Dep. 71:25-74:21, 88:7-17.

[334] T. 2232:3-22; LTB1 Dep. 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; Pl. Ex. 464; LTB1 Dep. 69:6-74:21, 90:19-91:8.

[335] Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

[336] Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

(continued...)

296. Shepard simply signed the agreement to lease his lenses to LTB. [337]

297. Shepard does not know what LTB did with his lenses after they had been subleased.[338]

298. Shepard does not know from whom LTB would collect any rent that it might pay him some day.[339]

299. Shepard knows, and has known since 2005, that LTB has never generated any income using his lenses.[340]

300. Shepard knows that no customer has been paid for the use of his or her lenses.[341]

301. He does not know who owns LTB, who runs it, or whether it has any expertise in operating and maintaining solar lenses,[342] although he does believe that Johnson is connected to LTB in some fashion[343].

302. He has never asked Johnson why LTB has never made a rental payment.[344]

303. In 2013, however, Shepard reported to customers that LTB was "considering using the solar lenses they are renting from RaPower[-]3 Team Members to provide heat and water for crop production in greenhouses."[345]

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[337] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[338] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[339] Shepard Dep. 153:22-154:4.

[340] Shepard Dep. 34:18-35:24, 61:24-63:4, 73:1-76:15; Pl. Ex. 464; Pl. Ex. 602 at 1-2.

[341] Shepard Dep. 34:18-35:24, 67:1-12 93:17-94:13; Pl. Ex. 279 at 1; Pl. Ex. 602 at 1-2.

[342] Shepard Dep. 73:1-76:15; Pl. Ex. 464.

[343] Shepard Dep. 96:19-100:4; Pl. Ex. 77.

[344] LTB1 Dep. 86:20-87:9.

[345] Pl. Ex. 557.

(continued...)

304. Johnson has told customers that LTB "placed [their lenses] in service" because LTB "has utilized solar energy from [the customer's lenses] for the purpose of assisting IAS in research and development" for various components of Johnson's solar energy technology.[346]

305. In July 2016, Shepard has told customers the same thing: that LTB "rents your solar lenses and utilizes the solar energy from your panels for the purpose of assisting IAS in research and development."[347]

306. Shepard also made such a claim in 2014, when he told customers that LTB had rented their lenses to IAS for research and development since 2010.[348] Shepard claimed that, therefore, customers' "rental payments began to accrue" *in 2010*.[349] Shepard said that he was "99.5% sure [customers would] start receiving rental payments" in 2014 for IAS's purported past use of their lenses.[350] This never happened.[351]

307. Freeborn knew, since 2009, that he never received rental income from his lenses.[352]

308. Freeborn never asked any questions about LTB, either before or after he agreed to "lease out" his lenses to LTB in 2009.[353]

309. Freeborn never asked Johnson why LTB has never made a rental payment.[354]

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[346] LTB1 Dep. 92:7-93:22; Pl. Ex. 558; RaPower-3 Dep. 117:22-118:23; Pl. Ex. 473.

[347] Pl. Ex. 473; *see also* Pl. Ex. 547.

[348] Pl. Ex. 341.

[349] Pl. Ex. 341.

[350] Pl. Ex. 341.

[351] Shepard Dep. 258:5-261:16; Johnson Dep., vol. 1, 239:18-240:1; LTB1 Dep. 88:18-90:18.

[352] IAS Dep. 182:16-183:4; Pl. Ex. 533; Freeborn Dep. 39:23-40:24.

[353] LTB1 Dep. 75:15-77:14.

[354] LTB1 Dep. 75:15-77:14.

(continued...)

310. No customer has asked questions of LTB, either before or after signing an agreement to "lease out" their lenses to LTB. [355]

311. Defendants know that if the solar lenses are going to generate rental income for customers, a third party must be willing to purchase power that the lenses will purportedly create.[356]

312. This agreement is typically called a "power purchase agreement" ("PPA").[357]

313. They know, or have reason to know, that there never has been such an agreement in place. [358]

314. Shepard testified that, since 2010, he has "tried to put his own projects together" to get a third-party purchaser.[359] "But we just kept running into road blocks. . . . Never got that far. Every time I got close, they wanted to see a power project up and running. . . . And we didn't have that running yet."[360]

315. Any other information that Shepard has about progress toward selling energy to an outside purchaser comes from Johnson.[361]

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[355] LTB1 Dep. 75:15-77:14.

[356] Johnson Dep., vol. 1, 130:5-131:6; Shepard Dep. 34:18-35:24, 153:22-154:4; Freeborn Dep. 48:2-55:1; Pl. Ex. 496 & 497; Pl. Ex. 185 at 2 (Johnson told a customer, in early 2010, "[w]e do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service.") *but see contra* IAS Dep. 149:4-16 (Johnson testified that IAS has never entered a power purchase agreement.). *See also* Pl. Ex. 504 at 22 (as of June 2012, Defendants knew that power purchase agreements were an integral part of a solar energy project).

[357] Shepard Dep. 204:24-205:6; PacifiCorp Dep. 46:22-48:14.

[358] Shepard Dep. 34:18-35:24, 153:22-154:4; Johnson Dep., vol. 1, 131:7-134:6; Pl. Ex. 412 at Response to Interrogatory No. 8; PacifiCorp Dep. 46:22-48:14..

[359] Shepard Dep. 204:15-209:11; Pl. Ex. 292.

[360] Shepard Dep. 205:21-12; *see also* IAS Dep. 204:24-207:10.

[361] Shepard Dep. 46:2-57:5.

(continued...)

316. On March 28, 2018, just before trial, RaPower-3 announced that rental payments would be paid to all customers "who have fully paid [their] obligation to [RaPower-3]. . . ."[362] The payments were made in the form of additional lenses for which the owners would owe a total price of "$3,500 but your rental fees would pay the difference."[363] The announcement did not explain why rental payments were made by RaPower-3 while LTB had the obligation to make the payment or why payments were made though most Operation and Maintenance Agreements do not require payment until power is produced.

317. This "payment" with lenses illustrates the illusory nature of the agreements and the absolute discretion Johnson exercises in relation to customers. The "payment" was unsolicited by customers and imposed a tax gain on them.[364] RaPower-3 advised that this tax gain could be mitigated by tax credits related to the lenses.[365] Thus, even at the eve of trial, Defendants were undeterred in their promotions and tax advice.

b. No customer has been paid a bonus.

318. The bonus contracts Johnson offered in the past are keyed to IAS's gross sales revenue.

319. Shepard and Freeborn know that no customer has been paid a bonus.[366]

320. Shepard does not know whether IAS has received sales revenue.[367]

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[362] Pl. Ex 796.

[363] *Id.*

[364] Pl. Ex. 796 at 2.

[365] Pl. Ex. 796 at 2.

[366] Shepard Dep. 34:18-35:24, 76:23-82:18, 93:17-94:13; Pl. Ex. 465.

[367] Shepard Dep. 77:6-78:18.

(continued...)

321. Shepard does not know what sales would generate such revenue.[368]

322. Shepard admitted that, even if IAS had generated sales revenue, he would not necessarily know about it.[369]

323. According to Johnson, IAS has never received any sales revenue.[370]

324. No customer has been paid a bonus.[371]

3. Defendants knew, or had reason to know, that their customers are not required to pay the full down payment, much less the full purchase price for a lens.

325. Shepard testified that Johnson "doesn't seem to be too forceful in trying to collect delinquent payments,"[372] and does not seem to even track which customers might be delinquent in paying their full down payment.[373]

326. Shepard does not believe that Johnson "does anything with people when they don't pay."

327. For example, one customer who purportedly purchased 500 lenses in January 2012 has not yet paid the "full down payment" of $1,050 on all 500.[374]

328. This customer has not done so yet because he has not yet received the benefit of using all 500 to reduce his tax liability.[375]

[368] Shepard Dep. 77:6-78:18.

[369] Shepard Dep. 77:6-78:18.

[370] Johnson Dep., vol. 1, 230:4-11.

[371] Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246.

[372] Shepard Dep. 112:9-113:7.

[373] Shepard Dep. 110:9-113:7; Pl. Ex. 468.

[374] Aulds Dep. 140:15-146:5.

[375] Aulds Dep. 140:15-146:5.

(continued...)

329. RaPower-3 has not taken action to collect the remaining down payment.[376]

330. If a solar lens customer no longer desires to "own" lenses, Johnson will refund the person's money and let them out of the contract.[377]

331. Johnson "has always" offered this out.[378]

332. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits Defendants promote.[379]

333. Johnson, via Shepard, reiterated this offer in January 2015 to customers who were being audited for having claimed the tax benefits that Defendants promote:

> We . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction. You can most likely get the IRS to drop the penalties. But, if you decide on the refund, then you would give up all bonuses and rental fees associated with those solar lenses.[380]

334. Customers know that they are not liable to make any payments on the debt they purportedly owe to RaPower-3 for the difference between their down payment and the remainder of the purchase price, at least until their lenses begin producing revenue.[381]

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[376] Aulds Dep. 140:15-146:5; *see also* Pl. Ex. 448, Deposition Designations for Mike Penn ("Penn Dep.") 11:21-15:23, 38:10-40:22 (Mar. 13, 2017), Pl. Ex. 391.

[377] Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

[378] Shepard Dep. 304:4-305:10.

[379] Johnson Dep., vol. 1, 237:16-239:13; Pl. Ex. 383; Shepard Dep. 304:4-305:10; Pl. Ex. 282 at 1.

[380] Pl. Ex. 282.

[381] Shepard Dep. 153:2-16; Gregg Dep. 53:20-55:9;

4. Defendants knew, or had reason to know, that Johnson, and not their customers, controlled the customers' purported "solar lens leasing businesses."

335. Johnson, Shepard, and Freeborn knew that RaPower-3 customers do not exercise any control over their purported lens leasing business.[382]

336. No customer has ever decided, for example, to buy a lens and then lease it to an entity other than LTB.[383]

337. Customers never take direct physical possession of their lenses.[384]

338. Because Defendants do not track which lens belongs to which customer, there is no way for a customer to know which specific lens he owns.[385] No customer testified that the owned lenses could be identified.

339. Johnson's entities retain the lenses and control what happens to them (if anything).[386]

340. Defendants emphasize how *little* any customer would have to do with respect to "leasing out" their lenses: "[s]ince LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."[387]

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[382] *E.g.*, Freeborn Dep. 28:19-40:16 (noting that he did not know where his lenses were or are, or what, exactly, they were being used for, or by whom).

[383] *See* LTB1 Dep. 87:10-88:6; RaPower-3 Dep. 62:21-64:5.

[384] LTB1 Dep. 87:10-88:6.

[385] *See* Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; Pl. Ex. 669 at 1 ("RaPower[-]3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17; *see also Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014) ("Gregg acknowledged on cross-examination that he was not certain whether the lenses were placed on the 'array' (*i.e.*, whether the lenses were or are in use) in Utah or stored someplace in boxes in a warehouse."); *e.g.*, Lunn Dep. 119:6-120:3; Zeleznik Dep. 35:21-38:13; Aulds Dep. 107:18-21, 130:21-131:11.

[386] LTB1 Dep. 32:8-34:15.

[387] Pl. Ex. 19.

(continued...)

341. As early as March 2011, Shepard was put on notice by the tax return preparer for RaPower-3 customer Kevin Gregg that she was "coming up empty handed with doing the business credit when there actually is no business."[388] Shepard told her that "Kevin has chosen not to work very hard at his business, but the IRS does not require hard work or even smart work. Kevin is still entitled to depreciate his systems."[389]

342. Over the years, other tax professionals have questioned the validity of different aspects of the solar energy scheme.[390]

343. Shepard keeps customers updated about what Johnson's entities are doing with their lenses (if anything). Shepard described this very process when he wrote to customers in June 2014[391]:

> **From:** Greg Shepard <greg@rapower3.com>
> **Sent:** Friday, June 20, 2014 8:32 PM
> **To:** undisclosed-recipients
> **Subject:** Ra3 Construction Update
> **Attach:** 016.JPG; 017.JPG
>
> TO ALL: A big RaPower3 Welcome to all our new members.
>
> PHOTOS #16 & 17 Installation: These two canvas buildings will add 20,000 square feet of construction space at the Delta, Utah project site. Twenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014.
>
> QUESTIONS AND ANSWERS:

. . .

> Q: Also, how do I as an owner know what my product is doing?
> A: Through my e-mails and rapower3.com website. Your lenses are being used right now by virtue of your Bonus Contract. It is our goal to have your lenses operating in a tower before summer is over.

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[388] Pl. Ex. 346 at 1; *see also* *Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *3-5 (Or. T.C. Nov. 30, 2017).

[389] Pl. Ex. 346 at 1.

[390] *E.g.*, Pl. Ex. 150; T. 1124:24-1127:7; Pl. Ex. 477; Shepard Dep. 235:20-239:14.

[391] Pl. Ex. 420.

(continued...)

344. Johnson knows that solar lens customers do not contact LTB for any reason.[392]

345. They do not inquire into LTB's experience operating and maintaining solar energy equipment, either before or after they sign the O&M to "lease out" their lenses to LTB.[393]

346. For example, in early 2014, one long-time RaPower-3 customer wrote to Shepard asking whether LTB has "a website, e-mail, contact #, or all of the above . . . ? I was unable to find anything online."[394]

347. This customer, who was being audited by the IRS for having claimed the tax benefits Defendants promote, noted that none of this information is in his O&M, and "[w]hen you google the company name and address there is zero information about the company."[395]

348. This customer told Shepard "I just want to be able to provide contact information for LTB if asked about it. . . . I fear it would be a big red flag if I cannot provide any contact information about the company who is supposed to be paying my rental fees."[396]

5. Defendants knew, or had reason to know, that their customers do not have special expertise or prior experience in the solar lens leasing business.

349. Johnson wanted to allow "everyday people" to "take advantage of all the generous tax benefits" of "not just receiving solar tax credits, but also getting the depreciation benefit" from buying solar lenses through RaPower-3.[397]

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[392] LTB1 Dep. 75:15-77:14.

[393] LTB1 Dep. 75:15-77:14; *e.g.*, Lunn Dep. 103:16-104:6; T. 1072:21-1074:4, 999:18-1000:24; Zeleznik Dep. 93:18-96:3.

[394] Pl. Ex. 77 at 1.

[395] Pl. Ex. 77 at 1-2.

[396] Pl. Ex. 77 at 1-2; Shepard Dep. 250:13-251:3; Pl. Ex. 72; *see also* Halverson Dep. 61:13-65:14; Pl. Ex. 189 at 1-3 (In 2011, a customer's accountant wrote to Shepard asking what, if anything, was happening with the customer's 2009 lens "purchase.")

[397] Pl. Ex. 8A at 7.

(continued...)

350. Defendants knew that they sold solar lenses to individuals who generally work full-time jobs, like teachers, school administrators, coaches, and others.[398]

351. They knew, or had reason to know, that their customers do not have special expertise in the solar energy industry.[399]

6. Defendants knew, or had reason to know, that advice from independent professionals did not support their claims about tax benefits.

352. In August 2009, Shepard consulted Ken Oveson, a CPA at Mantyla McReynolds.[400] He told Oveson that IAS had a system that could generate solar power.[401]

353. Shepard gave Oveson a basic overview of the transaction structure: that IAS and he wanted to promote a program where they would sell lenses to people for $3,500 total, with a partial down payment and the remaining payments financed with a note.[402] The purchasers would then make money off of the sale of electricity that was generated using their lenses, according to Shepard.[403]

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[398] Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12 (showing purported tax benefits of solar lens purchase for a "typical teaching couple."); Pl. Ex. 674 (touting "TAX TIME SUCCESS STORIES" from RaPower-3 customers with school-based jobs). Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1 (noting that RaPower-3 program allows "'Average Joes' like you and I" to qualify for solar energy tax credits; using as an example RaPower-3 customer a husband and wife who are a teacher and a nurse, respectively); Pl. Ex. 216 (noting a "teacher from the Midwest" who is a customer); Pl. Ex. 109 at 1 ("Sadly, right now most of the $6 Million is going to businesses rather than to teachers and coaches . . . ."); Pl. Ex. 214 ("The average dual income household, that pays taxes, forks over $5,000 each year to the IRS. Enrolling into RaPower[-] could reduce your federal income tax burden to ZERO!"); Pl. Ex. 544; Johnson Dep., vol. 1, 96:19-97:13; Zeleznik Dep. 9:10-13:5, 14:13-22, 24:9-28:21, 29:4-30:12; Gregg Dep. 22:10-33:24; T. 1066:4-1069:22, 978:2-979:24.

[399] *See* Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12; Pl. Ex. 674 (touting "TAX TIME SUCCESS STORIES" from RaPower-3 customers with school-based jobs). *See* Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1; Zeleznik Dep. 9:10-13:5, 14:13-22, 24:9-28:21, 29:4-30:12; Gregg Dep. 22:10-33:24; T. 1066:4-1069:22, 978:2-979:24.

[400] T. 328:24-330:9; Pl. Exs. 372-374.

[401] T. 336:7-11.

[402] T. 337:5-340:19.

[403] T. 339:9-340:19.

(continued...)

354. Shepard wanted an opinion from Oveson on whether a customer could claim a depreciation deduction and solar energy tax credit.[404] Among the specific topics Shepard wanted to know were whether solar lenses could be considered "placed in service" and how customers could meet "material participation" standards.[405] It was Oveson's understanding that Shepard was going to use the Mantyla McReynolds' tax opinion letter to market the solar energy program.[406]

355. In 2009, Shepard told Oveson that the company was producing solar energy, that they would be selling the solar lenses to investors, and that these investors were counting on receiving the energy credit, and that they would also be taking depreciation deductions since they own the equipment.[407]

356. Shepard told Oveson that '[h]aving our solar property 'placed in service' with absolutely no gray areas is fundamental to our selling units for our solar project west of Delta."[408] Shepard also told Oveson that IAS "has sent every client a letter stating the units have been placed in service. The IRS guidelines on that are easy to meet. The [IAS] units have done that."[409]

357. In researching and preparing the letter that Shepard wanted, Oveson became concerned about the developmental stage of the company. Oveson testified he told Shepard that, in order for customers to take both depreciation and the energy credit, the lenses had to be placed

[404] T. 330:17-331:16.

[405] Pl. Exs. 372 at 1, 373 at 1-2, 374 at 2; T. 344:7-346:19, 358:9-361:3 .

[406] T. 331:11-23.

[407] T. 334:3-15, 336:7-20.

[408] Pl. Ex. 373 at 1.

[409] Pl. Ex. 372 at 1.

(continued...)

in service. Since the company was a developmental company and it was not operating, the lenses could not be placed in service yet.[410]

358. Oveson's "biggest concern was that the placed in service issue, that we didn't feel that the equipment was placed in service" because the lenses did not have the ability to perform or function to create electricity. "[A]nd therefore [the lenses] wouldn't qualify for the credit or the depreciation."[411]

359. Oveson told Shepard his opinions: that the lenses were not placed in service and therefore would not qualify for a depreciation deduction or the solar energy tax credit for purchasers.[412]

360. Oveson's colleagues at Mantyla McReynolds, led by Cody Buck, were auditing IAS's financial statements around the same time.[413] The audit revealed the lenses were not placed in service for financial auditing purposes because they were not connected within a system that was generating electricity and therefore revenue.[414] Therefore, customers' lens down payments could not be booked as current income for IAS and had to be deferred until the lenses were placed in service.[415] The down payments were liabilities for IAS because customers could demand refunds of their down payments if the lenses did not produce revenue.[416] According to Buck, the financial statements he received from IAS from its prior CPA showed deferred

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[410] T. 343:1-344:10.

[411] T. 343:21-344:10.

[412] T. 350:22-354:7; Pl. Ex. 372.

[413] T. 242:14-243:1.

[414] T. 268:3-270:12.

[415] T. 255:3-256:2, 257:7-258:1.

[416] T. 259:14-261:9.

(continued...)

revenue for customer deposits, and therefore an understanding that the lenses were not yet placed in service.[417]

361. Because "[t]here must be consistency between the books of [IAS] and the taxpayer," if IAS's books did not recognize the lenses as placed in service, Oveson told Shepard that the taxpayers could not either.[418]

362. Shepard had told customers that Oveson would be available to explain the purported tax benefits of buying lenses on a conference call.[419] Shepard misrepresented the information generally, and his personal relationship with Oveson to lens customers.[420] Via email Shepard stated "I met with my CPA today…I have retained him and his firm…"[421] Oveson testified that he was not Shepard's personal CPA.[422]

363. When Oveson reported his conclusion that the lenses were not placed in service (which is a "key factor in taking deductions for depreciation and credits"[423]), Shepard said that they would find another CPA to give him the opinion he was looking for.[424]

364. Within a week of first meeting with Shepard, Oveson had withdrawn the engagement.[425]

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[417] T. 255:25-262:9.

[418] Pl. Ex. 372 at 1.

[419] Pl. Ex. 136 at 2-3; T. 366:1-18.

[420] *See* Pl. Ex. 136 at 2-3; T. 363:4-364:5.

[421] Pl. Ex. 163.

[422] T. 363:4-364:5.

[423] Pl. Ex. 372 at 1.

[424] T. 358:9-359:21; Pl. Ex. 373 at 1.

[425] T. 364:19-365:8.

(continued...)

365. As of October 2010, Shepard wrote to Johnson with his concern that certain aspects of the solar energy scheme were "problematic" under the internal revenue laws, including the fact that lenses "are purchased and then rented back."[426] Shepard stated that an opinion from Johnson's attorney on "the seven criteria for determining active participation would be essential."[427]

366. Around the same time, Johnson approached Todd Anderson, of the Anderson Law Center, with some questions about principles of tax law.[428] Todd Anderson referred the questions to his wife and partner in the Anderson Law Center, Jessica Anderson.[429]

367. Johnson gave Jessica Anderson only limited information about the factual context for the questions he had about tax law.[430] She relied on the information Johnson provided.[431]

368. Jessica Anderson researched the law applicable to general tax principles and summarized it.[432] She delivered a letter to Johnson in or about October 2010 with her summary of the three general principles of tax law he had asked about, including "material participation," which goes to whether a customer's activity in a trade or business is substantial enough such that business deductions may be claimed against other active income or must be claimed against passive income and the requirements to claim depreciation.[433]

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[426] Pl. Ex. 574.

[427] Pl. Ex. 574.

[428] T. 490:24-491:6; Pl. Ex. 570; T. 573:10-14.

[429] T. 500:17-501:3.

[430] T. 573:2-25.

[431] T. 573:15-576:5.

[432] *E.g.*, T. 498:14-23; 580:1-10;; Pl. Ex. 570; Pl. Ex. 23.

[433] Pl. Ex. 570; T. 578:4-22; 580:21-581:5; 589:2-598:12.

(continued...)

369. Citing 26 U.S.C. § 469(c)(2) & (4), the October 2010 letter stated that "losses generated from equipment leasing are considered to be passive," and that "material participation" standards do not apply to equipment leasing.[434] The letter noted exceptions to these rules, but expressly did not opine that any exception would apply to the limited facts stated in the letter.[435]

370. Further, the letter stated that, even if material participation standards did apply, "[i]nvestor-type activities do not count [toward material participation] unless the taxpayer is directly involved in day-to-day management or operations."[436] The "investor-type activities" that do not count include[437]:

- Studying or reviewing financial statements or reports.
- Preparing or compiling summaries of analyses for the individual's own use.
- Monitoring finances or operations in a non-managerial capacity.
- (This list is not all inclusive. Other activities could include organizing records, preparing taxes, and paying bills.)

371. Jessica Anderson also noted it is unlikely that a taxpayer will have "materially participated" in an activity if (among other things)[438]:

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[434] Pl. Ex. 570 at 2.

[435] Pl. Ex. 570 at 2-4.

[436] Pl. Ex. 570 at 5 (citing 26 C.F.R. § 1.469-5T(f)(2)(ii)(B)).

[437] Pl. Ex. 570 at 5.

[438] Pl. Ex. 570 at 6.

- The taxpayer was not compensated for services. Most individuals do not work significant hours without expecting wages or commissions.
- The taxpayer's residence is hundreds of miles from the activity.
- The taxpayer has a W-2 job requiring 40+ hours a week for which he or she receives significant compensation.
- The taxpayer has numerous other investments, rentals, business activities, or hobbies that absorb significant amounts of time.
- There is a paid on-site management/foreman/supervisor and/or employees who provide day-to-day oversight and care of the operations.
- The taxpayer is elderly or has health issues
- The majority of the hours claimed are for work that does not materially impact operations.
- Business operations would continue uninterrupted if the taxpayer did not perform the services claimed.

372. Johnson was unhappy with the October 2010 letter.[439] He thought the letter was too technical and wanted something more akin to marketing materials.[440] He also wanted energy credits to be included.[441]

373. Jessica Anderson and Todd Anderson revised the October 2010 letter in an attempt to address Johnson's concerns.[442] In November 2010, they gave Johnson their revisions in a working draft.[443] Jessica Anderson and Johnson were going to review it together.[444]

374. The October 2010 letter and the November 2010 draft provide a general summary of what the law is.[445] They do not include specific facts about the transactions, purported energy

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[439] T. 599:10-600:19.

[440] T. 601:2-14.

[441] T. 601:21-602:3.

[442] T. 602:11-603:7.

[443] Pl. Ex. 23A; T. 611:3-611:21; Pl. Ex. 23; T.603:19-604:10, 511:8-514:19.

[444] T. 604:4-10.

[445] Pl. Exs. 570 & 23.

(continued...)

property, or people or entities at issue in the solar energy scheme.[446] Neither the October 2010 letter nor the November 2010 draft state that purchasers of solar lenses are in a "trade or business" with respect to the solar lenses or are holding the lenses to generate income, or that any person who purchases solar lenses through RaPower-3 may lawfully claim the tax benefits Defendants promote.[447]

375. Only *after* Johnson received the November 2010 draft did he give the Andersons specific facts of the transactions he proposed for RaPower-3 customers.[448] Johnson wanted an opinion letter saying that, on the facts he provided, RaPower-3 customers could claim a depreciation deduction and solar energy tax credit on the energy equipment.[449] He wanted the opinion letter to say that the lenses were placed in serviced immediately upon purchasing as opposed to when a lens started actually producing energy.[450]

376. Johnson was trying to find a way to generate tax benefits (a depreciation deduction and a solar energy tax credit) for lens purchasers before his purported solar energy equipment ever produced energy.[451] Johnson admitted that customers would not be running a solar energy power plant and would not be involved in the day-to-day operations of running the energy equipment.[452]

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[446] Pl. Exs. 570 & 23.

[447] *See generally* Pl. Ex. 570 at 6-7 (To be depreciable, property "must be used in your business or income-producing activity."); Pl. Ex. 23 at 2 ("To be depreciable, the property must meet all of the following requirements: . . . it must be used in your business or income-producing activity . . . .").

[448] T. 608:22-609:12, 612:11-625:25.

[449] T. 612:11-613:1.

[450] T. 620:11-17.

[451] T. 613:12-614:6, 617:8-620:17, 621:7-625:11 .

[452] T. 583:14-584:2, 618:22-619:25.

(continued...)

377. When Jessica Anderson questioned Johnson about how customers would materially participate in their business, none of Johnson's answers led her to conclude that there would be active participation by any customer. Johnson believed that RaPower-3 customers would actively participate in an energy production business, and thus be entitled to tax benefits, by being a member of the multi-level marketing structure, and their participation would be in selling more equipment to others.[453]

378. After taking the information Johnson provided and performed research, Jessica Anderson could not find any information that would indicate that the tax benefits would be applicable to RaPower-3 customers immediately upon purchase of the equipment.[454]

379. Johnson came into Anderson Law Center, and Jessica Anderson expressed her concerns about the energy credits, specifically (1) customers couldn't take energy credit for equipment that was not producing energy, (2) just by taking energy equipment and using it as a billboard wasn't placing it in service, and (3) selling energy equipment didn't qualify as active participation in an energy producing business.[455]

380. When Jessica Anderson told Johnson she was not sure that the energy equipment would qualify for the energy credit, Johnson brushed it off and they didn't talk about it again.[456]

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[453] T. 618:10-619:25.

[454] T. 621:25-622:18.

[455] T. 622:19-623:20.

[456] T. 623:21-624:1.

(continued...)

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381. Jessica Anderson believed that equipment leasing under the IRS laws qualified as passive and told Johnson that she did not believe sales activity qualified as active participation in running an energy production business.[457]

382. Johnson remained confident that his ideas were going to fit within the parameters of the tax code and asked Jessica Anderson to go back and look at it again.[458]

383. Jessica Anderson and Todd Anderson discussed the issue and decided that their opinion remained the same, that "these principles" did not immediately apply to a RaPower-3 customer.[459]

384. Over the next several weeks, Johnson returned to the Anderson Law Center to propose different hypotheticals to change Jessica Anderson's opinion that the tax principles would apply to RaPower-3 customers.[460]

385. Jessica Anderson communicated to Johnson that these new hypotheticals did not change her opinion and a purchaser of energy equipment from RaPower-3 would not meet the active participation requirement.[461]

386. Jessica Anderson ultimately decided that she could not reach the conclusions that Johnson wanted her to reach regarding the tax principles as it applied to RaPower-3 customers.[462]

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[457] T. 624:14-625:4.

[458] T. 625:5-11.

[459] T. 626:3-9.

[460] T. 626:10-627:6.

[461] T. 627:7-21.

[462] T. 627:7-628:3.

(continued...)

387. In January 2011, Jessica Anderson told Johnson that she could not reach the conclusions she wanted him to and he would need to find another attorney.[463]

388. Via email, Jessica Anderson wrote Johnson and reiterated that she did not believe customers who purchased solar equipment and then turned over the operation of the equipment to generate power to a third party would be considered active participants in a business. Also, in this email Jessica Anderson informed Johnson that he would need to find a new attorney.[464]

389. In fall 2012, Johnson retained Kirton McConkie, through its partner Kenneth Birrell, on behalf of his entity or entities XSun Energy, SOLCO I, and/or International Automated Systems, Inc.[465]

390. Birrell provided SOLCO I and Johnson with a memorandum containing a general overview of the tax benefits associated with the solar business that was described.[466] It summarizes "certain tax consequences for the buyers . . . of solar lenses from SOLCO I, LLC . . . based on factual circumstances that are substantially similar in all material respects" to the facts set forth in the memorandum.[467]

391. Among the facts stated or assumed in the memorandum is that the solar lens buyer is an entity taxed as a C corporation.[468] The memorandum does not address a solar lens buyer

[463] T. 629:12-630:23.

[464] T. 629:12-632:15; Pl. Ex. 582.

[465] T. 406:8-18, 407:14-18, 408:5-22, 412:8-23; Pl. Ex. 364 at 2; Pl. Exs. 355, 358, 370.

[466] Pl. Ex. 363 at 33-45; T. 412:10-23, 423:4-22.

[467] Pl. Ex. 363 at 33 ("Introduction").

[468] Pl. Ex. 363 at 33 ("Factual Background"); T. 422:25-424:7; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1 ("Please note that this analysis is limited to C corporations – there would be different issues for an individual, partnership or S corporation purchaser.").

(continued...)

that is an individual or a pass-through entity like a partnership or an S corporation.[469] The memorandum does not address whether an individual (or owner of a pass-through entity) could be considered to be in a "trade or business" or holding the lenses to generate income.[470]

392. The memorandum also assumes that the purported solar energy technology actually works as a system to generate electricity from solar radiation.[471] Birrell relied on the representation that the technology had been approved for a § 1603 grant.[472] If Birrell had known that there was no system that would work using the lenses to convert solar radiation to any sort of energy, he would not have written the memorandum because the lenses would not be eligible for the solar energy tax credit.[473]

393. Another assumption in the memorandum is that any lens purchase and lease arrangement would be executed using the transaction documents that Birrell prepared.[474]

394. Johnson knew these features of the memorandum. Birrell reminded him that the memorandum applies only to C corporations.[475]

395. RaPower-3 put the Kirton McConkie memo on its website and has used the memo to market solar lenses, not just to C corporations, but to individuals as well.[476]

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[469] Pl. Ex. 363 at 33, 45; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1; T. 422:25-424:7.

[470] *See generally* Pl. Ex. 363 at 33-45; Pl. Ex. 370 at 1-2; T. 422:25-424:7.

[471] Pl. Ex. 363 at 33-34, 37; T. 429:12-25, 440:6-18, 713:16-715:2.

[472] T. 420:24-25.

[473] T. 429:12-25, 440:6-18, 713:16-715:2.

[474] Pl. Ex. 363 at 33-34.

[475] Pl. Ex. 364.

[476] T. 454:6-8.

(continued...)

396. Shepard received both the Anderson November 2010 draft and the Kirton McConkie memorandum from Johnson.[477]

397. In or around July 2013, the Andersons learned that Johnson was using their November 2010 draft to encourage people to buy solar lenses, and take a depreciation deduction and solar energy tax credit on their tax returns.[478] The Andersons retained an attorney to send a cease-and-desist letter to Johnson and RaPower-3, stating that the November 2010 draft was "only in the 'rough draft' stage and was intended to solicit additional information" and was not a final product.[479]

398. Similarly, Birrell learned that the Kirton McConkie memorandum was on the RaPower-3 website.[480] On or about January 10, 2014, Birrell sent a cease-and-desist letter to Johnson.[481] Birrell told Johnson that: 1) the memorandum is a general summary of tax principles regarding an energy tax credit and is not an opinion letter; 2) the memorandum is written with the assumption that the taxpayer claiming the credit is "taxed as a subchapter C corporation[] for federal income tax purposes," and is not an individual or subchapter S corporation; and 3) the analysis in the memorandum is only valid if the solar lens transactions are completed on the terms and conditions of the transaction documents Birrell drafted and attached to the memorandum.[482]

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[477] Shepard Dep. 280:24-281:18; RaPower-3 Dep. 172:24-173:5.

[478] T. 5336-9 ; *see also* Aulds Dep. 157:1-8; Pl. Ex. 399.

[479] Pl. Ex. 480 at 1; T. 533:6-536:21 .

[480] T. 454:4-457:15.

[481] Pl. Ex. 370; T. 460:4-10; Pl. Ex. 579, Johnson Dep., vol. 1, 277:18-279:3.

[482] Pl. Ex. 370 at 1-2; *accord* Pl. Ex. 363 at 34-45 (general principles described), 33 (purchaser taxed as C corporation), 33-34 and 2-32 (transactions completed per transaction documents supplied).

(continued...)

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399. Shepard learned, soon after the Kirton McConkie memorandum was issued, that Birrell said that the memorandum could not be used to support the solar energy scheme.[483] Yet Shepard expressly told customers that Shepard "believe[d] that the vast majority, if not all, of the references and information contained therein also applies to sole proprietor."[484]

400. Shepard continuously misled and made false statements to RaPower customers about these writings. Plaintiff's Exhibit 231 is an example of how Shepard disseminated false information to customers regarding tax benefits. Shepard attempted to summarize the Kirton McConkie memorandum and in doing so altered a major fact. Although the analysis in the memorandum applies only to C corporations, Shepard's summary asserts that the memorandum also applies to LLCs and sole proprietors:

> **Shepard's Note:** The Kirton-McConkie Memorandum was written specifically for corporations or limited liability companies. While some RaPower3 Team Members have purchased their Solar Lenses as an LLC, most have purchased as a sole proprietor. However, Shepard believes that the vast majority, if not all, of the references and information contained therein also applies to sole proprietors

401. Shepard also summarizes the memorandum and titles his summary "Kirton-McConkie Memorandum Comments." Birrell did not write these comments nor did he review Shepard's comments. This is confusing to RaPower-3 customers.[485]

402. Shepard told RaPower-3 customers that he wrote Birrell "a detailed letter about the situation and asked [him] to write a letter of clarification." Birrell testified that he did not

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[483] Shepard Dep. 276:8-22; Pl. Ex. 231.

[484] Pl. Ex. 479 at 3; *see also generally id.* at 1-4; Shepard Dep. 270:7-271:4, 279:10-280:21.

[485] Pl. Ex. 231.

(continued...)

receive any letter from Shepard; he never wrote a clarification letter; and he never talked to Shepard after his one visit to Kirton McConkie.[486]

403. Shepard also falsely told RaPower-3 customers that Kirton McConkie could not rescind the memorandum.

404. The Andersons' November 2010 draft and the Kirton McConkie memorandum remained on RaPower-3's website until this Court ordered them to remove it – even after Defendants heard the Andersons and Birrell testify to the reasons the writings could not be used as Defendants were using them.[487]

405. Defendants had reason to know, and did in fact know that RaPower-3 customers were not entitled to the tax benefits they promoted based on their serial solicitations and rejections from multiple attorneys, and the misrepresentations to RaPower-3 customers regarding who they met with and the attorneys' work product. Therefore, Defendants knew that their statements made to RaPower-3 customers were false or fraudulent.

406. Furthermore, based on the testimony presented, Johnson did not meet with any engineers regarding the scheme. But he consulted with tax professionals and attorneys regarding the tax issues. This shows that this is not a bona fide energy activity, but a tax scheme.

7. Defendants knew, or had reason to know, that the IRS disallowed their customers' depreciation deductions and solar energy tax credits.

407. The IRS began investigating Defendants' conduct in June 2012.[488]

[486] Pl. Ex. 231; T. 468:7-469:25.

[487] Pl. Ex. 903 at 2 ("Tax Opinion (Anderson)" and "Tax Letter (K&M)"); *see also* RaPower-3 Dep. 125:2-129:6; T. 537:8-540:8; Pl. Ex. 548; T. 454:4-457:25; Pl. Exs. 27, 351.

[488] *See* Pl. Ex. 10 at 2; Shepard Dep. 311:2-313:2.

(continued...)

408. Defendants knew, at least as of June 2013, that the IRS was auditing their customers and disallowing the tax benefits Defendants promoted.[489]

409. Defendants knew, as of November 2014, that IRS investigators had contacted tax return preparers who had prepared returns for Defendants' customers and claimed the tax benefits Defendants promoted.[490]

8. Defendants knew, or had reason to know, that the Oregon Tax Court rejected their customers' depreciation deductions and solar energy tax credits.

410. Defendants knew, as early as 2013, that the State of Oregon disallowed tax benefits their customers claimed on their state tax returns.[491]

411. To date, there have been three decisions issued by the Oregon Tax Court, Magistrate Division, which disallowed the tax benefits Defendants promote. The first decision came out in October 2014.[492]

412. These three decisions follow federal law in evaluating the allowability of the customers' claimed depreciation deduction and solar energy tax credit because Oregon state tax law is intended to be "identical in effect to the [internal revenue code] for the purpose of determining [Oregon state] taxable income of individuals."[493]

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[489] *E.g.*, Pl. Ex. 328; Gregg Dep. 141:20-142:7; Pl. Exs. 71 & 73; Zeleznik Dep. 165:13-166:10, 167:3-21; Pl. Ex. 602; Howell Dep. 216:16-217:15.

[490] Pl. Ex. 606; Howell Dep. 226:11-227:23; *see also* Pl. Ex. 642;.

[491] T. 1275:2-18; ; Pl. Ex. 279; Gregg Dep. 147:5-148:10, 149:1-7, Pl. Exs. 330-33.

[492] *Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *10 (Or. T.C. Nov. 30, 2017); *Orth v. Dep't of Revenue*, No. TC-MD 160075R, 2017 WL 5904611, at *10 (Or. T.C. Nov. 30, 2017); *Peter Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014). Former counsel for Defendants, Justin Heideman, represented the taxpayers in the two most recent cases. *K. Gregg*, 2017 WL 5900999, at *1; *Orth*, 2017 WL 5904611, at *1.

[493] *K. Gregg*, 2017 WL 5900999, at *2 (citing ORS § 316.007); *P. Gregg*, 2014 WL 5112762, at *4 (same).

(continued...)

413. All three cases concluded, based on the customers' conduct and a comprehensive analysis of the relevant provisions of the internal revenue code, that the customers did not have a trade or business involving the solar lenses.[494]

414. All three cases disallowed all tax benefits related to the solar lenses.[495]

D. In connection with organizing or selling any interest in a plan or arrangement, Defendants made or furnished (or caused another person to make or furnish) gross valuation overstatements as to the value of the solar lenses.

415. Defendants currently sell a single solar lens for a total purported price of $3,500.

416. But the record evidence showed that Plaskolite charged IAS between $52 and $70 dollars for a rectangular sheet of plastic.[496]

417. Assuming each rectangle could be cut into a single triangular "lens," the raw cost of that "lens" is very low.

418. There is no other credible evidence about other possible costs of a "lens."

419. The correct valuation of any "lens" is close to its raw cost, and does not exceed $100.

E. The harm caused by Defendants' conduct is extensive.

420. Defendants' customers followed the solar energy scheme and claimed depreciation deductions and solar energy credits on their tax returns.

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[494] *K. Gregg*, 2017 WL 5900999, at *5; *Orth*, 2017 WL 5904611, at *5; *P. Gregg*, 2014 WL 5112762, at *4.

[495] *K. Gregg*, 2017 WL 5900999, at *10; *Orth*, 2017 WL 5904611, at *10; *P. Gregg*, 2014 WL 5112762, at *6.

[496] Pl. Ex. 518, 519, 520.

(continued...)

421. The United States was able to identify and collect information about certain of Defendants' customers' tax returns for tax years 2013-2016. [497] Over 1,600 tax returns from 9 preparers were examined.[498]

422. A reasonable approximation of the harm to the Treasury, from depreciation and tax credits claimed, from this sample is at least $14,207,517.[499]

423. Critically, these numbers do not include the still-unknown harm to the Treasury from Defendants' misconduct.

424. It does not include tax returns for tax years 2008 through 2012, when customers bought lenses and claimed unwarranted tax benefits as a result.

425. It does not include tax returns for tax year 2017, although Defendants sold lenses in 2017 and it is reasonable to conclude that the people who "bought" lenses in 2017 claimed the tax benefits Defendants' promoted for tax year 2017.

426. The United States' numbers also do not include, for example, customers' tax returns that claimed the tax benefits Defendants promoted throughout the solar energy scheme, but which the IRS has not yet identified.[500]

427. Defendants' conduct wrongfully deprived the U.S. Treasury of the taxes Defendants' customers lawfully owed.

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[497] Pl. Ex. 752; T. 825:1-826:3;; *see also, e.g.*, Howell Dep. 186:3-190:23, 193:22-194:10, 194:19-200:20; Pl. Exs. 598-99; T. 1221:17-25; Pl. Exs. 128-32, 316-17, 636; T. 1137:5-18; Zeleznik Dep. 152:10-15, 152:22-159:5; Pl. Exs. 63-68; Gregg Dep. 102:7-103:25, 104:24-105:4, 105:15-106:2, 112:7-124:9; Pl. Exs. 308, 314-17

[498] Pl. Ex. 752at 1, T. 825:13-15; 829:8-830:17.

[499] Pl. Ex. 752 at 3; T. 833:22-833:25.

[500] Penn Dep. 38:10-43:21; Pl. Ex. 391 at 33; Aulds Dep. 154:22-155:16 & 158:17-; *compare* Pl. Exs. 397, 400, 401 (which have no connection to RaPower-3 on the face of the return) *with* Pl. Ex. 402 at 19 (with connection to RaPower-3 on the face of the return); Howell Dep. 199:7-200:10; *see* T. 1228:18-1229:14, 1247:17-1248:4.

III. Conclusions of Law

One of the statutes under which the United States seeks an injunction is 26 U.S.C. § 7408. Section 7408(a) authorizes a district court to enjoin any person from engaging in conduct subject to penalty under 26 U.S.C. § 6700 if injunctive relief is appropriate to prevent recurrence of that conduct or any other activity subject to penalty under the Internal Revenue Code.[501] Section 6700 is meant to attack abusive tax shelters "at their source: the organizer and salesman."[502] It creates a penalty for a person who 1) organizes or sells any plan or arrangement involving taxes and 2) makes or furnishes, or causes another to make or furnish, a statement connecting the allowability of a tax benefit with participating in the plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter.[503]

A. Defendants organized, or assisted in organizing, the solar energy scheme, and sold solar lenses pursuant to the scheme.

"[A]ny 'plan or arrangement' having some connection to taxes" is a "plan" under § 6700.[504] The solar energy scheme is a "plan" under § 6700 because the key component of the scheme was its promoted connection to the federal tax benefits of a depreciation deduction and a solar energy tax credit.

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[501] 26 U.S.C. § 7408(b).

[502] S. Rep. No. 97-494,Vol. 1 at 266 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1014.

[503] 26 U.S.C. § 6700(a)(2)(A).

[504] *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n. 1 (7th Cir. 2013); see also *United States v. Stover*, 650 F.3d 1099, 1107-08 (8th Cir. 2011) (The organizing, promoting, or selling element of § 6700 "should be defined broadly, and is satisfied simply by selling an illegal method by which to avoid paying taxes." (quotations omitted).); *United States v. Benson*, 561 F.3d 718, 722 (7th Cir. 2009); *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

(continued...)

All Defendants organized, or assisted in organizing the scheme, and sold the scheme to customers either directly or through other people.[505] Johnson created the solar energy scheme and organized other people, including Shepard and Freeborn, to sell lenses pursuant to the scheme. Johnson directed IAS, and now, RaPower-3, to market the lenses in ways that would maximize sales. Johnson also established the contracts and infrastructure through which customers buy lenses. In an effort to increase sales, Johnson has spoken to countless customers and prospective customers about his purported solar energy technology and the tax benefits he promotes, including on radio broadcasts twice per month since March 2017. Johnson directed both IAS and RaPower-3 to pay commissions to people who sell solar lenses. He also gave Shepard and Freeborn information about the purported technology, the transactions underlying the solar energy scheme, and the purported tax benefits to publicize and, thereby, increase sales of solar lenses. Johnson is paying for customers' representation in Tax Court, and Shepard's and Freeborn's representation in this case.

Shepard takes all Johnson's information about the solar energy scheme, adds his own observations, and then spreads the scheme as widely as he can, especially through the internet and social media. Shepard has created and managed a website, newsletter, and email distribution list solely devoted to selling solar lenses through RaPower-3; supported and encouraged RaPower-3 "distributors" to increase their downline sales; convened and hosted events like the 2012 RaPower-3 National Convention and other tours of Defendants' facilities. When distributors or other customers have questions, they look to Shepard (as "Chief Director of Operations for RaPower-3") to answer them, or to get the answer from Johnson. Shepard also

[505] *See* § 6700(a); *Stover*, 650 F.3d at 1107-08; *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1104 (9th Cir. 2000); *United Energy Corp.*, 187 WL 4787, at *8-9.

provides arguments and materials for customers to submit to the IRS that mirror Defendants' promotional materials.

Freeborn was a prolific salesman for RaPower-3. As the self-titled "National Director for RaPower-3," he took information from Johnson and Shepard about the purported technology, the transactions, and the purportedly related tax benefits, and presented it to people in-person or by phone or email. His work resulted in more than $300,000 in commissions; it follows from IAS's and RaPower-3's commission structure, that either Freeborn or those in his downline have generated well over $3 million in actual revenue to IAS or RaPower-3.

B. While promoting the solar energy scheme, Defendants made or furnished (or caused others to make or furnish) statements about the allowability of a depreciation deduction and a solar energy tax credit as a result of buying solar lenses, which statements Defendants knew or had reason to know were false or fraudulent.

Defendants told customers they could claim a tax deduction for depreciation on the lens and the solar energy tax credit on their individual income tax returns if they purchased a lens. Defendants constantly made statements to customers, over years and years, in support of these assertions while promoting the solar energy scheme. Defendants' statements were false or fraudulent as to material matters, and Defendants knew or had reason to know it.

Statements about "material matters" include those that "directly address[]" the tax benefits purportedly available to a participant in a tax scheme and those that "concern[] factual matters that are relevant to the availability of tax benefits."[506] "Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor

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[506] *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, at *9.

(continued...)

and include matters relevant to the availability of a tax benefit."[507] "There is no matter more material to the sale of a tax avoidance package than whether the package effectively allows customers to avoid taxes."[508]

A statement about a material matter is false in the tax law context if "untrue and known to be untrue when made."[509] A statement about a material matter can also be false because of what a plan promoter fails to say.[510] Promoters are charged with knowledge of the law governing the tax benefits they promote.[511] A promoter who does not tell customers all of the requirements

[507] *Campbell*, 897 F.2d at 1320; *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985).

[508] *Benson*, 561 F.3d at 724; see *Stover*, 650 F.3d at 1111 (affirming district court's finding that a promoter's promises of numerous tax advantages induced customers to purchase his tax arrangements).

[509] *Stover*, 650 F.3d at 1108.

[510] 26 U.S.C. § 7408(c) (conduct subject to injunction is "any action, *or failure to take action*" which is subject to certain penalty provisions or the regulations governing practice before the IRS (emphasis added)); *Stover*, 650 F.3d at 1109 (8th Cir. 2011) ("Stover's statements regarding all three schemes were also false because of what he failed to convey: that deductions taken under 26 U.S.C. § 162(a) must be 'ordinary and necessary' for the deducting business. The district court found that Stover 'advised his clients to set up these entities in order to save taxes without also advising them of the potential pitfalls and the actions necessary to guard against the obvious conclusion that the transaction was a sham and bore no relation to reality.' . . . [C]ourts have repeatedly held that a tax promoter's failure to advise his clients of the requirements for a proper deduction qualifies as a false statement."); *United States v. Gleason*, 432 F.3d 678, 682-683 (6th Cir. 2005) (affirming district court's finding that a defendant "made false statements about the purported home-based business deductions" that the defendant claimed could be derived from using his abusive tax scheme because the defendant "did not properly qualify his assertions about the deductibility of weddings, college, travel, meals, golf, cars, and everyday household expenses by stating that business expenses must be 'ordinary and necessary' to the business, and that personal consumption expenditures must be 'inextricably linked to the production of income[.]'" (internal citations omitted)); *United States v. Elsass*, 978 F. Supp. 2d 901, 935 (S.D. Ohio 2013) (listing "examples of false statements made by [the defendants], keeping in mind that statements can be false based on what they fail to convey").

[511] *See*, *e.g.*, *United States v. Campbell*, 704 F. Supp. 715, 725 (N.D. Tex. 1988) ("The Coral program was based on the deduction for research and experimental expenditures allowed by [I.R.C. § 174]. That section permits an electing taxpayer to currently deduct from gross income (rather than to amortize) the amount of expenditures 'paid or incurred' for research and experimental activities. Acquiring a project completed before the date of acquisition would not constitute an expenditure for research and experimentation under Section 174." (citation omitted)); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985) ("Under Section 46(c) of the Code, property must be placed in service in the year for which an investment tax credit is claimed. Music Masters represented to investors that these masters were purchased in 1982 and that the investors could deduct the investment tax credits for that year. These were material false statements, since the availability of credits for the 1982 year would have a substantial impact on a reasonably prudent investor in the investment program." (citations omitted)).

(continued...)

to lawfully claim a deduction or credit has made a false statement.[512] A promoter who does not tell customers all of the facts relevant to whether the customers may lawfully claim a deduction or credit has made a false statement.[513]

A court may conclude that a promoter had *reason to know* his statements are false or fraudulent based on "what a reasonable person in the defendant's subjective position would have discovered."[514] The trier of fact may impute knowledge to a promoter, "so long as it is commensurate with the level of comprehension required by [his] role in the transaction."[515] A person selling a plan "would ordinarily be deemed to have knowledge of the facts revealed in the sales materials furnished to him by the promoter."[516] A person who holds himself out as an authority on a tax topic has reason to know whether his statements about that topic are true or false.[517] "The test for injunctive relief under § 7408 is satisfied if the defendant had reason to know his statements were false or fraudulent, regardless of what he actually knew or believed."[518]

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[512] *E.g.*, *Stover*, 650 F.3d at 1109 ("When Stover's client Donald Clark questioned whether it was a 'legal and standard practice' to create sham management companies solely for tax savings purposes, Stover replied that it was. Stover's statements were false because they untruthfully conveyed that his clients' tax arrangements did not need to have economic substance.").

[513] *United Energy Corp.*, 1987 WL 4787, at *9 (among the false statements that the defendants made were "representations that [solar energy equipment] modules would be installed by the end of the year of purchase and that the solar farms were operational, letters stating that modules were installed and available for service, and statements reflecting payments for power that was never produced. The income projections also constituted false statements, as did, in some instances, the statement that a module existed at all.").

[514] *Campbell*, 897 F.2d at 1321-22 (quotation and alteration omitted); *accord* *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

[515] *Campbell*, 897 F.2d at 1322; *Estate Pres. Servs.*, 202 F.3d at 1103; *United States v. Davison*, No. 08-0120-CV-W-GAF, 2010 WL 286419, at *1 (W.D. Mo. Jan. 19, 2010).

[516] *United States v. Harkins*, 355 F. Supp. 2d 1175, 1180 (D. Or. 2004) (quotation omitted).

[517] *United States v. Poseley*, No. CV 06–2335–PHX–EHC, 2008 WL 4811174, at *2 (D. Ariz. Nov. 4, 2008) ("Although the Defendants attempted to disclaim liability as tax or legal experts in their marketing materials, Defendants held themselves out as tax experts to their customers and at promotional seminars. Defendants knew or had reason to know that their tax evasion schemes, including the creation of Pure Trusts, were unlawful and fraudulent." (fact citations omitted)).

[518] *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

Here, Defendants' statements about "material matters" go to the law and facts applicable to 1) whether their customers were in a "trade or business" related to leasing out solar lenses, or were holding the lenses "for the production of income," such that their customers were allowed a depreciation deduction related to the solar lenses and the solar energy credit in § 48; 2) whether, even if their customers were in a "trade or business" or other "activity" with respect to the solar lenses, customers were allowed to deduct expenses against active income and use the solar energy credit to offset tax on active income; and 3) whether Defendants' customers were "at risk" for the full purchase price of each lens.

1. Defendants knew, or had reason to know, that their customers were not allowed a depreciation deduction or the solar energy credit because customers were not in a "trade or business" related to the solar lenses and did not hold the lenses for the production of income.

Under the proper circumstances, the Internal Revenue Code allows a taxpayer engaged in a trade or business certain tax deductions for expenses the taxpayer incurs while generating income, and certain credits against tax liability. At issue here are the business deduction for depreciation and the solar energy credit.

a. Defendants knew, or had reason to know, that their customers were not in a "trade or business" related to the solar lenses and did not buy lenses for the production of income.

The typical first step in the analysis of whether a taxpayer is in a "trade or business" (such that depreciation and/or the solar energy credit may be allowed) is to determine whether the taxpayer has undertaken activity for that purported "trade or business" in good faith, with the primary purpose of the activity to make a profit – or, instead, has bought into an abusive tax scheme designed to create tax losses.[519] Here, the focus is on *Defendants' statements* to their

[519] 26 U.S.C. §§ 162(a), 183, 7701(o)(1)(A) (for a transaction to be recognized for tax purposes, the transaction must "change[] in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position"); *Nickeson*

(continued...)

customers that their customers were in the trade or business of holding out solar lenses for lease, and what Defendants knew or had reason to know about whether those statements were false or fraudulent.

At minimum, Defendants had "reason to know" that their solar energy scheme is an abusive tax scheme rather than a bona fide trade or business for their customers, and that their statements about tax benefits were false or fraudulent. Common red flags that courts have identified as showing an abusive tax scheme include: 1) continued failure of a purported "business" to earn income; 2) control of the purported business remaining with the promoter, rather than the customer; 3) illusory contract documents with little cash outlay by the customer and substantial debt or obligation that the customer is unlikely to pay; and 4) a promoter's heavy emphasis on greatly reducing or eliminating a customer's tax liability by buying in to the plan.[520] Courts have rejected abusive tax schemes with these features.[521] All of these red flags are present here and, for the reasons that follow, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens purchaser was in a "trade or business" with respect to any solar lens.

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v. Comm'r, 962 F.2d 973, 976-77 (10th Cir. 1992). Often, this question is before a court when an individual taxpayer claims to have a "trade or business" and therefore seeks business-related tax deductions and/or credits. *E.g.*, *Sala v. United States*, 613 F.3d 1249 (10th Cir. 2010), *as amended on reh'g in part* (Nov. 19, 2010); *Nickeson*, 962 F.2d at 976-77; *Keeler v. Comm'r*, 243 F.3d 1212, 1218-20 (10th Cir. 2001); *Jackson v. Comm'r*, 966 F.2d 598, 601 (10th Cir. 1992).

[520] *E.g.*, *Nickeson*, 962 F.2d at 976-77; *Music Masters, Ltd.*, 621 F. Supp. at 1049-50.

[521] *See Rose v. Comm'r*, 88 T.C. 386, 413 (1987) (collecting cases), *aff'd* 868 F.2d 851 (6th Cir. 1989), *not followed on other grounds as stated in Bank of New York Mellon Corp. v. Comm'r,* 106 T.C.M. (CCH) 367 (T.C. 2013); *United States v. Philatelic Leasing*, 794 F.2d 781, 782-85 (2d Cir. 1986); *United States v. Petrelli*, 704 F. Supp. 122, 124 (N.D. Ohio 1986) (concluding that defendants violated § 6700 when they "entered into lease agreements with investors who leased master photographs and plates from the defendants. Defendants advised the lessees of the master photographs and plates to claim investment tax credits and deductions for the leased art work and plates allegedly made therefrom, some of which never existed.").

i. Defendants knew, or had reason to know, that no customer earned or would earn income from buying solar lenses.

When the activity underlying a tax plan fails to perform as promised, the plan's promoters know, or have reason to know, that the plan is an abusive tax shelter and not a trade or business.[522] For example, in *United States v. United Energy Corporation*, from 1982 through 1984, four defendants "sold 'solar power modules' which, according to advertising literature, would simultaneously produce electricity and thermal energy (hot water) from the sun's rays."[523] None of the modules actually worked as promised, however, and no module purchaser was ever paid by a third party for energy produced by a module.[524] For this and other reasons, the district court concluded that the defendants made false or fraudulent statements in their "representations designed to mislead purchasers into believing that the solar farms were operational, that uses for hot water existed . . . and that their modules could and would be fully installed."[525] These false statements were contributing factors to the defendants' "income projections based upon

[522] *Blum v. Comm'r*, 737 F.3d 1303, 1312 (10th Cir. 2013) ("The probability of earning a profit must be reasonable, not a mere possibility."); *see Sala*, 613 F.3d at 1254 ("The existence of some potential profit is 'insufficient to impute substance into an otherwise sham transaction' where a 'common-sense examination of the evidence as a whole' indicates the transaction lacked economic substance."); *Keeler*, 243 F.3d at 1218 ("While it is true that investors routinely make decisions with an eye to decreasing tax liability, the deliberate incurrence of first-year losses may be an indication that a transaction lacks economic substance."); *Jackson v. Comm'r*, 864 F.2d 1521, 1526 (10th Cir. 1989) ("Although the failure to make sales in a given period does not per se prevent a taxpayer from carrying on a business, the tax court's finding that taxpayers 'made [no] legitimate efforts to locate potential buyers for the [player/recorders]' during 1978 is fatal to taxpayers' case. Merely possessing the legal capability to sell player/recorders by obtaining a license from the inventor, without actual efforts to sell the products, is insufficient to constitute carrying on a trade or business for purposes of section 162." (citations and footnote omitted)); *see generally Apperson v. Comm'r*, 908 F.2d 975, 1990 WL 100774 at *1-2 (7th Cir. 1990) (unpublished); *Music Masters, Ltd.*, 621 F. Supp. at 1056. *See also Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *4 (Or. T.C. Oct. 13, 2014) (concluding that Defendants' customer Peter Gregg did not have a trade or business related to his solar lens purchase).

[523] 1987 WL 4787, at *1.

[524] *United Energy Corp.*, 1987 WL 4787, *2-5.

[525] *United Energy Corp.*, 1987 WL 4787, *5.

(continued...)

completely unsupportable energy production estimates."[526] Such false statements were "material to the issue of whether [that solar energy] enterprise is entered into with a profit-making motive."[527]

It is no excuse for making such false or fraudulent statements that a promoter-defendant "had intended to accomplish" things like installing and starting up solar energy equipment, "but had been thwarted."[528] "[A] statement that something non-existent currently exists is false irrespective of the most reasonable, good faith intentions that it will exist in the future. Even a statement that something will exist in the future, such as an income projection, can be false if there is no reasonable basis for the prediction." [529]

(a) Defendants knew, or had reason to know, that customers would not earn income from "leasing out" his lenses to LTB.

Johnson and Shepard have been promoting the solar energy scheme for more than *ten years*, and Freeborn promoted the scheme for at least four years. During that time, all repeatedly made statements to customers creating the expectation that customers would earn income from "leasing out" their lenses to LTB according to Johnson's 2006 vision[530]:

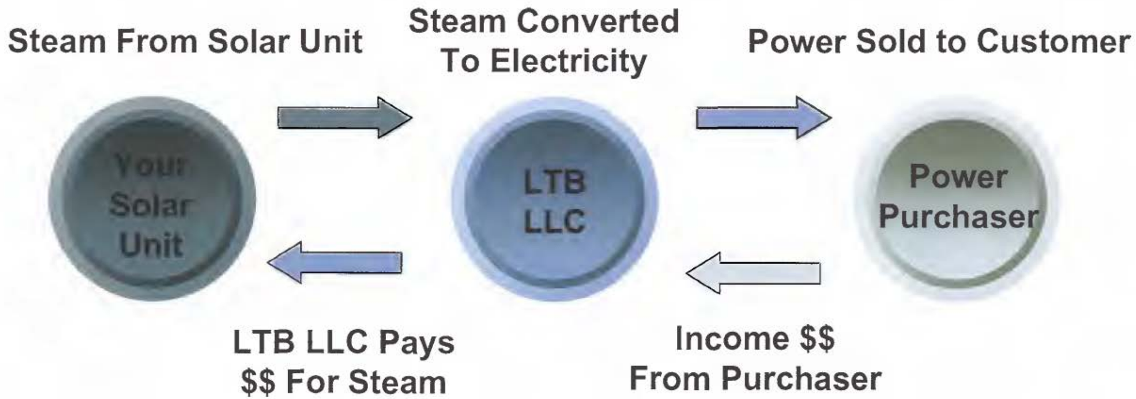
[526] *United Energy Corp.*, 1987 WL 4787, *4.

[527] *United Energy Corp.*, 1987 WL 4787, *9.

[528] *United Energy Corp.*, 1987 WL 4787, *9.

[529] *United Energy Corp.*, 1987 WL 4787, at *9.

[530] IAS Dep. 162:1-163:22; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531 at 1-3.



But as of April 2018, no third-party power purchaser has ever paid LTB (or any other entity) for energy. LTB has never paid a customer for use of his lens.

Defendants have known that no customer was paid rental income generated by payments from a third-party purchaser throughout the entire time they have been promoting the solar energy scheme. Johnson, as the manager and director of all entities at issue in this case knew that no money was coming in from a third-party power purchaser. Shepard knew as early as 2006, and Freeborn knew as early as 2009 (and continuously through the years thereafter), that IAS had missed its target installation dates in their own contracts and their own lenses were not producing rental income. They knew that other customers were not being paid either. Tellingly, Shepard has never even bothered to ask Johnson why. Payments were irrelevant because the principal benefit was tax advantages.

Not only have Defendants known that no customer has ever been paid rental income generated by payments from a third-party purchaser, they knew or had reason to know that such rental income would not be paid. Defendants knew, or had reason to know, that Johnson's purported solar energy technology had not resulted, and would not result, in sales of energy to a third-party purchaser. Johnson knew that neither he, nor anyone affiliated with him, had ever installed, operated or maintained a solar energy production plant before. Running a solar energy

power plant is not an endeavor for the inexperienced. Johnson also knew, all along, that LTB existed only on paper. He also knew that neither Shepard nor Freeborn ever asked any questions about LTB or its experience in operating or maintaining solar energy equipment: not when they first signed an agreement purportedly to lease their lenses to LTB, and not in the intervening years.

Defendants' solar energy scheme is clearly a complete sham. Defendants knew it was not generating income for customers for more than *ten years*. Yet, despite their clear knowledge that the system did not produce energy or income to customers, they continued to sell lenses, encourage customers to take purportedly related tax deductions and credits, and deplete the United States Treasury. Defendants have given self-serving and conflicting reasons for the lengthy delay in bringing Johnson's ideas to fruition, all of which show that they knew or had reason to know that their customers were not earning income from leasing their lenses, and would not be earning such income in the near future. Johnson claims to have been able to put electricity on the grid since 2005. He has just made the "business decision" not to do it. But Johnson has also claimed, as have Shepard and Freeborn, that his process toward generating energy has taken more than ten years because his work is so cutting-edge. Every time he thinks he is finished and ready to connect to a third-party purchaser, he finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system. For example, Shepard testified that he told a customer in November 2012 that there were "150 towers ready to install" because (at that time) he thought that it "wouldn't take too long to put up 150 towers."[531] But because Defendants were using "brand new technology," various components of the

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[531] Shepard Dep. 172:9-173:15; Pl. Ex. 141 at 1.

(continued...)

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purported technology did not work.[532] So the towers were not erected at that time.[533] Now, more than five years later, all those new towers with lens arrays are *still* not up.

Even if such towers had been constructed, they would not work as Defendants claim they will. The United States' expert witness on concentrating solar power, Dr. Thomas Mancini, credibly testified that Defendants' purported technology comprises separate component parts that do not work together in an operational solar energy system to produce electricity or other useable energy from the sun. Dr. Mancini also credibly testified that Defendants' purported technology is not now, and will never be, a commercial-grade dish solar system converting sunlight into electrical power or other useful energy. Defendants do not have the expertise, the experience, the research, or the data to build a system that converts solar radiation into electrical power or other useful energy.

But one need not have Dr. Mancini's extensive expertise to see that Defendants' purported technology is a sham. As Freeborn (a high school teacher and coach who did not have any special expertise in solar energy technology) testified, getting the "individual parts" of Johnson's purported technology to "work in concert . . . seems to be the hurdle."[534] Yet Defendants have continued to sell the scheme.

For these reasons, Defendants knew or had reason to know that any "construction updates" they gave customers, suggesting that rental income was soon to arrive, were false or fraudulent. Shepard and Freeborn knew that each time they visited Millard County, Utah, because the only towers they ever saw were the 19 that went up in 2006. To date, those towers are *still* the only towers built with lens arrays installed. Defendants knew, or had reason to know,

[532] Shepard Dep. 172:9-179:17.

[533] Shepard Dep. 172:9-179:17.

[534] Freeborn Dep. 95:3-13.

that the bulk of customers' "lenses" are shrouded in plastic wrap on pallets in a warehouse, uncut, unframed, and not installed on any tower such that they could even have the possibility of providing heat to generate electricity. The Court gives no credence to Defendants' claims that they have made "progress" on any site, either in manufacturing or construction. Assembling components for a system that has not been shown to work is not progress. Rather, it is a convenient façade for Defendants' ongoing fraud. They are savvy enough to inject just enough purported reality into the solar energy scheme to convince willing believers.

Further, the requirements for interconnecting to the electrical grid are extensive, expensive, and time-consuming. Defendants have no expertise or experience in this technical and specialized process, or in obtaining a power purchase agreement to sell electricity to a commercial third-party purchaser. Defendants knew, or had reason to know, that there has never been an interconnection agreement. Johnson and Shepard know, or have reason to know, that there is no current, concrete plan to obtain either an interconnection agreement, yet their statements to customers suggested that they would have one soon. But PacifiCorp, the entity responsible for maintaining the electrical grid near Defendants' property, and through which Defendants would interconnect to the grid if they could, has not received an interconnection application, nor has it ever heard of Defendants.

Defendants also knew, or had reason to know, that there has never been a contract for any third party to buy power generated through any system using the solar lenses. Johnson and Shepard know, or have reason to know, that there is no current, concrete plan to obtain a power purchase agreement. As Shepard said, when discussing his efforts to enter a power purchase agreement *since 2010*: "Every time I got close, they wanted to see a power project up and

running. . . . And we didn't have that running yet."[535] Yet they told their customers that such an agreement was imminent.

In short, Defendants knew, or had reason to know, that their statements to customers that they would earn rental income from leasing out their solar lenses to LTB for the production of electricity were false or fraudulent.[536]

(b) Defendants knew, or had reason to know, that no customer would earn a bonus payment.

Defendants told customers that, if they bought lenses and signed a "bonus contract," they would earn a payout based on certain gross sales benchmarks for IAS. The bonus payouts (of either $6,000 or $2,000 per lens) were keyed to IAS's first and second billion dollars in gross sales revenue. On their face, those sales numbers are astronomical to reach, based on what Shepard and Freeborn knew about the state of the purported solar lens technology. Shepard and Freeborn knew that since 2010, RaPower-3, *not IAS*, had been selling lenses – both Shepard and Freeborn were part of the transition from IAS to RaPower-3. Because IAS was not selling, both had reason to question why a customer should expect any payout on a bonus contract, much less "soon" as they both told customers. Shepard admitted that he would not know how to begin evaluating whether IAS was anywhere near its first (or second) billion dollars. Either Shepard or Freeborn could have asked Johnson about this at any time to learn exactly how far away customers (including Shepard and Freeborn themselves) are from receiving a bonus payment. Instead, Shepard was willfully ignorant.

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[535] Shepard Dep. 205:21-206:12.

[536] *See* United Energy Corp., 1987 WL 4787, at *9.

In fact, Johnson testified that to date IAS has produced *no* sales revenue. Nonetheless, Defendants told customers about how important the bonus contract was for obtaining tax benefits (when Johnson was offering bonus contracts) and why they should expect revenue from it.

But like the other transaction documents in the solar energy scheme, the promises in the "bonus contracts" are illusory. Johnson used the bonus contracts to increase lens sales, knowing that RaPower-3 was the entity that generated sales and not IAS. His promise to pay will never come due as long as he directs that entities other than IAS make sales (which is what he has done so far). The "bonus contract" is just one more façade for Defendants' ongoing fraud.

Defendants knew, or had reason to know, that no customer was paid a bonus, or would be paid a bonus.

ii. Defendants knew, or had reason to know, that customers had no control over their purported "lens leasing" businesses.

When a promoter sells a plan in which the promoter, and not the customer, retains control over the customer's purported trade or business, the promoter knows or has reason to know that he is selling an abusive tax scheme.[537] Defendants know, or have reason to know, that Johnson

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[537] *Blum*, 737 F.3d at 1314-15 (indicia of tax-avoidance motive are when a taxpayer fails to investigate a deal before signing up and does not understand the details of the plan); *Nickeson*, 962 F.2d at 977 ("failure of taxpayers to inquire into the potential profitability of the program" and "taxpayers' lack of control over activities" are hallmarks of an abusive tax shelter); *Rose v. Comm'r*, 868 F.2d 851, 854 (6th Cir. 1989); *United Energy Corp.*, 1987 WL 4787,. at *1-3; *Music Masters, Ltd.*, 621 F. Supp. at 1056 ("The investors were each told they were to be in the business of manufacturing and distributing records based on the partial interest(s) they leased in the masters, and that they would not have to pay more than the start-up distribution expenses, which could be as little as $200." But in fact "[t]he evidence [was] clear that *Defendants* [and not their customers] carried on the business of manufacturing and distributing the masters. The Defendants' representations to the contrary are false and/or fraudulent." (emphasis added)); *see also* *Van Scoten v. Comm'r*, 439 F.3d 1243, 1253 (10th Cir. 2006) (a taxpayer did not reasonably rely on a promoter's assurances about purported tax benefits from entering a cattle partnership, in part because the taxpayer had no experience in the cattle industry); *see also* *Arevalo v. Comm'r.*, 469 F.3d 436, 439 (5th Cir. 2006) ("where the transferor continues to retain significant control over the property transferred, the transfer of formal legal title will not operate to shift the incidence of taxation attributable to ownership of the property" (quoting Upham v. Comm'r, 923 F.2d 1328, 1334 (8th Cir.1991)).

(continued...)

controls the entire process, from start to finish, of their customers' purported foray into the "solar lens leasing business." Johnson controls all terms of the transaction. He decides whether and when to install a customer's lens in a tower, which (according to Defendants' transaction documents) is a prerequisite to the lens generating any income. Defendants tell customers how little effort they will be required to expend in their "solar lens leasing business."

Customers do not negotiate terms, including price. Defendants know, or have reason to know that customers have no reason to negotiate price because customers pay a mere $105 per lens to claim tax benefits calculated on the $3,500 "purchase price" of a lens.[538] Customers simply write a check to RaPower-3. Customers have not asked about LTB's experience operating and maintaining solar energy equipment before signing the O&M. Customers do not take possession of their lenses. No customer has ever chosen to buy a lens, then lease it to an entity other than LTB.[539] Defendants do not even have a way to track which lens belongs to which customer. It follows that there is no way for a customer to identify which lenses (whether among the many stacks of uncut plastic inside a warehouse or framed on one of the towers erected in 2006) belong to him. Defendants know, or have reason to know, that their customers are typically wage-earners in other full-time professions who lack the time and experience to meaningfully engage in a solar lens leasing business, and are not experienced in "leasing out" solar lenses.[540]

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[538] *See* Keeler, 243 F.3d at 1219 ("The Tax Court also found that the prices of the items traded were not set by market forces, but by [the promoter]. Contrary to taxpayer's assertion, any alleged negotiation between [the promoter] and its customers as to the prices of the legs falls short of demonstrating economic substance, because the importance of the instruments' prices was dwarfed by their tax advantages.").

[539] *See* Jackson, 864 F.2d at 1526.

[540] *See Apperson*, 1990 WL 100774, at *1-2.

(continued...)

iii. Defendants knew, or had reason to know, that the transaction documents were meaningless.

When transactions feature substantial deferred debt, backed by non-recourse promissory notes, which will purportedly be paid out of proceeds from the plan itself, a promoter knows or has reason to know that he is selling an abusive tax scheme.[541] The form of Defendants' lens sale-lease transactions that Defendants use in the solar energy scheme have similar features.

Defendants tell their customers the "full purchase price" of each lens that the customer purportedly buys, but allow them to make a much smaller "down payment." From 2006 through 2009, the full purchase price was $30,000 but the down payment was only $9,000. Currently, the full purchase price is $3,500 and the down payment is $1,050.[542] From the beginning, Johnson conditioned the customer's obligation to pay the difference between the initial "down payment" and the "full purchase price" of a lens on that very lens being installed and producing revenue. No lenses are installed and producing revenue. And Johnson's transaction terms mean that no customer actually owes the difference between the down payment and the full purchase price until five years *after* his lenses are "installed and producing revenue." Payments continue for 30 years thereafter. These facts show that any purported obligation to pay is substantial – and perhaps indefinitely – deferred debt.

Johnson does not charge interest on these "financed amounts." Customers borrow for free. According to the plain terms of the contracts, the only security for the customers' promise to pay these outstanding amounts is the lens itself. Customers are not required to fill out any type

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[541] *See Nickeson*, 962 F.2d at 977 (one hallmark of an abusive tax scheme is nonrecourse indebtedness); *Philatelic Leasing*, 794 F.2d at 786; *United States v. Stover*, 731 F. Supp. 2d 887, 911-12 (W.D. Mo. 2010); *see Music Masters, Ltd.*., 621 F. Supp. at 1054.

[542] As explained in the facts, this is a simplified statement of Defendants' "down payment" structure. Typically, customers do not even pay $1,050 in the tax year for which they claim depreciation and a credit for any lens; they pay $105 in that tax year and then pay the remaining $945 per lens once they receive the tax benefits Defendants promote.

of credit application, pledge any collateral or otherwise demonstrate their ability to pay the outstanding obligation on the "full purchase price" of the lens.

As described above, all Defendants know, or have reason to know, that that promise to pay is illusory (or at least is within Johnson' entire control). If Johnson has never installed a customer's lenses on towers that Johnson has, to date, failed to build, the customer will never be required to pay IAS or RaPower-3 the full purchase price of any lens. All Defendants know this, or have reason to know it, based on the plain terms of the contracts they signed or sold and their knowledge of the conditions at Defendants' facility in Delta, Utah.

Further, Defendants also know, or have reason to know, that Johnson does not actually enforce the full down payment amount of $1,050. Johnson will refund a customer's money if they simply no longer wish to own lenses, or if the IRS has disallowed the customer's depreciation or solar energy tax credit. Refunding money paid to "buy" lenses on the basis of a change in tax treatment shows that customers never had a bona fide "lens leasing" business or income producing activity. As a result, Defendants knew, or had reason to know, that the contracts contain illusory promises from all parties. They are designed to create the appearance of substance where there is none. And Defendants knew, or had reason to know, that their statements to customers, relying on the form of these documents to assert that a customer was in a substantive trade or business were false or fraudulent.[543]

[543] *See Twenty Mile Joint Venture, PND, Ltd. v. Comm'r*, 200 F.3d 1268, 1277 (10th Cir. 1999) ("the form chosen by the parties will be respected only if it comports with the reality of the transaction").

iv. Defendants knew that they promoted the solar energy scheme based on the tax benefits it would provide.

When a promoter sells a plan by focusing on the plan's ability to greatly reduce or eliminate a customer's income tax liability, the promoter knows or has reason to know that he is selling an abusive tax scheme, and the customer is not in a trade or business.[544] As they sold the solar energy scheme to customers, Defendants made it very clear that the goal of buying solar lenses was to eliminate a customer's tax liability. They told people to calculate the number of lenses to buy based on their anticipated tax liability. According to Shepard's sample Form 1040, a customer should end up buying enough lenses so that the amount of their depreciation deduction would "get [their adjusted gross income] low enough for zero taxes."[545] If that was not enough, Shepard told customers to claim solar energy tax credits "if needed" to reach the goal of "zero" taxable income.[546] Freeborn explicitly coached his downline to sell lenses by waiting for people to complain about paying taxes and then telling them that, with RaPower-3, they could stop paying taxes.

The system by which customers made payments (which all Defendants knew about) also shows that the purpose of the solar energy scheme was to reduce or eliminate a customer's tax

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[544] Blum, 737 F.3d at 1311 ("Evidence that a transaction was designed to 'produce a massive tax loss' indicates the transaction lacks economic substance."); Stover, 650 F.3d at 1110 (that money would "forever escape taxation" was a "key selling point" and an indicator of an abusive tax scheme). *See also* Hartshorn, 751 F.3d at 1204 ("Paying income taxes is a statutory duty; some also consider it a civic duty. Few gladly pay, but most faithfully do. Faithful compliance is tested, sometimes beyond elastic limits, by the siren's song of the unscrupulous — pay 10% of your income to the 'church' and completely avoid the much higher extractions demanded by the taxman AND do so without changing your life circumstances in any significant manner. Sounds great! To the unprincipled or the naïve, it is precisely what the doctor ordered. It is also illegal.") (O'Brien, J., concurring); Nickeson, 962 F.2d at 977 (one hallmark of an abusive tax scheme is "marketing on the basis of projected tax benefits"); Keeler, 243 F.3d at 1220 ("the fact that taxpayer's losses offset almost all of his income--100% and 97%, respectively, in 1981 and 1982--indicates his primary motivation was tax avoidance and not profit potential").

[545] Pl. Ex. 40 at 13; Pl. Ex. 490 at 9-10.

[546] Pl. Ex. 40 at 13; Shepard Dep. 240:4-11. *See also* Pl. Ex. 158 at 15; Shepard Dep. 243:3-9; Pl. Ex. 490 at 9-10.

(continued...)

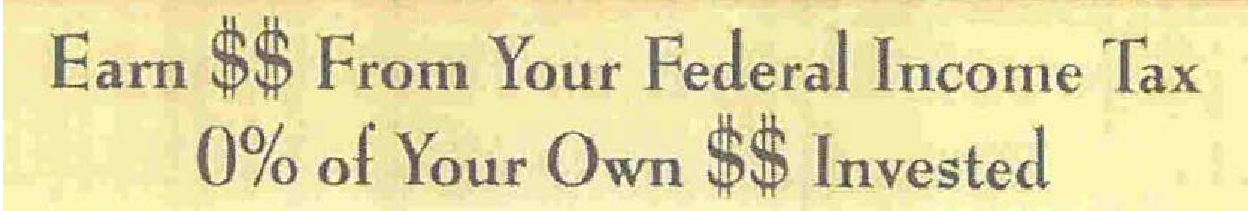
liability, while enriching Defendants with funds rightfully owed the Treasury.[547] Johnson's system since 2010 allowed customers to pay RaPower-3 only $105 of the $3,500 purchase price per lens in the year they wish to "buy" the lenses and claim the associated tax benefits. Johnson allows customers to pay RaPower-3 the remaining down payment amount of $945 in the *following year*, only *after* a customer has claimed depreciation and the solar energy tax credit for the year of purchase. The customer has the cash-in-hand to pay RaPower-3 because he "zero[ed] out" his taxes.[548] Instead of paying the United States Treasury his rightful tax liability, the customer pays RaPower-3 for "buying lenses."

Defendants knew, or had reason to know, that the full purchase price stated for each lens (whether $9,000, $3,000, or $3,500) nearly equals the amount of tax benefits Defendants tell customers they are allowed. The amount of the down payment Johnson states is identical to the amount Defendants tell customers they may claim as a solar energy tax credit. From 2006 through 2009, both the down payment and the promoted credit were $9,000. Since 2010, the total down payment and the promoted credit were $1,050. The difference between the down payment and the "full" purchase price of a lens is almost exactly the same amount that Defendants claim customers may deduct in depreciation. In this way, a customer never has to spend "his own money" to buy a lens. The United States Treasury pays for it, just as Johnson promised in 2006[549]:

[547] *See* Pl. Exs. 496-97, 777.

[548] Pl. Ex. 48.

[549] Pl. Ex. 532 at 12.



Because of the way Defendants marketed the solar energy scheme, it is clear: Defendants knew, or had reason to know, that the "solar lens sales" were not bona fide transactions. Defendants knew, or had reason to know, that the solar lenses were a smokescreen for their unlawful "sales" of tax deductions and credits to customers.

b. Defendants knew, or had reason to know, that their customers were not allowed a depreciation deduction.

One "business" deduction is for depreciation, the "wear and tear" on property either used in the taxpayer's "trade or business" or held by the taxpayer "for the production of income."[550] If a taxpayer is *not* in a trade or business, or is *not* holding property for the production of income, then the taxpayer is *not* eligible for a deduction for depreciation on that property.[551] "Depreciation . . . [is] not allowed on assets acquired for a business that has not begun operations."[552] The period for depreciation in an ongoing business begins when property is "placed in service."[553] "Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function."[554]

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[550] 26 U.S.C. § 167(a). Depreciation is not the only business expense deduction Defendants promoted to their customers, but it is the one with the greatest impact on the Treasury.

[551] § 167(a).

[552] *Piggly Wiggly S., Inc. v. Comm'r of Internal Revenue*, 84 T.C. 739, 745 (1985); *United Energy Corp.*, 1987 WL 4787, at *11 ("[T]he term 'placed in service' refers to an asset that is 'available for service' but not yet actually in use only if the taxpayer is engaged in an ongoing trade or business and the asset is not yet in service for reasons beyond the taxpayers control."); *see also id.* at *10.

[553] 26 C.F.R. § 1.167(a)-10(b).

[554] 26 C.F.R. § 1.167(a)-(11)(e)(1)(i) (26 C.F.R. § 1.46-3(d)(1)(ii) and (d)(2) "shall apply for the purpose of determining the date on which property is placed in service").

(continued...)

In furtherance of the solar energy scheme, Defendants told customers that their lenses were "placed in service" in the tax year in which the customer bought the lens.[555] Defendants asserted that customers' solar lenses are placed in service once they are "available for ANY income producing activity, including leasing [them] out."[556] To Defendants, the fact that customers signed a contract to "lease" their lenses to LTB was sufficient to show that their lenses were in a "state of readiness" to be leased, and therefore were placed in service. These assertions are false. For all of the reasons described above, Defendants knew or had reason to know that their customers' "lens leasing" businesses were not bona fide and ongoing businesses. Defendants knew, or had reason to know, that LTB existed only on paper. Defendants knew, or had reason to know, that their customers' purported "leasing businesses" existed only on paper and would never produce income. Defendants knew, or had reason to know, that their customers were not engaged in any business activity with a true profit motive.[557]

Defendants have also argued that customers' solar lenses are "placed in service" because as soon as the plastic rectangles "[come] off the production line" at the manufacturer, the

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[555] Pl. Ex. 25 at 1.

[556] Pl. Ex. 1 at 3; Pl. Ex. 10 at 3; Pl. Ex. 29; Pl. Ex. 231 at 4; Pl. Ex. 547. Defendants have claimed, at times, that customers "leased out" their lenses to advertise for IAS and/or RaPower-3 in some fashion. The analysis that follows applies regardless of the purported purpose for which the lenses were "leased out."

[557] The facts of this case, which Defendants knew or had reason to know, distinguish it from cases Defendants have cited to support their idea that a tangible piece of property is "placed in service" as soon as someone "holds it out for lease." In those cases, the Tax Court first found that the taxpayers entered into leasing activities with a bona fide profit objective – meaning that the taxpayers actually had a business, unlike Defendants' customers here. *Cooper v. Comm'r*, 88 T.C. 84, 109 (1987) ("we believe that petitioners entered into their leasing activities with a bona fide objective to make a profit"); *Waddell v. Comm'r*, 86 T.C. 848, 849 (1986) ("Ps' computerized ECG terminal franchise venture was an activity engaged in for profit."). Because of the lack of substance to the purported leasing transactions (including the critical fact that the entity to which customers purportedly lease their lenses does not exist except on paper, this case is closer akin to the cases concluding that property that does not exist cannot be depreciated. *Hudson v. Comm'r*, 71 F.3d 877, 1995 WL 725812, at *5 (5th Cir. 1995). *See also* *Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *5-6 (Or. T.C. Nov. 30, 2017); *United Energy Corp.*, 1987 WL 4787, at *2-4, 11.

(continued...)

"lenses" are "in a state of readiness" to "provide[] solar process heat."[558] While the solar lenses may be able to concentrate solar radiation sufficient to set wood or shoes smoldering, blacken a rabbit, or burn an IRS agent,[559] that alone is not sufficient to generate "solar process heat." "Solar process heat" is taking heat from the sun and using it to accomplish function or application, like heating potash to speed the process of turning it into fertilizer.[560] There is no evidence that Defendants' solar lenses have ever, by themselves, used heat from the sun to accomplish any kind of useful function or application.

There is also no evidence that Defendants' solar lenses have ever been used as an individual component within a system to concentrate solar radiation to accomplish any kind of useful function or application – or to generate electricity. "[A]n individual component, incapable of contributing to the system in isolation, is not regarded as placed in service until the entire system reaches a condition of readiness and availability for its specifically assigned function."[561] Defendants' purported system as a whole has not been placed in service. For facilities that are intended to generate power, factors that go to whether the system as a whole is placed in service (such that any individual component could be placed in service) are: "1) whether the necessary permits and licenses for operation have been obtained; 2) whether critical preoperational testing has been completed; 3) whether the taxpayer has control of the facility; 4) whether the unit has been synchronized with the transmission grid; and 5) whether daily or regular operation has

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[558] Pl. Ex. 9 at 1-2; *see also* Pl. Ex. 32 at ¶ 2; Pl. Ex. 73 at 1; Pl. Ex. 185 at 1-2; Pl. Ex. 472 at 1.

[559] T. 1666:14-24; T. 1737:2-9.

[560] T. 105:13-106:6.

[561] *Sealy Power, Ltd. v. Comm'r*, 46 F.3d 382, 390 (5th Cir. 1995).

(continued...)

begun."[562] The evidence here shows that Defendants' purported solar energy technology does not work, nor will it ever. Accordingly, there is no "daily or regular operation" of the system; it has not been "synchronized with the transmission grid"; "critical preoperational testing" has not yet been completed, and there is no evidence that it has even begun.[563] Defendants themselves continually assert the need for additional research and development before they will be "operational." Because the system in which the solar lenses would purportedly be used is not placed in service, the lenses themselves – component parts of that system, even lenses that have been installed on towers – are not placed in service.

Further, the bulk of customers' "lenses" are not installed on towers. They currently exist as rectangular sheets of plastic, shrouded in plastic wrap on pallets in a warehouse, uncut, unframed. According to Defendants, a lens must be installed in a tower before it even has a chance of producing revenue from the production of electricity. Even if Defendants' purported technology did work and was in operation, the rectangular plastic sheets would still have to be modified (cut into triangles and framed) before they can be installed. Thus, in their rectangular state, the sheets of plastic are not ready and available for any income-producing activity.

Ken Oveson, a CPA, told Shepard in August 2009 that customers' lenses were not "placed in service" such that customers could lawfully claim a depreciation deduction or solar

[562] *Sealy Power, Ltd.*, 46 F.3d at 395. "The most important of the . . . factor appears to be . . . that the unit has gone into ordinary daily operation." *In re Mitchell*, 109 B.R. 434, 438 (Bankr. W.D. Wash. 1989), *aff'd,* No. C90-484M, 1990 WL 142016 (W.D. Wash. Aug. 31, 1990), *judgment rev'd on other grounds*, 977 F.2d 1318 (9th Cir. 1992).

[563] This is not a situation that has presented in other cases, when a nearly operational power plant was seeking "placed in service" status for certain property in a particular tax year. *E.g.*, *Sealy Power, Ltd.* 46 F.3d at 395; *Consumers Power Co. v. Comm'r*, 89 T.C. 710, 725-26 (1987). Further, "[m]aterials and parts acquired to be used in the construction of an item of equipment shall not be considered in a condition or state of readiness and availability for a specifically assigned function." 26 C.F.R. § 1.46-3(d)(2)(iv).

(continued...)

energy tax credit. For all of these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens was "placed in service."

c. Defendants knew, or had reason to know, that their customers were not allowed the solar energy credit.

Under § 48, a taxpayer may be allowed an "energy credit" that reduces his income tax liability in a given year[564] for certain "energy property" he "placed in service" during the tax year for which the taxpayer claims the credit.[565] "[E]nergy property" means equipment with respect to which depreciation is allowed, and "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."[566]

Defendants told their customers that they were allowed to claim an energy credit under § 48 for their lenses. But as described *supra*, their customers are not allowed a depreciation deduction for their solar lenses because they were not in a trade or business or holding the lenses for the production of income and their lenses were not "placed in service." These two factors disqualify their customers from the solar energy credit, and Defendants knew or had reason to know it based on the plain text of § 48.

Further, Defendants knew or had reason to know that customers' solar lenses did not "use[] solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat"[567] in the years in which the taxpayers bought the lenses and claimed credits. The preponderance of the credible evidence already described shows that customers' lenses have never been used in a system that generates electricity, that heats or

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[564] §§ 48(a), 46(2), 38(a) & (b)(1).

[565] § 48(a)(1); 26 C.F.R. § 1.46-3(d)(1) & (2).

[566] § 48(a)(3)(A)(i) & (C); see also 26 C.F.R. § 1.48-9(d)(1).

[567] *See* § 48(a)(3)(A)(i) & (C); see also 26 C.F.R. § 1.48-9(d)(1).

cools a structure or provides hot water for use in a structure. Nearly all customer "lenses" are actually rectangular sheets of plastic sitting in a warehouse, uncut, unframed, and not yet installed on towers. Further, the preponderance of credible evidence shows that even the lenses installed on towers do not "provide solar process heat."

For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens qualified for a solar energy credit under 26 U.S.C. § 48.

2. Defendants knew, or had reason to know, that their customers were not allowed to deduct their purported expenses related to the solar lenses against their active income or use the credit to reduce their tax liability on active income.

As just described, Defendants knew or had reason to know that their customers did not operate a trade or business as a result of purportedly buying the solar lenses, or hold the lenses to produce income. Their customers were not allowed the business expense deduction for depreciation or the solar energy credit. But even assuming that they were allowed the depreciation deduction and the solar energy tax credit, the next question to ask is whether (as Defendants have repeatedly asserted) their customers could use these tax benefits to offset their wages, or other "active" income.

Under 26 U.S.C. § 469, deductions and credits accrued in a passive activity, for individuals,[568] are only allowable to offset passive activity income.[569] They are *not* allowed to

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[568] The overwhelming majority of Defendants' customers purchased the solar lenses in their individual capacity, but some purchased the solar lenses under the guise of a limited liability company ("LLC"). For tax purposes, these types of LLCs are "disregarded," and the tax consequences are treated as being incurred directly by the individual and reported directly on that individual's federal income tax return *See, generally*, 26 C.F.R. §§ 301.7701-1 through 301.7701-3.

[569] § 469(a), (d).

(continued...)

offset non-passive activity income like wages earned from an employer.[570] "Section 469 was intended to limit the financial incentive to structure traditional tax shelters. Prior to this enactment, taxpayers could use passive activity losses to offset non-passive activity income, thereby sheltering active income from taxation. Now, however, § 469 generally prohibits the deduction of passive activity losses, except insofar as the losses are used to offset passive activity income."[571]

Activity that involves the rental of tangible property is *per se* a passive activity.[572] Jessica Anderson expressly told Johnson this in October 2010.[573] Defendants knew or had reason to know the black letter law that any business involving leasing out tangible property like a "solar lens" was a *per se* passive activity, and that deductions and credits from purportedly leasing out solar lenses are not allowed to offset active income or tax on active income.

Yet Defendants repeatedly told customers they could lawfully claim deductions and credits from their "solar lens leasing business" to offset their active income and tax accruing from active income. They did so by telling customers that the customers "materially participated" in their "solar lens leasing business."[574] This is a false or fraudulent statement, about which Defendants knew or had reason to know, because the plain text of § 469 states that a rental activity is a passive activity "without regard to whether or not the taxpayer materially

[570] § 469(a), (d); *Senra v. Comm'r*, 97 T.C.M. (CCH) 1386, 2009 WL 1010855 at *4 (T.C. 2009).

[571] *Van Scoten*, 439 F.3d at 1249 n.4 .

[572] 26 U.S.C. § 469(c)(2), (c)(4), (c)(7), & (j)(8); *Williams v. Comm'r*, 108 T.C.M. (CCH) 128, 2014 WL 3843838, at *8 (T.C. 2014) ("Rental activities are generally considered to be passive regardless of material participation."); *Senra*, 97 T.C.M. (CCH) 1386, 2009 WL 1010855 at *3 ("Any activity where payments are principally for the use of tangible property is a rental activity.").

[573] Pl. Ex. 570 at 2.

[574] *E.g.*, Pl. Ex. 25 at 1.

(continued...)

participates in the activity."[575] Jessica Anderson expressly told Johnson this in October 2010.[576] There are very limited exceptions to this rule, all of which apply to bona fide businesses and not the bogus transactions Defendants sold.[577]

Because Defendants made statements about "material participation," the Court will analyze those statements even though the standard does not apply here. If a taxpayer "materially participates" in an activity, losses and credits from that activity may be allowed to offset active income and tax on active income.[578] A taxpayer "materially participates" in an activity only if the taxpayer's involvement in the activity is regular, continuous, and substantial.[579] A Temporary Treasury Regulation identifies a number of fact-specific tests to determine whether a taxpayer has "materially participated" in any trade or business.[580] They include the number of hours the taxpayer has participated in the activity during the tax year and the kinds of activities the taxpayer performed for the business.[581] Defendants point to these tests to argue that their customers meet the standard for having "materially participated" in their lens leasing businesses.

But once again, Defendants ignore a critical provision of the regulation – which Jessica Anderson expressly told Johnson in 2010. Work done by a taxpayer as an *investor* in an activity (such as "[m]onitoring the finances or operations of the activity in a non-managerial capacity" or "[s]tudying and reviewing financial statements or reports on operations of the activity") is not

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[575] 26 U.S.C. § 469(c)(2), (c)(4).

[576] Pl. Ex. 570 at 2.

[577] 26 C.F.R. § 1.469-1T(e)(1)(ii), (e)(3); *see also* Pl. Ex. 570 at 2-4.

[578] 26 U.S.C. § 469(a), (c)(1), (c)(2), (j)(8).

[579] 26 U.S.C. § 469(h).

[580] *See generally* 26 C.F.R. § 1.469-5T.

[581] *See* 26 C.F.R. § 1.469-5T(a), (b), (f).

(continued...)

"participation" in the activity, "unless the individual is directly involved in the day-to-day management or operations of the activity."[582] These are exactly the kinds of activities Defendants claim their customers do with respect to their "lens leasing businesses." But performing these activities does not mean that a person has "materially participated" in a business.

Therefore (even assuming that the material participation standard applied here, which it does not), Defendants knew or had reason to know that their customers were not engaged in day-to-day management of a lens leasing business. Defendants promoted the solar energy scheme to wage-earning taxpayers with other investments, activities, hobbies, and personal commitments that absorbed their time, leaving no time that the customers could devote to materially participating in a purported "solar lens leasing business." One of Defendants' key selling points was telling customers how *little* they would have to do with respect to the lenses: "Since LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."[583] Under the solar energy scheme as Defendants operated it, customers did not materially participate in any activity related to the solar lenses.

For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that a solar lens purchaser could lawfully claim deductions and credits related to solar lenses to offset the purchaser's active income and tax accruing from active income.

[582] 26 C.F.R. § 1.469-5T(f)(2)(ii)(A) & (B).

[583] Pl. Ex. 19 at 1.

3. Defendants knew, or had reason to know, that that the full "purchase" price of the lenses was not at risk in the year a customer signed transaction documents.

As is clear from the above, Defendants' customers were not in a trade or business, and were not allowed deductions like depreciation. And even if they were allowed such tax treatment (which they are not), they would be allowed to use those deductions and credits only to offset passive income. Assuming that Defendants' customers would be allowed some passive deductions, the next step in the analysis is to determine what amount they could be allowed.

The allowable amount of any deduction with respect to any activity is limited to the amount that the taxpayer has "at risk" in the activity.[584] "Section 465 was enacted because of the proliferation of tax shelters in the 1970's. Before the enactment of section 465, investors could take advantage of quick depreciation rules plus the deductibility of interest on nonrecourse debt to generate large "losses" in order to offset personal income. Section 465 attacks these practices directly."[585] A taxpayer is considered "at risk" with respect to money and property that the taxpayer contributed to the activity (so, amounts that the taxpayer pays to the activity out-of-pocket) and certain limited amounts that the taxpayer borrows.[586]

There are numerous caveats and exceptions to the general idea that a taxpayer is at risk for amounts that the taxpayer borrows to participate in the activity.[587] A taxpayer is *not* "at risk" to the extent the taxpayer is not personally liable to repay the borrowed funds or has secured repayment of the debt with property used in the activity at issue.[588] A taxpayer is not "at risk

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[584] § 465(a).

[585] *Nicholson v. Comm'r*, 60 F.3d 1020, 1026 (3d Cir. 1995) (footnote omitted) (Alito, J.).

[586] § 465(b)(1).

[587] *E.g.*, § 465(b)(2), (3), (4),

[588] § 465(b)(2).

(continued...)

with respect to amounts protected against loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements."[589] "We look to the economic reality of the situation to determine whether there was a realistic chance that [the taxpayer] might lose the money [he borrowed], or, rather, whether the funds were protected from loss by the arrangement of the transactions."[590]

Here, Defendants tell their customers that they may claim federal tax deductions based on the "full purchase price" (currently $3,500, but $9,000 or $3,000 in prior years) of each lens that the customer purportedly buys. But Defendants' customers are not "at risk" with respect to the full $3,500 in the year they purportedly purchase their lenses and claim the purportedly related tax benefits. Instead, the customers typically make a down payment of $1,050 (at most) of the $3,500 purchase price. The contract documents state that the customer does not incur an obligation to pay the remaining $2,450 of the $3,500 purchase price until the customer's lens is installed and producing revenue. Defendants knew, or had reason to know, that no customer's lens was installed and producing revenue at any time, so they knew or had reason to know that no customer had any obligation to pay the remaining $2,450 for any lens. Therefore, no customer was "at risk" for that amount in the tax year the customer purportedly purchased a lens.

And even if a customer were ever to incur the obligation to pay the $2,450, that amount is "financed" by RaPower-3 at zero percent interest.[591] The customer is not personally liable to pay

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[589] § 465(b)(4).

[590] *Oren v. Comm'r*, 357 F.3d 854, 860 (8th Cir. 2004); *Brifman v. Comm'r*, 64 T.C.M. (CCH) 3 (T.C. 1992) ("The 'economic reality' of the situation is the key factor in determining who is ultimately liable for a debt.").

[591] Defendants' customers never executed any notes or entered into any borrowing transaction. However, to the extent that the transaction could be viewed as the customers borrowing funds – they are borrowing the funds from RaPower-3 by deferring payment and/or from LTB, who will take its payment from revenue generated from the lens. Under 26 U.S.C. § 465(d)(3), a taxpayer is not considered "at risk" for funds borrowed from any person who has an interest in such activity or from a person who is related to a person (other than the taxpayer) having such an interest in the activity. Here, both LTB and RaPower-3 have an interest in the "activity" and therefore Defendants' customers are not at risk for the remaining purchase price if that amount is considered borrowed.

any of the "financed" amount; all payments will come from LTB from revenue the lens generates and the only collateral for the "financed" amount is the lens itself. There is no provision for payment in the event the lens does not generate revenue. There is no remedy in case a customer defaults, other than "repossession" of the lens by RaPower-3. These features make any potential obligation to pay the $2,450 a nonrecourse debt, for which no customer would be "at risk."

Further, customers' down-payments (currently $1,050 per lens) also do not appear to have been "at risk." IAS and RaPower-3 contracts contained an explicit statement that a customer could get a refund of all amounts paid in, without penalty, if either IAS or RaPower-3 did not perform on the contract. Johnson has offered refunds of all funds used to purportedly buy solar lenses to anyone being audited by the IRS.

The facts show that Defendants' customers funds are not "at risk" with respect to *any* amount they have paid in to the solar energy scheme or purportedly borrowed to participate. Defendants, who structured and sold these transactions, knew or had reason to know that their customers were not at risk for the full purchase price of any lens and therefore were not allowed to claim a depreciation deduction for the full purchase price or any related amount. For these reasons, Defendants engaged in conduct subject to penalty under § 6700(a)(2)(A) each time they stated that the full purchase price of a lens (whether $9,000, $3,000, or $3,500) was "at risk" for federal income tax purposes.

4. Defendants knew, or had reason to know, that all of their statements were false or fraudulent in spite of the legal advice upon which they claim reliance.

Defendants claim that they relied on the Andersons' writings and the Kirton McConkie memorandum while they were promoting the solar energy scheme, to support their assertions that customers could lawfully claim a depreciation deduction and a solar energy tax credit from

buying solar lenses and signing the transaction documents that Defendants provided. But these writings, and the facts and circumstances surrounding them, cannot support the heavy weight of Defendants' purported reliance on advice of counsel – especially because Defendants knew facts about the solar energy scheme that the attorneys did not know.[592]

When an advisor's opinion depends on facts that do not match the reality of a transaction, a promoter's claimed reliance is not in good faith.[593] The Anderson writings offer no genuine basis for Defendants' purported reliance because they are general summaries of the law, unconnected to the specific facts and circumstances of the transactions Defendants promoted. The October 2010 letter and the November 2010 draft say as much: they withhold any decisive opinion on the lawfulness of any tax treatment because they do not have specific facts and circumstances about the transactions. They each state that the availability of the tax benefits summarized will depend on facts and circumstances that do not appear in either document.

The Kirton McConkie memorandum is factually inapposite to RaPower-3 customers. On its face, the memorandum applies only to lens buyers that are C corporations (among other factual assumptions and preconditions stated in the memorandum). Birrell was careful to repeat this because of the differences in tax treatment for C corporations versus individuals and pass-through entities. Johnson and Shepard knew that RaPower-3 sold solar lenses to individuals or pass-through entities, not to C corporations. The memorandum assumes that Defendants' purported solar energy technology works and that the sale and lease transactions are completed using forms Birrell prepared. Neither of these assumptions match the facts of the solar energy

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[592] *United Energy Corp.*, 1987 WL 4787, at *11 ("The important point here, however, is not what defendants or their tax attorney believed the law to be. The point is that the module purchasers were entitled to truthful information on which to base their own decisions, regardless of defendants' interpretation of the law. Thus, even if defendants, knowing all the facts, reasonably believed their legal interpretation was correct, still their misstatements of the underlying material facts to purchasers are actionable.").

[593] *United States v. Zanfei*, No. 04 C 2703, 2006 WL 2861051, at *3, 13 (N.D. Ill. Sept. 29, 2006).

scheme as Defendants know them. The memorandum provides them no basis for their purported reliance.

Shepard's purported reliance on these writings was also unreasonable because he did not personally consult with or receive advice from the Anderson Law Center or Kirton McConkie. He got the November 2010 Anderson draft and the Kirton McConkie memorandum from Johnson. Shepard knows that Johnson is the originator of the solar energy scheme and Johnson's entity collects all the money from the solar energy scheme. It is not reasonable for a person to rely on opinion letters delivered to him by a financially conflicted promoter.[594] Shepard was also on notice from discussions with Ken Oveson about the true limitations on tax treatment of lenses.

While the text of the attorneys' materials shows their limitations, the attorneys also made clear that the use of the materials by Defendants was improper. A promoter's claimed reliance on advice of counsel is "disingenuous" when the promoter ignores warnings from independent attorneys that his interpretation of the internal revenue code is wrong.[595] Here, Jessica Anderson told Neldon Johnson, no later than January 2011, that he was wrong about the tax benefits solar lens purchasers could claim. Both the Andersons and Birrell sent Johnson cease-and-desist letters, which told him in no uncertain terms exactly why their writings did not support his solar energy scheme. Shepard knew, too, that Birrell said that the memorandum could not be used as RaPower-3 was using it. Shepard's visit to Kirton McConkie to complain about this did nothing to change Birrell's mind.

In short, the Anderson and Kirton McConkie writings do not negate Defendants' reason to know that they made false or fraudulent statements to customers. If anything, the

[594] *Van Scoten*, 439 F.3d at 1253 ; *Anderson v. IRS*, 442 F. Supp. 2d 365, 372 (E.D. Tex. 2006).

[595] *Campbell*, 704 F. Supp. at 730-31; *see also* *Estate Pres. Servs.*, 202 F.3d at 1103 .

circumstances surrounding the writings, and the attorneys' outraged response to learning that Defendants were using their writings to promote the solar energy scheme, bolster Defendants' reason to know that their statements were false or fraudulent.

C. While promoting the solar energy scheme, Defendants made or furnished (or caused others to make or furnish) gross valuation overstatements as to the value of the solar lenses.

A defendant may also be enjoined under § 7408 for making or furnishing, or causing another to make or furnish, "gross valuation overstatement[s]" as to a material matter while organizing or selling a plan related to taxes.[596] A gross valuation overstatement is "any statement as to the value of any property or services" if the value of the property or services is directly related to the amount of any tax deduction or credit and the stated value is more than 200 percent of the correct value of the property or services.[597] A defendant "who stated [a] price to any person as part of an effort to induce them to invest . . . [has] furnished a 'gross valuation

[596] 26 U.S.C. § 6700(a)(2)(B), § 7408; *United States v. Alexander*, 2010 WL 1643425, at *5 (D.S.C. 2010) ("Regardless of whether he created the statements or merely re-circulated others' work, the Defendant cannot dispute that he furnished materials to his customers through the Aware Group and the Freedom Trust Group."); *Mattingly v. United States*, 722 F. Supp. 586, 571(E.D. Mo. 1989) ("Clearly whether property exists or whether a valuation can actually be rendered at the time the representation is made is inconsequential. The fact that the statement was made and that it exceeds the correct value by 200 percent is all that is relevant under § 6700(b)(1)(A).").

[597] 26 U.S.C. § 6700(b)(1).

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overstatement' within the meaning of § 6700(a)(2)(B)."[598] There is no scienter element in proving penalty conduct under this provision of § 6700; it is a strict liability standard.[599]

Defendants sell a single solar lens for a total purported price of $3,500. But the evidence shows that that number far exceeds 200 percent of the correct price for a "lens." The record evidence showed that Plaskolite charged IAS between $52 and $70 dollars for a rectangular sheet of plastic. Each rectangle could be cut into two triangular "lenses," making the raw cost of each "lens" very low. Defendants' technology does not work, and is not likely to work to produce commercially viable electricity or solar process heat. Therefore, each "lens" is just one component of an inoperable system. It is not a piece of sophisticated technology such that premium pricing is appropriate for it.

Defendants have attempted to argue that "research and development" costs should be attributed to the costs of the lens, but there is no credible evidence about the amount of those costs. The concept of the Fresnel lens itself is not new. If Defendants have incurred "research and development" costs associated with their purported technology, such costs are in their yet-unsuccessful attempts to get the entire system working. The Court does not credit any such costs

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[598] *United States v. Turner*, 601 F. Supp. 757,767 (E.D. Wis. 1985); accord *Gates v. United States*, 874 F.2d 584, 586 (8th Cir. 1989) ("[The defendant] admitted that in responding to questions about the valuation, he would refer individuals to the valuation statements contained in the promotional offering materials. This conduct is sufficient to satisfy the requirements of section 6700."); *Reno v. United States*, 717 F. Supp. 1198, 1202 (S.D. Miss. 1989); *Mattingly*, 722 F. Supp. at 572 (distributing brochures listing inflated purchase prices in connection with the sale of an abusive tax shelter constituted making or furnishing a gross valuation overstatement); *Campbell*, 704 F. Supp. at 726 ("Statements of the . . . contract price were statements of value. To offer an object or service at a specified price is to implicitly represent that the object is worth the price."), *aff'd Campbell*, 897 F.2d at 1322-23 (rejecting the defendant's argument that a quoted price for a purported investment was not a representation of value directly related to a tax deduction).

[599] *Autrey v. United States*, 889 F.2d 973, 981 (11th Cir. 1989); *United States v. Hand-Bostick*, 816 F. Supp. 2d 343, 352 (N.D. Tex. 2011); *Campbell*, 704 F. Supp. at 726 ("Scienter need not be shown to hold a person liable for gross valuation overstatements . . . . This 200 percent overvaluation is to be a bright line test."); *Turner*, 601 F. Supp. at 767 ("scienter is not required" to establish a violation of § 6700(a)(2)(B)); see also *Gates*, 874 F.2d at 586 (rejecting a defendant's attempt to avoid liability for making or furnishing a gross valuation overstatement because he did not know that the valuations were overstatements).

(continued...)

to the price of the lens alone. Based on the available and credible evidence, the Court concludes that the correct valuation of any "lens" is close to its raw cost, and does not exceed $100.[600] The most expensive parts of the purported solar energy production system are other components, such as collectors, towers, frames, distribution pipes and fluids, turbines, and generators. And those components consume the most testing and development resources.

It follows that Defendants engaged in conduct subject to penalty under § 6700(a)(2)(B) and made or furnished a gross valuation overstatement each time they told someone the price of a lens (whether $9,000, $3,000, or $3,500). They caused others to make or furnish gross valuation overstatements when those people told *others* the price of a lens – for example, when a RaPower-3 team member told someone the price of a lens while attempting to recruit that person into his downline.

D. An injunction and other equitable relief are necessary and appropriate to enforce the internal revenue laws of the United States.

Because § 7408 sets forth specific criteria for injunctive relief, namely that injunctive relief is appropriate to prevent recurrence of penalty conduct, the United States need only show that that criteria is met; it need not show that the traditional equitable factors are satisfied before an injunction may issue.[601] The foregoing facts show that an injunction is appropriate here. But

[600] *C.f.* *United Energy Corp.*, 1987 WL 4787, at *5 ("A buyer with reasonable knowledge of the relevant facts would not have purchased a UEC module at any price. Such a buyer would have realized that UEC's modules had no chance of producing any significant income and that tax credits would never become available because the modules would never be placed in service and because defendants' operation was a sham. The people who actually purchased modules did not have a reasonable knowledge of the relevant facts because of the false statements made in UEC's advertising literature.")

[601] *Buttorff*, 761 F.2d at 1063; *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983) ("The legislative process has already taken these [equitable] factors into consideration in its decision to address the promotion of abusive tax shelters . . . ."); *accord* *Stover*, 650 F.3d at 1106 (traditional equitable factors need not be discussed when an injunction is authorized by statute like § 7408 and the statutory elements have been satisfied); *Estate Pres. Servs.*, 202 F.3d at 1098; *see also* *Hartshorn*, 751 F.3d at 1198.

(continued...)

the Court will also address other factors that courts have weighed to issue an injunction under § 7408(b), which are: (1) the extent of each Defendant's participation; (2) the isolated or recurrent nature of each Defendant's abusive conduct; (3) the Defendants' degree of scienter; (4) the Defendants' recognition (or non-recognition) of culpability; and (5) the likelihood that any Defendant's occupation would put him "in a position where future violations could be anticipated;" and (6) the gravity of the harm caused by Defendants' abusive conduct.[602]

Injunctive relief is appropriate to prevent recurrence of penalty conduct because of the multi-level marketing used by RaPower-3. The high economic incentives for network participation are illustrated by the testimony of Robert Aulds. In his downline a total of 2,468 lenses have been purchased.[603] His sales pitch was simple. Aulds answered the question as to whether RaPower-3 worked by telling potential buyers that he got a check from the federal government.[604]

The incentive for evangelizing the misleading scheme is high. Under the RaPower-3 commission structure, 10% of the purchase price paid by people directly sponsored by a purchaser was paid to the sponsor, and 1% of the purchase price paid by people sponsored by a purchaser in up to five lower levels was paid to the sponsor.[605] Multi-level marketing is pernicious due to the propagation of misinformation. For example, Aulds testified that his understanding was that "according to the definition of 'placed in service' that the government uses, they didn't actually have to be on a lens to be placed in service. They had to be on site

[602] *Gleason*, 432 F.3d at 683 (quoting *Estate Pres. Servs.*, 202 F.3d at 1105).

[603] Aulds Dep. 69:15-24, Pl. Ex. 394 at 2.

[604] Aulds Dep. 59:17-60:11.

[605] Aulds Dep. 79:7-16.

(continued...)

available to be on the lens, and so we met that qualification from the moment they were purchased."[606] He also said that he and "99.9%" of the RaPower-3 purchasers "didn't understand tax law and all that stuff," but that they had to help other purchases "understand this is not a scam. We're actually taking tax law and applying it . . . ."[607] The toxic combination of multi-level marketing and misleading information creates an urgent need an injunction.

The facts and legal analysis already recited show that Defendants Neldon Johnson, IAS, RaPower-3, LTB1, and R. Gregory Shepard ("Defendants" hereafter, in light of Roger Freeborn's death and dismissal from this case) fully, actively, and consistently, for more than ten years, participated in promoting and selling the solar energy scheme. They each knew, or had reason to know, that their statements about the tax benefits purportedly related to buying solar lenses were false or fraudulent. Johnson, IAS, RaPower-3, and Shepard made or furnished gross valuation overstatements while promoting the scheme. Defendants show no remorse, recognition of culpability, or likelihood of stopping this abusive conduct without a Court order.

Johnson, Johnson's entities, and Shepard have made the solar energy scheme a primary focus of their time, energy, and efforts for the past ten years. They did not stop promoting the scheme after investigation by the IRS, multitudes of customer audits by the IRS, and adverse rulings in the Oregon Tax Court, Magistrate Division. According to Shepard, the only change in his behavior since the United States filed this case is that he "bowed [his] back and [is] fighting harder."[608] This shows that, without an injunction, Defendants' occupations put them in a position where future violations of the internal revenue laws are likely. Defendants' efforts to

[606] Aulds Dep. 107:13-17.

[607] Aulds Dep. 119:16-23.

[608] Shepard Dep. 314:1-5.

promote the depreciation deduction and the solar energy tax credit have been so robust, that although Defendants stopped promoting depreciation as a benefit in 2016, their customers continued to claim it.

Further, the harm caused by Defendants' abusive conduct is extensive. The United States showed that its direct financial harm due to the deductions and credits claimed on a subset of Defendants' customers' tax returns for tax years 2013-2016 is at least $14,207,517.[609] Critically, these numbers do not include the still-unknown harm to the Treasury from Defendants' misconduct. It does not include tax returns for tax years 2008 (or prior) through 2012, although Defendants' customers bought lenses and claimed purportedly related tax benefits during those years. This snapshot does not include tax returns for tax year 2017, although Defendants sold lenses in 2017 and it is reasonable to conclude that the people who "bought" lenses in 2017 claimed the tax benefits Defendants' promoted for tax year 2017. The United States' numbers also do not include, for example, customers' tax returns that claimed the tax benefits Defendants promoted, but which the IRS has not yet identified.

All of Defendants' conduct that warrants an injunction under § 7408 also warrants an injunction and disgorgement under § 7402(a). Under § 7402(a), "[t]he district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions . . . orders of injunction, . . . and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." An injunction under § 7402 may be issued "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to

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[609] Pl. Ex. 752 at 3.

(continued...)

enforce such laws."[610] "It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws" than the language in § 7402(a).[611]

There is no need show that a Defendant "has violated a particular Internal Revenue Code section in order for an injunction to issue" under § 7402(a).[612] All the United States must show is that an injunction (or other order, such as one for disgorgement and other equitable relief) "may be necessary or appropriate for the enforcement of the internal revenue laws."[613] An order for disgorgement, in this case, is "appropriate" for the enforcement of the internal revenue laws.[614]

To show entitlement to disgorgement, the United States has the burden of "producing evidence permitting at least a reasonable approximation of the amount of [Defendants'] wrongful gain."[615] Defendants bear the "risk of uncertainty in calculating net profit."[616] "'Reasonable approximation' will suffice to establish the disgorgement liability of a conscious wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk

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[610] 26 U.S.C. § 7402(a).

[611] *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957).

[612] *E.g.*, *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984); *Elsass*, 978 F. Supp. 2d at 941 ("[E]ven if the Defendants' business structure somehow left them outside the legal definition of tax return preparers, broad relief would still be appropriate, as § 7402(a) is undoubtedly designed to prevent individuals from undermining the Nation's tax laws through exploiting loopholes in the [Internal Revenue Code]'s overall regulatory scheme.").

[613] 26 U.S.C. § 7402(a); *accord*, *e.g.*, *United States v. ITS Financial, LLC*, 592 F. App'x 387, 394 (6th Cir. 2014) ("The fact that no other court has ever granted the precise injunction granted in this case does not mean [§ 7402(a)] does not authorize it.").

[614] *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla. 2017) ("Because § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws, the Court has determined that disgorgement is an available remedy in this case." (quotation omitted)).

[615] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i.; *Stinson*, 239 F. Supp. 3d at 1329; *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1120-23 (M.D. Fla. 2016).

[616] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & cmt. i. ; *Stinson*, 239 F. Supp. 3d at 1329; *Mesadieu*, 180 F. Supp. 3d at 1120-23.

(continued...)

of uncertainty arising from the wrong. The allocation of risk of uncertainty to the wrongdoer yields the rule that 'when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.'"[617] In other words, if "the true measure of unjust enrichment is an indeterminable amount not less than 50 and not more than 100, liability in disgorgement will be fixed at 100."[618]

Defendants obstructed discovery about their gross receipts and other topics involving their finances. They did not produce relevant documents and information to the United States on these issues. Nonetheless, the United States showed that Defendants "sold" at least 49,415 lenses.[619] If all customers paid the $1,050 down payment required under the terms of Defendants' own transaction documents, Defendants' gross receipts were $51,885,750.[620] There was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought, but Defendants offered no credible evidence of the amount of any missing down payments. But this is the likely explanation for why Defendants' own customer database shows that (even if Defendants "sold" 82,365 lenses) customers actually paid in $50,025,480 as of February 28, 2018.[621] It is reasonable, based on the facts of this case and Defendants' extensive promotion of the solar energy scheme, to conclude that customers have

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[617] *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) *quoted in* Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

[618] Restatement (Third) of Restitution and Unjust Enrichment § 51 cmt. i.

[619] Pl. Ex. 742B.

[620] Pl. Ex. 742B, Pl. Ex. 749.

[621] T. 758:10-777:10; Pl. Ex. 749. *See also supra* ¶ 79, noting likely ranges of revenue based on Pl. Exs. 742A and 742B. It appears that data from sales by IAS and RaPower-3, and perhaps also XSun Energy and SOLCO I, are in Defendants' customer database. The United States' bank deposit analysis, which contained data only through 2016, also supports this number.

(continued...)

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.[622] 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.[623]

On the facts of this case, it is appropriate to hold Johnson liable for the gross receipts shown in the RaPower-3 database. An individual may be held liable for what is, on its face, an entity's debt, when 1) there was "such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders that the personalities and assets of the corporation and the individual are indistinct" and 2) "adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations." [624]

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[622] *E.g.* Freeborn Dep. 48:2-51:18; Pl. Ex. 496, Pl. Ex. 497; Pl. Ex. 777 at 1-2; Pl. Ex. 40 at 13.

[623] *See Esgar Corp. v. Comm'r.,* 744 F.3d 648, 656 (10th Cir. 2014) ("It is the function of the Tax Court to draw appropriate inferences, and choose between conflicting inferences in finding the facts of a case. The Tax Court may draw these inferences from the whole record, including the Commissioner's evidence on a given fact and the taxpayer's lack thereof." (quotations and alterations omitted)); *Wardrip v. Hart*, 949 F. Supp. 801, 804 (D. Kan. 1996).

[624] *N.L.R.B. v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993); *United States v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (identifying factors to determine whether to pierce the corporate veil, including "whether a corporation is operated as a separate entity"; "commingling of funds and other assets"; "the nature of the corporation's ownership and control"; "use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation"; "disregard of legal formalities and the failure to maintain an arms-length relationship among related entities"; and "diversion of the corporation's funds or assets to noncorporate uses."); *see also United States v. Badger*, 818 F.3d 563, 572 (10th Cir. 2016) ("One can attempt to improperly escape a payment responsibility using any manner of entity, regardless of the formal connection between the two alter egos.").

(continued...)

Here, the whole purpose of RaPower-3 was to perpetrate a fraud to enable funding of the unsubstantiated, irrational dream of Nelson Johnson.[625] The same is true for the other entities Johnson established and used including IAS, SOLCO I, XSun Energy, Cobblestone, and the LTB entities. He created the solar energy scheme and directed all of these entities' actions to sell it. Johnson owns RaPower-3, SOLCO I, and XSun Energy directly or indirectly and exercises exclusive control over their actions. Johnson commingled funds between his entities and frequently used the entities' bank accounts to pay his personal expenses and his family.[626] The funds were disbursed from the entities' bank accounts either with Johnson's knowledge or at his direction. Johnson was personally enriched from the gross receipts received by IAS ($5,438,089[627]), RaPower-3 ($25,874,066[628]), SOLCO I ($3,434,992[629]) and XSun Energy ($1,126,888[630]) even if he did not go through the process of formally moving money into his own personal account before spending it.

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[625] *Boilermaker-Blacksmith Nat. Pension Fund v. Gendron*, 96 F. Supp. 2d 1202, 1218 (D. Kan. 2000) ("[P]laintiffs must show that defendants acted with intent to avoid payment to plaintiffs, or that their disregard of corporate formalities caused the companies to be less able to pay plaintiffs or otherwise caused injustice.").

[626] *See S.E.C .v. World Capital Mkt., Inc.*, 864 F.3d 996, 1007 (9th Cir. 2017) ("ongoing possession of the funds is not required for disgorgement"); *S.E.C. v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1098 (9th Cir. 2010) ("A person who controls the distribution of illegally obtained funds is liable for the funds he or she dissipated as well as the funds he or she retained."); *S.E.C. v. Monterosso*, 756 F.3d 1326, 1338 (11th Cir. 2014) ("Given the close relationship between Monterosso and Vargas, and their collaboration in the fraudulent scheme, we find it was appropriate to hold them jointly and severally liable.").

[627] Pl. Ex. 738; T. 869:1-25; Pl. Ex. 852, at 59; T. 257:7-258:20, 271:9-272:12, 293:1-294:11, 312:5-15; Pl. Ex. 371; Pl. Ex. 507, at 20, 35; T. 1812:4-12.

[628] Pl. Ex. 735; T. 863:18-868:24; *see also* Pl. Exs. 742B, 749.

[629] Pl. Ex. 739; T. 863:18-866:18; 870:3-872:14; Johnson Dep., vol. 1, 82:8-85:2; IAS Dep. 38:10-40:6; 45:4-21; LTB1 Dep. 78:22-79:5; 79:12-80:9;81:12-21; Pl. Exs. 38, 325, 495, 545..

[630] Pl. Ex 740; T. 871:9-872:14; Johnson Dep., vol. 1, 79:8-81:7; 82:8-10; IAS Dep. 47:2-19; Pl. Exs. 208, 355, 356, 510, 743 at 11.

(continued...)

The United States has shown that a reasonable approximation for Shepard's gross receipts from the solar energy scheme was at least $702,001.[631] Any amounts that went through an entity that Shepard owns and operates are attributable to him, personally, for the same reasons that Johnson is personally liable for the gross receipts of his entities.

Disgorgement will be ordered, pursuant to § 7402(a), in these amounts. Defendants will not be allowed any credit of operating expenses to "carry[] on the business that is the source of the profit subject to disgorgement."[632] When a defendant defrauds the claimant, as the United States has shown Defendants have done, such credits are not consistent with principles of equitable disgorgement.[633]

In addition to this direct harm to the Treasury, Defendants' misconduct has caused the government to devote substantial resources to investigating the solar energy scheme, which Defendants promoted widely; investigating Defendants' conduct in particular; examining the tax returns of Defendants' customers; litigating nearly 200 petitions filed by Defendants' customers

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[631] Pl. Ex. 411 at 16-17; Pl. Ex. 445; T. 1296:14-1301:3, 1596:5-1598:21.

[632] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & cmt. h; *see also id.* at cmt. i. ("[T]he claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment. If the claimant has done this much, the defendant is then free (there is no need to speak of 'burden shifting') to introduce evidence tending to show that the true extent of unjust enrichment is something less."); *id.* at cmt. k. ("[T]he wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct.").

[633] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & cmt. h ("The defendant will not be allowed a credit for the direct expenses of an attempt to defraud the claimant, even if these expenses produce some benefit to the claimant."). *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1114 (9th Cir. 2006) ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place."); *SEC v. Veros Farm Holding LLC*, No. 1:15-cv-00659-JMS-MJD, 2018 WL 731955, at *4 (S.D. Ind. Feb. 6, 2018); *SEC v. Art Intellect, Inc.*, No. 2:11-CV-357, 2013 WL 840048 at *23 (D. Utah, Mar. 6, 2013) ("The amount of disgorgement should not include any offset for the operating expenses of [the defendant company, which was run as a Ponzi scheme].") (Campbell, J.); *SEC v. Smart*, No. 2:09cv00224, 2011 WL 2297659 at *21 (D. Utah June 8, 2011) (the purpose of "depriving a wrongdoer of unjust enrichment" would not be served if defendants "who defrauded investors" were allowed a credit against disgorgement of the "expenses associated with this fraud.") (quoting *JT Wallenbrock*, 440 F.3d at 1115)) (Kimball, J.).

(continued...)

in Tax Court; and litigating this case for nearly three years.[634] Further, the government has suffered irreparable harm from Defendants' misconduct, which "undermine[d] public confidence in the administration of the federal tax system and encourage[d] noncompliance with the internal revenue laws."[635]

For these reasons, the United States has shown that it is entitled to the following relief.

ORDER AND INJUNCTION

IT IS HEREBY ORDERED pursuant to 26 U.S.C. §§ 7402 and 7408 that Defendants and their officers, agents, servants and employees, and anyone acting in active concert or participation with them are **HEREBY PERMANENTLY ENJOINED** from directly or indirectly, by use of any means or instrumentalities:

1. **Solar Energy Business Limited without Disclosures.** Organizing (or assisting in the organization of), promoting, or selling any entity, plan, or arrangement or participating (directly or indirectly) in the sale of any interest in an entity, plan, or arrangement involving a solar lens and/or any solar energy system or component without the following affirmative disclosure printed on every document; included on every webpage and sub-page that comprises

[634] *See United States v. Anderson*, 3:10-510-JFA, 2010 WL 1988100, at *3 (D.S.C. May 5, 2010) ("The United States is also harmed because the IRS is forced to devote substantial resources to identifying whether the taxpayers for whom Anderson filed returns were actually owed refunds and recovering any erroneous refunds that are issued."); *United States v. Casternovia*, 08-426-CL, 2011 WL 4625638, at *7 (D. Or. August 23, 2011) ("Pendell's conduct has resulted in serious harm to the United States, not only in the form of understatements of liability but also the administrative burden on the IRS of auditing, investigating, and collecting taxes from SORCE and ERS customers."); *United States v. Grider*, 3:10-CV-0582-D, 2010 WL 4514623, at *4 (N.D. Tex. November 2, 2010) ("There is a broad public interest in maintaining a sound tax system and defendants' failure to pay employment and other taxes causes harm by divesting funding from other government objectives." (quotations and alteration omitted); *United States v. Ferrand*, 05-0069, 2006 WL 598212, at *5 (W.D. La. February 7, 2006) ("Not to be forgotten is the administrative cost the IRS and, in turn, the general public, will suffer from having to audit each return the Defendants prepared.").

[635] *Anderson*, 2010 WL 1988100, at *3; *accord HedgeLender*, 2011 WL 2686279, at *10 (Promoting an abusive tax shelter that caused millions of lost tax revenue "is a significant harm to society because it promotes noncompliance with federal tax laws and is a great cost to the public."); As the Senate Report regarding the enactment of § 6700 observed, "[t]he widespread marketing and use of tax shelters undermines public confidence in the fairness of the tax system and in the effectiveness of existing enforcement provisions." S. Rep. No. 97- 494, Vol I at 266.

rapower3.com, iaus.com, rapower3.net, the IAUS & RaPower3 Forum, and any other website controlled by any Defendant and used in relation to marketing lenses; and included in any other written communication: "THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in *U.S. v. RaPower-3, LLC., et al.*, Case No., 2:15 cv 828, has determined that the solar energy technology of RaPower-3 in place from 2005 to 2018 is without scientific validation or substance and ineligible for tax credits or depreciation by individual purchasers of lenses.";

2. **False and Fraudulent Statements Prohibited in Solar Energy Business.** Making or furnishing, or causing another to make or furnish, in connection with organizing promoting, or selling any entity, plan, or arrangement involving a solar lens and/or any solar energy system or component any false and fraudulent statements including, without limitation, the following:

a. That a purchaser of a solar lens is in a "trade or business" of "leasing out" the solar lens, or is in any other "trade or business" with respect to a solar lens;

b. That a purchaser of a solar lens may lawfully claim on a federal tax return a depreciation deduction related to a solar lens;

c. That a purchaser of a solar lens may lawfully claim on a federal tax return any other business expense deduction related to a solar lens; or

d. That a purchaser of a solar lens may lawfully claim on a federal tax return a solar energy credit related to a solar lens.

3. **Limitation on Statements Regarding Tax Benefits**. Making or furnishing, or causing another to make or furnish, in connection with organizing or selling any plan or arrangement, a statement with respect to the allowability of any deduction or credit or the

securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which Defendants know or have reason to know is false or fraudulent as to any material matter;

4. **Gross Overvaluation Statements Prohibited – Solar Energy**. Making or furnishing, or causing another to make or furnish, a statement of the value of a solar lens and/or any solar energy system or component that exceeds 200 percent of the correct valuation of the lens, system, and/or component, when the value of the lens, system, and/or component is directly related to the amount of a federal tax deduction, credit, or other benefit;

5. **Gross Overvaluation Statements Prohibited – Property or Service**. Making or furnishing, or causing another to make or furnish, a statement of the value of any property or service that exceeds 200 percent of the correct valuation of the property or service, when the value of the property or service is directly related to the amount of a federal tax deduction, credit, or other benefit;

6. **Recommending Tax Advisors Prohibited.** Recommending a tax return preparer or other tax professional to any person with whom a Defendant has a financial or contractual relationship;

7. **Prohibition Against Tax Document Activities – Solar Energy.** Preparing or filing, or assisting or advising in the preparation or filing of, any federal tax return or amended return, or claim for refund, other related documents or forms (including but not limited to Internal Revenue Service ("IRS") Form 3800, IRS Form 4368, IRS Form 4562, and IRS Schedule C), or any other document filed with the IRS, that claims federal tax benefits as a result of using, purchasing, or otherwise acquiring a solar lens and/or any solar energy system or component;

8. **Prohibition Against Tax Document Activities for Others.** Preparing or filing, or assisting or advising in the preparation or filing of, any federal tax return or amended return, or claim for refund, other related document or form (including but not limited to IRS Form 3800, IRS Form 4368, IRS Form 4562, and IRS Schedule C), or any other document filed with the IRS, for any person or entity other than himself or an entity in which he owns an interest;

9. **Prohibition Against Advocacy to Federal Taxation Authorities.** Making arguments or submitting documents or other materials to the IRS or to the United States Tax Court that claim or support the claim that federal tax benefits are available to a taxpayer as a result of using, purchasing, or otherwise acquiring a solar lens and/or any solar energy system or component; and

COMPLIANCE VERIFICATIONS

IT IS FURTHER ORDERED THAT in aid of this order, the following compliance verifications must be made. Wherever possible, these materials must be delivered in native format (electronic, machine readable, searchable) with cover explanatory information disclosing any proprietary programs needed to read the data**:**

10. **Identification of Entities.** Each Defendant must deliver to counsel for the United States, no later than 28 days from the date this Injunction is entered, a list identifying any entity in which they own an interest, either directly or indirectly through another entity, or through which they sold a solar lens and/or any solar energy system or component. The list must include the name of any other person or entity who owns an interest in an identified entity (with the address, telephone number, taxpayer identification number, and email address of that person or entity); the identified entity’s taxpayer or employer identification number; and the registered agent for the identified entity, including the registered agent’s address and telephone number.

Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

11. **Identification of Purchasers.** Each Defendant must deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all persons or entities who, on or since January 1, 2005, have purchased any solar lens and/or any solar energy system or component, including each person's or entity's mailing address, e-mail address, telephone number, and taxpayer identification number. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

12. **Identification of Sellers, Marketers, MLM Participants.** Each Defendant must deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all persons or entities who have sold a solar lens and/or any solar energy system or component on behalf of a Defendant, including each person's or entity's mailing address, e-mail address, telephone number, taxpayer identification number, item sold, and quantity sold. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

13. **Identification of Tax Preparers.** Each Defendant must to deliver to counsel for the United States, no later than 56 days from the date this Injunction is entered, a list of all

persons or entities to whom they referred customers for the preparation of federal tax returns related to a solar lens and/or any solar energy system or component, including each tax preparer's or entity's mailing address, e-mail address, and telephone number. Each Defendant must also file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph and that the information provided to counsel for the United States under this paragraph is true and correct.

14. **Distribution of Complaint and Injunction.** Each Defendant must, no later than 56 days from the date this Injunction is entered and at their own expense, (a) contact by first-class mail (and also by e-mail, if an address is known) all persons or entities who have purchased any solar lens and/or any solar energy system or component, since 2005 stating that (1) a copy of the United States' complaint, and (2) a copy of this signed document is available for download at a specified web site; and (b) email a copy of those documents to every purchaser for whom an email address is available. There must not be any other document enclosed with the email. Each Defendant must file with the Court, no later than 56 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph; a copy of the standard letter and email sent; a listing of the persons who received a letter and those who also received an email; that the mailing and emailing complied with this paragraph; and attaching any agreements between Defendants as permitted in this paragraph. A Defendant may, in a signed writing, agree with a Defendant who has entirely completed a timely and compliant distribution , that the distribution was made in behalf of the Defendant making the agreement provided that the letter and email so state, and provide email, phone and mail contact information for each Defendant on whose behalf the mailing and emailing was made. Such Defendants are jointly and severally responsible for deficiencies in the mailing and emailing.

15. **Warning; Removal of Tax Information from Websites.** Each Defendant, their officers, agents, employees, servants and persons acting in active concert or participation with them must, no later than 28 days from the date this Injunction is entered, remove all tax related content from www.rapower3.com and www.rapower3.net and www.iaus.com and the IAUS & RaPower3 Forum and any other site controlled by any Defendant. At the top of each page of each such web site the following notice must appear, which must include a link to this document which must be posted on that website:

> THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH in *U.S. v. RaPower-3, LLC.*, et al., Case No., 2:15 cv 828, has determined that the solar energy technology of RaPower-3 in place from 2005 to 2018 is without scientific validation or substance and ineligible for tax credits or depreciation by individual purchasers of lenses. The tax information provided by Neldon Johnson, RaPower-3, International Automated Systems (IAUS), XSun Solar, SOLCO I LLC, Greg Shepard, and others associated with them is misleading. Tax information related to solar energy systems or components must not appear on this site until further order of the court.

This notice must appear at in text that is at least as large as the largest text on the rest of the page, and in a color that distinguishes it from any background color and other text color on the page. Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph.

16. **Removal of Other Tax Related Information.** Each Defendant must, no later than 28 days from the date this Injunction is entered, remove all tax related content regarding Defendants' purported solar energy technology system from any website and/or social media account he owns or maintains, or is owned or maintained on his behalf. Each Defendant must also file with the Court, no later than 28 days from the date this Injunction is entered, a certification signed under penalty of perjury that they complied with this paragraph.

17. **Reporting Customer Information to IRS and Notice to Customers.** For the duration of the time between the date of this Injunction and ten years from the date of this

Injunction, no later than January 15 each year, Defendants must report to the IRS the following information about their customers for any solar lens or other product relating to solar energy technology: name; taxpayer identification number; address; phone number; product purchased; quantity of product purchased; date of purchase; total sales price; amount actually paid; date(s) of payment; and Defendants' account in which payment was deposited. Defendants must report this information to the IRS through its designee, Revenue Agent Kevin Matteson, at Internal Revenue Service, 178 S. Rio Grande, M/S 4218, Salt Lake City, UT, 84101. Defendants must notify customers, at the time this information is collected: "This information will be provided to the IRS. You may be subject to audit, interest on any unpaid taxes, and penalties if you claim tax benefits connected with your purchase."

18. **Notice of Future Entities**. For the duration of the time between the date of this Injunction and ten years from the date of this Injunction, each Defendant must advise the IRS through its designee, Revenue Agent Kevin Matteson, of any entity formed by him or it or at his or its direction after the entry of this Injunction, no later than 28 days from the date of the entity's formation. Notice to the IRS must be sent to Revenue Agent Matteson at Internal Revenue Service, 178 S. Rio Grande, M/S 4218, Salt Lake City, UT, 84101 (or any other designee the IRS appoints), and must include: 1) copies of the documents as filed with the appropriate authorities to form the entity (e.g., Articles of Incorporation); 2) the entity's taxpayer identification number and/or employer identification number; 3) the location and identifying number for all of the entity's bank accounts (whether domestic or foreign). Each Defendant must advise all principals of any such entity of these requirements.

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19. **Misrepresentations Prohibited.** Each Defendant must not make any statements, written or verbal, or cause or encourage others to make any statements, written or verbal, that misrepresent any of the terms of this Injunction.

20. **Persons Bound.** Pursuant to Fed. R. Civ. P. 65(d)(2), this Injunction binds the following who receive actual notice of it by personal service or otherwise:

a. each Defendant, Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, LTB1, LLC, and R. Gregory Shepard;

b. each Defendant's officers, agents, servants, employees, and attorneys; and

c. other persons or entities who are in active concert or participation with anyone identified in paragraphs (a) or (b) above.

21. **Discovery Permitted.** The United States may propound post-judgment discovery to monitor compliance with this Injunction.

22. **Costs and Expenses.** The United States is awarded its costs and expenses incurred in this suit with respect to its claims against Defendants. The United States may file a Bill of Costs pursuant to 28 U.S.C. § 1920 and the Local Rules of the District of Utah, which shall be subject to objection as the statute and rules provide.

23. **Jurisdiction Retained.** This Court will retain jurisdiction over this action for purpose of implementing and enforcing this Injunction and issuing any additional orders necessary or appropriate for the enforcement of the internal revenue laws.

IT IS FURTHER ORDERED THAT:

24. **Equitable Disgorgement.** Judgment shall be entered in favor of the United States and against Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and R. Gregory Shepard, jointly and severally, in the amount of $50,025,480 as equitable monetary relief, up to and including the amount of gross receipts each received from the solar energy scheme as follows:

a. Neldon Johnson: $50,025,480 ;

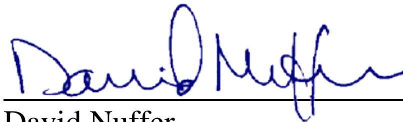
b. International Automated Systems, Inc.: $5,438,089;

c. RaPower-3, LLC: $25,874,066; and

d. R. Gregory Shepard: $702,001.

Signed October 4, 2018.

BY THE COURT:



David Nuffer
United States District Judge

EXHIBIT B

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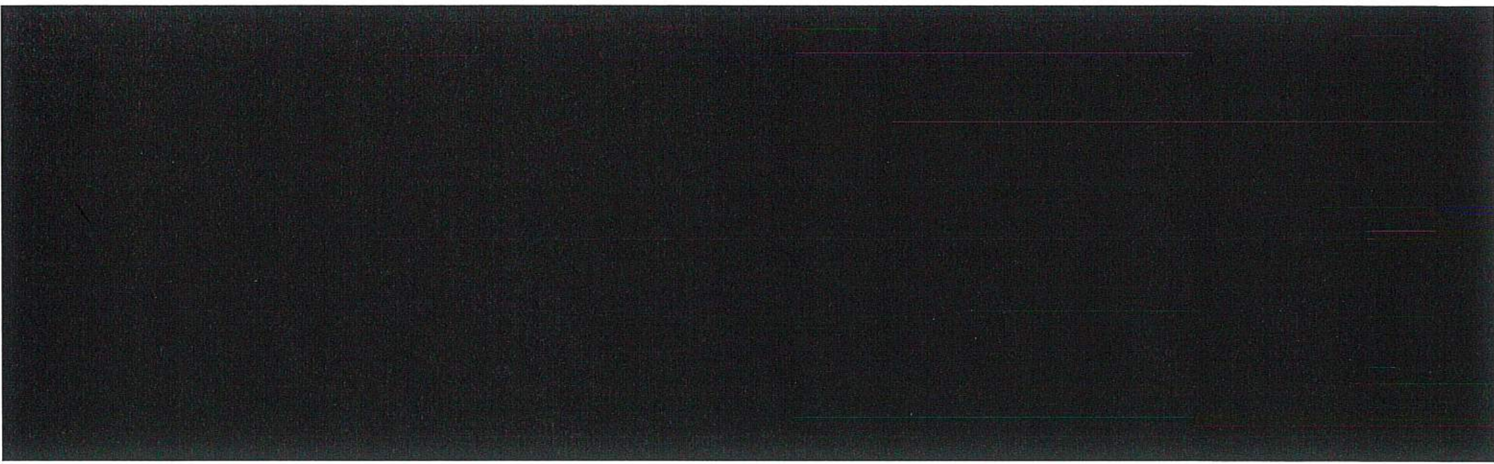
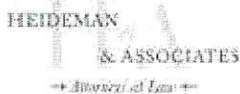


Sam Fowlks | *Paralegal*



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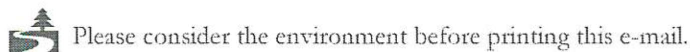
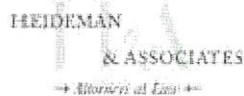


From: Samantha Fowlks
Sent: Wednesday, December 4, 2019 11:41 AM
To: Justin Heideman <jheideman@heidlaw.com>
Cc: Lilly Alvidrez <lalvidrez@heidlaw.com>; Wendy Poulsen <wpoulsen@heidlaw.com>
Subject: RE: RaPower3 Oregon sharefile

I haven't found anything that says it's a conflict waiver or requiring Rapower to defend them – do you know of what it would be called or say? I'm not aware of one and we are looking as quick as we can. Attached are some contracts I've found in the file so far.

Sam Fowlks | *Legal Assistant*



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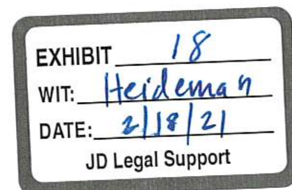

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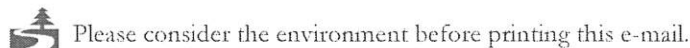


From: Justin Heideman <jheideman@heidlaw.com>
Sent: Wednesday, December 04, 2019 11:26 AM
To: Samantha Fowlks <sfowlks@heidlaw.com>
Cc: Lilly Alvidrez <lalvidrez@heidlaw.com>; Wendy Poulsen <wpoulsen@heidlaw.com>
Subject: RE: RaPower3 Oregon sharefile

Sam:

Thank you for this. We will also need to pull the agreements with the Oregon clients and the conflict waivers/contracts that required RAPower to defend them.

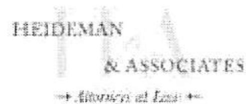
Justin

From: Samantha Fowlks <sfowlks@heidlaw.com>
Sent: Wednesday, December 4, 2019 11:08 AM
To: Justin Heideman <jheideman@heidlaw.com>
Cc: Lilly Alvidrez <lalvidrez@heidlaw.com>; Wendy Poulsen <wpoulsen@heidlaw.com>
Subject: RaPower3 Oregon sharefile

https://heidemanandassociates.sharefile.com/d-s4be0b33dba445569

Justin, these are the pleadings I could find. It also includes the trial transcripts from when you went to trial up there.

Sam Fowlks | *Legal Assistant*



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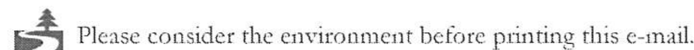

EXHIBIT C

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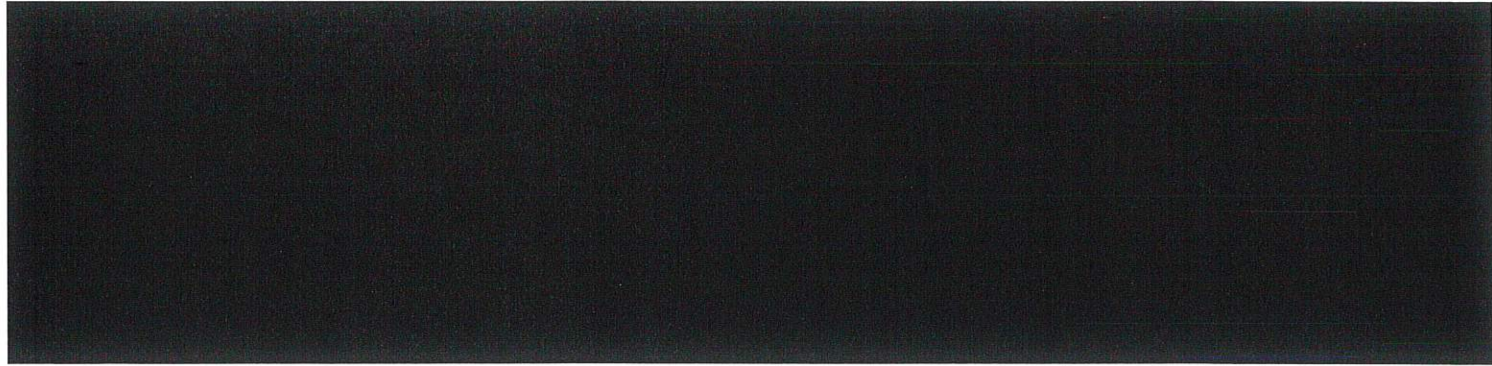

From: Norman Peat <npeat@heidlaw.com>
Sent: Wednesday, December 4, 2019 12:39 PM
To: Justin Heideman <jheideman@heidlaw.com>
Subject: RaPower3

Justin,

I quickly reviewed all of the documents in the RaPower3 (Oregon case) folder and could not find any document that required RaPower3 to represent anyone.

What I did find was the RaPower3 Policies and Procedures which governs a "Team Member" when the individual becomes a distributor for the Solar Lenses.

Section 15.7 states, "Each Team Member agrees to indemnify and hold harmless the Company for any tax related penalties and charges incurred."
Section 16.1 indemnifies the Company.

I am not sure if this is helpful but I have attached the documents.

Norman Peat | Law Clerk

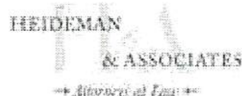

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EXHIBIT 19
WIT: Heideman
DATE: 2/18/21
JD Legal Support

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IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, please be advised that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used or relied upon, and cannot be used or relied upon, for the purpose of (i) avoiding penalties under the Internal Revenue Code, or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

EXHIBIT D

Page 1

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

3

4 R. WAYNE KLEIN, as Receiver,)
) CERTIFIED COPY
5 Plaintiff,)
)
6 v.) Civil No. 2:19-CV-00854-DN
)
7 JUSTIN D. HEIDEMAN LLC DBA)
HEIDEMAN & ASSOCIATES, a Utah)
8 limited liability company,)
)
9 Defendant.)
)

10

11

12 DEPOSITION OF JUSTIN D. HEIDEMAN

13 Provo, Utah

14 Thursday, February 18, 2021

15

16

17

18

19

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21

22

23

24

25 Reported by: Daren S. Bloxham, RPR No. 000335

Page 2

1 Deposition of Justin D. Heideman, taken at
2 Heideman & Associates, located at 2696 N. University
3 Avenue, Ste. 180, Provo, Utah, on February 18, 2021, at
4 9:12 a.m., before Daren S. Bloxham, Certified Court
5 Reporter, in and for the State of Utah.
6
7 A P P E A R A N C E S
8 FOR THE PLAINTIFF:
9 David C. Castleberry, Esq.
MANNING, CURTIS, BRADSHAW & BEDNAR
10 136 E. South Temple, Ste. 1300
Salt Lake City, Utah 84111
11 (801) 363-5678
dcastleberry@mc2b.com
12
13 FOR THE DEFENDANT:
14 Justin R. Elswick, Esq.
HEIDEMAN & ASSOCIATES
15 2696 N. University Avenue, Suite 180
Provo, Utah 84601
16 (801) 472-7742
jelswick@heidlaw.com
17
18 ALSO PRESENT: R. Wayne Klein, Esq.
19
20
21
22
23
24
25

Page 3

1 I N D E X
2 WITNESS: Justin D. Heideman
3 EXAMINATION PAGE
4 By: Mr. Castleberry 5
5
6
7 E X H I B I T S

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9	EXHIBIT 1	Second Amended Notice of Deposition	8
10	EXHIBIT 2	Client Information Form	17
11	EXHIBIT 3	4/22/16 email - Shepard to all	23
12	EXHIBIT 4	5/23/16 email - Shepard to all	25
13	EXHIBIT 5	6/24/16 email - Gregg to Shepard	26
14	EXHIBIT 6	8/15/16 email - Orth to Fowlks	27
15	EXHIBIT 7	Order granting motion for Pro Hac Vice	29
16	EXHIBIT 8	8/30/16 letter - Salisbury to Nickerson	33
17	EXHIBIT 9	Order Pro Hace Vice	44
18	EXHIBIT 10	5/19/17 email - Fowlks to Salisbury	58
19	EXHIBIT 11	RaPower-3 Equipment Purchase Agreement	67
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21	EXHIBIT 13	2/23/13 email - Orth to Shepard	84
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1	EXHIBIT 18	12/4/19 email - Fowlks to Heideman	99
2	EXHIBIT 19	12/4/19 email - Peat to Heideman	102
3	EXHIBIT 20	Payments by Receivership to Heideman & Ass.	102
4	EXHIBIT 21	Transactions H&A Client Billing Report	104
5	EXHIBIT 22	Civil Trial Subpoena to Leslie Bick	113
6	EXHIBIT 23	10/18/16 email - Heideman to Fowlks	113

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Page 5

1 P-R-O-C-E-E-D-I-N-G-S
2 --oOo--
3 JUSTIN D. HEIDEMAN,
4 having been first duly sworn to tell the
5 truth, was examined and testified as follows:
6 EXAMINATION
7 BY MR. CASTLEBERRY:
8 Q. Good morning. Please state your name for the
9 record.
10 A. Justin Douglas Heideman.
11 Q. And have you ever had your deposition taken
12 before?
13 A. I have.
14 Q. How many times?
15 A. Once.
16 Q. Once? What was the nature of that proceeding?
17 A. It was a contract dispute.
18 Q. You've taken, I'm sure, many depositions through
19 your career?
20 A. Probably thousands.
21 Q. Is there any reason why you can't give your best
22 testimony today?
23 A. That's a really good question to be honest with
24 you. I will tell you since COVID, a lot of people in the
25 office have said this, my memory is not as sharp, my -- my

Page 6

1 attention span is not as good, and my patience level is
2 far less.
3 Q. Okay. And when did you catch COVID?
4 A. I got it on December 15th.
5 Q. Of '20?
6 A. Uh-huh (affirmative).
7 Q. Is that a yes?
8 A. Yes, that's a yes.
9 Q. Have you had any official diagnosis from any
10 doctor regarding your memory or your patience?
11 A. They just say that's a common sign. They call
12 it a brain fog.
13 Q. And when did you begin to experience your brain
14 fog?
15 A. My daughter came home -- she's a CNA at Cove
16 Point Senior Care facility, and they had an outbreak there
17 over Thanksgiving. She was exposed and came home. The
18 following Saturday is when I woke up, massive headache,
19 just literally felt like -- I think I understand what it
20 feels like to have Alzheimer's because you can feel
21 yourself thinking, but you can't come up with the
22 information. It's weird.
23 Q. And did you have an official diagnosis with
24 COVID?
25 A. I did.

Page 7

1 Q. Did you pursue any treatment for COVID?
2 A. To the extent there is any treatment for COVID,
3 yes. And they gave me exactly what they give everybody
4 else, which is go home, get some rest, and hope it doesn't
5 get worse.
6 Q. Did they provide you with any type of medicine
7 or --
8 A. They did not.
9 Q. As far as this brain fog goes that you're
10 experiencing, have you felt that it's been getting better,
11 staying the same?
12 A. Yeah, no, it's been improving, but it's slow.
13 There's a definite difference in -- in my abilities.
14 Q. So as far as being able to give your best
15 testimony today, you're here under oath.
16 A. Yes.
17 Q. You will state your recollection and memory to
18 the best of your ability?
19 A. As absolutely best as I can.
20 Q. And you will let me know if you cannot remember
21 something?
22 A. Certainly will tell you if I don't remember.
23 Q. Is there any other reason you cannot give your
24 best testimony today?
25 A. Nope.

Page 8

1 Q. And you're here in your capacity as a
2 representative of Heideman, LLC; is that correct?
3 A. Justin D. Heideman, LLC, dba Heideman &
4 Associates, yes.
5 Q. And what I'm going to do is mark as an exhibit
6 the Notice of Deposition.
7 (Exhibit 1 marked.)
8 Q. (By Mr. Castleberry) The court reporter has
9 handed you what's been marked as Exhibit 1, and I'll
10 represent to you that this is the Rule 30(b)(6) deposition
11 notice for this case; is that correct?
12 A. It is.
13 Q. You've seen this document before?
14 A. I have.
15 Q. And if you flip to the topics, which is on
16 page 6, you're here in the capacity to testify on all six
17 of these topics; is that correct?
18 A. I am.
19 Q. Is there anyone else who will be testifying on
20 any of these topics?
21 A. I don't anticipate that.
22 Q. And it's your anticipation that you will provide
23 testimony on all of these topics contained in this
24 30(b)(6)?
25 A. As you ask me questions, I'll answer them.

Page 9

1 Q. Tell me a little bit about your practice?
2 A. I was licensed in October of 2000, and I've been
3 in continuing practice since that point in time, licensed
4 here in Utah, bar number 8897.
5 Q. Throughout your practice, have you developed any
6 type of specialty?
7 A. Well, I don't know that Utah allows us to call
8 ourselves specialists or experts, but the area I emphasize
9 in in my practice has to do with financial and business
10 matters.
11 Q. As far as the firm goes, can you give a
12 percentage of time spent on litigation?
13 A. Pre-COVID?
14 Q. Sure.
15 A. Pre-COVID, probably 90 percent. Post-COVID,
16 there's no courts operating, so the percentage has fallen
17 dramatically.
18 Q. It's a different day right now?
19 A. It is a different day.
20 Q. And what I'd be curious about, during the time
21 when the firm represented RaPower and the Oregon lens
22 purchasers, at that time was about 90 percent of the
23 firm's business devoted to litigation?
24 A. At that time I would say it would be closer
25 to -- it would be less, probably -- again, we're

Page 10

1 ballparking estimates here. Probably 75 percent.
2 Q. And what was the other 25 percent spent with?
3 A. Well, I started a bank in 2008, Town & Country
4 Bank. And I was general counsel for that bank, as well as
5 on the loan committee. And so it -- the bank itself
6 comprised about 15 percent of our firm's overall practice,
7 just banking, law banking issues. Some of it was
8 litigation, but a lot of it was just contracts and things
9 of that nature.
10 Q. Was the bank a client of the firm?
11 A. Yes.
12 Q. Other than working for the bank, what other
13 types of matters would the firm handle that were not
14 litigation?
15 A. Lots of estate planning. We do -- this spawned
16 kind of from a litigation, 2004 I think it was. We won
17 the largest arbitration verdict, SEC arbitration verdict
18 in U.S. history. It's called Packard v. Edwards Jones.
19 Justin Elswick and I did that. And then we developed an
20 area of emphasis in terms of private placement memorandums
21 and private offerings, so we do a lot of PPMs.
22 Q. And you provide -- can you describe the type of
23 services that you provide in that area?
24 A. We draft them, and then we vet them. I guess
25 are you asking in terms of litigation or non-litigation?

Page 11

1 Q. Non-litigation.
2 A. So we'll draft PPMs. We'll go through and
3 analyze the business plans that are provided associated
4 with those. Sometimes we even offer some just general
5 business guidance. I'm not really sure what you're
6 asking, but that would probably be it. That's the way I'm
7 understanding your question.
8 Q. Do you have any tax specialists at the firm?
9 A. Well, we don't have any specialists because
10 that's not something you're allowed to be in Utah.
11 Q. Do you have any attorneys that focus their
12 practice on tax issues?
13 A. No, not an area of emphasis. We do have people
14 that have practiced in that area, but it's not an area
15 of -- of emphasis.
16 Q. Who are the attorneys that have practiced in
17 the -- in the area of tax?
18 A. I have, and at the time we had Jeff Bissegger
19 and -- what's his name? I'm sorry. I can't think of his
20 name. He's not with the firm anymore.
21 Q. When you say "at the time," what do you mean?
22 A. I'm assuming you're asking at the time of the
23 case?
24 Q. Correct. 2012 to about 2017.
25 A. I cannot think of his name. I can probably

Page 12

1 provide that after a break. I'll have to go and look at
2 the employment log. I can't think of it. Sorry.
3 Q. That's fine. That's fine. Does Heideman &
4 Associates file regulatory exemptions?
5 A. No, if you're asking in terms of the firm.
6 You're asking about our firm?
7 Q. Correct.
8 A. Yeah, we don't have a regulatory exemption.
9 Q. So you talked about preparing PPMs. And the
10 question is whether you -- the firm would file these with
11 the state agencies or whether someone else would?
12 A. Well, it depends on where the person is at and
13 what the offering is.
14 Q. But the firm -- you yourself, as a matter of
15 course or as a matter of consistent practice, don't file
16 these PPMs?
17 A. No, depends on where the offering is. For
18 instance, if you're going to make an offering in Florida
19 or New York, you have to file your PPM in advance. If
20 you're going to make an offering here in Utah, until you
21 receive an offer to receive an investor, you don't
22 actually have to file it. There have been times that we
23 have filed, and there have been times that the client has
24 filed.
25 Q. Okay. We're here today because of some work

Page 13

1 you've done for lens purchasers in Oregon?
2 A. Uh-huh (affirmative).
3 Q. Is that correct?
4 A. That's correct.
5 Q. Can you tell me the names of the Oregon lens
6 purchasers that were involved in the actions in Oregon?
7 A. I anticipated that, so I wrote them down.
8 Q. Okay. Great.
9 A. I'm going to give you the names of all the
10 individuals that were involved in the cases, but not all
11 of the individuals did we personally work with or for
12 because of the reasons of the cases.
13 There was Roger Freeborn, Kevin and Michelle
14 Gregg, Peter Gregg, Matthew and Elizabeth Orth, Bruce and
15 Daniella Reece, Lyle J. Froyd and Amy L. Froyd,
16 Greg Shepard, Jesse and Samantha Pershin. And I think
17 that's it. There might be one other name, but I couldn't
18 find it fast enough.
19 Q. So for my benefit and the court reporter's
20 benefit, would you mind spelling those names for us?
21 A. Sure. Roger Freeborn is common spelling,
22 R-o-g-e-r, then Freeborn just like it's phonetically
23 spelled. Kevin and Michelle, K-e-v-i-n, M-i-c-h-e-l-l-e,
24 Gregg, common spelling except two Gs at the end,
25 G-r-e-g-g. Then there's Peter Gregg. I'm sure Peter is

Page 14

1 married, but I don't know his wife's name.
2 Matthew and Elizabeth Orth, M-a-t-t-h-e-w,
3 Elizabeth, E-l-i-z-a-b-e-t-h, and Orth, O-r-t-h. Bruce
4 and Danielle Reece, Bruce, B-r-u-c-e, Danielle is
5 D-a-n-i-e-l-l-e, and Reece is R-e-e-c-e. Lyle J. Froyd,
6 L-y-l-e, J as in my middle name or firm name, Justin,
7 Froyd, F-r-o-y-d, and Amy L. Froyd, A-m-y, L. middle
8 initial, and then Froyd, F-r-o-y-d.
9 Greg Shepard. I apologize. I've seen his last
10 name spelled multiple ways. The one that's on the
11 corporate pleading is G-r-e-g and S-h-e-p-a-r-d. I always
12 understood his name to be Gregory, but -- I've understood
13 his name to be Shepard with two Ps as well, but that's
14 what's on the court pleading up in Oregon.
15 MR. KLEIN: It's Ralph Gregory Shepard with one
16 P.
17 THE WITNESS: There you go. You know that
18 better than I do.
19 **Q. (By Mr. Castleberry) We got it for the record?**
20 A. Pershin is P-e-r-s-h-i-n. Jesse is J-e-s-s-e.
21 And then Samantha, S-a-m-a-n-t-h-a. There you go.
22 **Q. All right. Thank you. Do you have any**
23 **engagement letters for any of these clients or any of**
24 **these matters?**
25 A. Yes. And those were provided in discovery.

Page 15

1 Specifically it's an engagement letter with RaPower. And
2 then we have corresponding email between the three -- not
3 three, but between the individual entities.
4 **Q. I'll represent to you that we've looked at your**
5 **production, and we did ask for all types of correspondence**
6 **with RaPower as one of the discovery requests. And we did**
7 **not receive an engagement letter.**
8 A. I guess it depends on how you define
9 "engagement." Do we have a document that says "engagement
10 letter"? No. We don't have a document that says that,
11 period.
12 We use documents that say "client agreement."
13 In this particular instruction, it was an email
14 instruction and we provided that. I actually reviewed
15 that production this morning, and I know you have it.
16 **Q. Can you describe the substance of that email?**
17 A. Yes. It says, Justin, we need to retain you as
18 counsel. Something to the effect of, We need to retain
19 you as counsel to handle legal matters on behalf of the
20 investors -- it doesn't use the word "investors." It uses
21 the word "leasehold operators," I can't remember the
22 term -- up in Oregon because the Department of Justice is
23 prosecuting them on the same theories that they're
24 bringing in the case in federal court.
25 **Q. Who is the email with?**

Page 16

1 A. That's a good question. I don't know that I
2 reviewed that this morning. I think it was Greg Shepard
3 or Roger Freeborn that sent the email to me and copied --
4 copied Neldon and Glenda and myself.
5 **Q. And about when was that email sent?**
6 A. It would have been -- well, the cases started in
7 2016, and we engaged on them almost immediately because of
8 what had happened. My best estimate would be somewhere
9 between June and September of 2016.
10 That would be my best guess, and it might be
11 wrong. Might even be a little earlier than that, but I
12 think that's right. I'm just going off the dates of
13 the -- of the events that I'm aware of and extrapolating
14 from there.
15 **Q. And do you recall anything else from this email,**
16 **any other substance?**
17 A. I don't. I mean, I could go find them and pull
18 them for you. I know where they're at.
19 **Q. That might be worth our time, quite frankly, for**
20 **you to go find them and pull them so we can all be on the**
21 **same page with what you're --**
22 A. Okay. Well, when we take a ten-minute break, we
23 can get them for you.
24 **Q. Why don't we take the break right now since**
25 **we're on that topic?**

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1 A. It will take me a minute because I've got to go
2 through them, but I can track them down.
3 (Recess taken at 9:28, resuming at 10:07.)
4 MR. CASTLEBERRY: Back on the record. And let's
5 mark this client information as Exhibit 2.
6 (Exhibit 2 marked.)
7 MR. ELSWICK: To be clear, it is our client
8 agreement. The "Client Information Statement" at the top
9 is the first caption for it. So for clarification, it is
10 our client agreement.
11 MR. CASTLEBERRY: Okay.
12 **Q. (By Mr. Castleberry) Justin, I've handed you**
13 **what's been marked as Exhibit 2. You have seen this**
14 **document before, correct?**
15 A. Before this moment, yes, I have.
16 **Q. And, in fact, your signature is on the last page**
17 **of Exhibit 2; is that correct?**
18 A. That is my signature, yes.
19 **Q. And we have another signature on the last page**
20 **of Exhibit 2, and is that the signature of Neldon Johnson?**
21 A. That is.
22 **Q. If you turn to the first page of the client**
23 **information, it lists "client name." Do you see that?**
24 A. Yep.
25 **Q. And is the client RaPower?**

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1 A. RaPower-3, yes.
2 Q. RaPower-3?
3 A. Uh-huh (affirmative).
4 Q. And if you go to the second page, under the
5 heading "Employment," there is a button filled in or a
6 bullet point filled in next to "Municipal."
7 Do you see that?
8 A. Yes.
9 Q. And can you tell me why the "Municipal" bullet
10 is filled in?
11 A. Well, frankly, if I had to do it over again, I
12 probably would have scratched out "Municipal" and written
13 "Government," but it's intended to indicate there's a
14 government entity involved.
15 Q. And below that, do you see some handwriting?
16 A. Yes.
17 Q. And whose handwriting is that?
18 A. That's mine.
19 Q. And it reads, "New action including pro hac vice
20 admission in the State of Oregon regarding administrative
21 actions commenced against client."
22 Did I read that correctly?
23 A. Yes. That's correct. Not a very neat penman.
24 Q. Well, it's helpful to have you here so we can
25 make sure we're on the same page.

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1 And the opposing part is Oregon; is that
2 correct?
3 A. Yes. Uh-huh (affirmative). That's what it
4 says, yes.
5 Q. What, if any, administrative actions were taken
6 against RaPower in Oregon?
7 A. Well, what you're asking, I think, is a
8 conflation of two questions. What you're asking is why
9 did I put "administrative action" on this particular
10 document?
11 And the answer is because during -- well, and
12 you know, Neldon. Listening to him testify or try to
13 explain something is like trying to wind your way through
14 and find a needle in a stack of needles. He's very, very
15 difficult to keep focused.
16 And so in our initial consultation, which would
17 have been -- on this matter anyway, which would have been
18 on April -- I guess April 5th, the conversation that took
19 place was such that he indicated there was a state tax
20 event that was taking place against RaPower. And I
21 certainly didn't have all the facts of the case, didn't
22 understand exactly what was going on, beyond the fact that
23 I knew there was an urgency.
24 The urgency was that there had already been a
25 default entered against one of the defendants. That

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1 default was being utilized by the DOJ for purposes of a
2 prejudicial or preferential ruling against RaPower in the
3 state action.
4 It was on the same issues associated with the
5 state action. And so as a result, when I put it down, I
6 put it down because my impression from our conversation
7 was it was going to be an administrative event. Obviously
8 it was far more than that.
9 Q. When you say, "It was far more than that," what
10 do you mean?
11 A. Well, it wasn't just an administrative action,
12 it was in front of the tax court. And it was already to
13 the appellate level. An initial determination had already
14 been issued.
15 Q. And who had the initial determination been
16 issued against?
17 A. Several of the individuals that were leasing
18 assets and were partners or investors, if you will, in
19 RaPower. The people we identified earlier.
20 Q. Yeah, you listed a number of individuals?
21 A. Uh-huh (affirmative).
22 Q. Did all of these individuals have judgments
23 against them?
24 A. No. They all had administrative decisions, or
25 they were underneath the same investigation. So they

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1 were -- at some point in the process, there was only one
2 individual that had been defaulted.
3 Q. And who was that individual?
4 A. And I apologize, I should have looked on this.
5 I'm pretty sure, as I sit here, like if I had to bet
6 money, it's Peter Gregg. You'll remember he was the
7 brother, he and his wife -- brother of Kevin and Michelle
8 Gregg.
9 And I think he -- if my memory serves on this,
10 it was explained that he had effectively gone it alone,
11 gotten his head handed to him by the DOJ, ended up with
12 either a default or some type of a judgment such that
13 there was a ruling that was on the books that was -- that
14 there was not going to be -- or there would be a
15 disallowance of these tax credits. So as a result, we had
16 to step in.
17 The DOJ was actually trying to argue that it was
18 res jud. And then they were -- Erin Healy Gallagher was
19 trying to argue that it should have a similar preclusive
20 effect in federal court.
21 Q. When you said, "His head was handed to him by
22 the DOJ," was the DOJ involved in any way in these --
23 A. If you look at the letters, you'll see the DOJ
24 is involved.
25 Q. In the Oregon tax proceedings?

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1 A. Yes. And they're actually addressed to the
2 Department of Justice Oregon.
3 Q. And when you say "DOJ," do you mean the --
4 A. Department of Justice Oregon. That's what it
5 says on the letterhead.
6 Q. The Oregon Department of Justice?
7 A. Yep.
8 Q. Go to page 4 of this Exhibit 2. There's some
9 more handwriting. Do you see that?
10 A. Yes.
11 Q. And it looks like there's something that's been
12 whited out. Do you see that under "other fee
13 arrangement"?
14 A. Uh-huh (affirmative).
15 Q. Have you looked at the original? Do you know
16 what was whited out?
17 A. Yeah, we usually have there -- that's a
18 section -- that box is a section that says something to
19 the effect of conditions in which attorney covers cost.
20 As you can tell, I spilled over into the second one, and I
21 didn't want there to be any confusion, so I whited out
22 that header.
23 Q. So you started writing under "other fee
24 arrangement." It was so long, you moved it to the other
25 boxes and then whited out what you began writing to avoid

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1 confusion?
2 A. Yeah.
3 Q. Did Neldon sign this agreement with you as part
4 of an in-person meeting?
5 A. Yes.
6 Q. And this -- this meeting with Neldon, how long
7 did it take?
8 A. Oh, gosh, I have no independent recollection of
9 the length of this particular meeting, beyond the fact
10 that I can tell you I never had a meeting with Neldon that
11 was less than two hours. So if I met with him in person,
12 if we got through 20 minutes worth of information, it
13 would take two hours to do it.
14 I take that back. I did have one where he just
15 came in and dropped off a check. That was the only time I
16 ever know it was less than two hours. I tried to avoid
17 those in-person meetings as much as possible.
18 MR. CASTLEBERRY: Let's mark this as Exhibit 3.
19 (Exhibit 3 marked.)
20 Q. (By Mr. Castleberry) The court reporter has
21 handed you what's been marked as Exhibit 3. Have you seen
22 this document before?
23 A. Yes.
24 Q. What is it?
25 A. It's an email from Greg Shepard.

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1 Q. What's it dated?
2 A. The date on it is April 22, 2016, at 11:06 a.m.
3 Q. And who was this email sent to?
4 A. I don't truly know the answer to that. It
5 doesn't have a list there.
6 Q. How did Heideman & Associates get a copy of this
7 email?
8 A. My recollection is it was received as part of a
9 production of documents in the underlying case. I think
10 it came from Greg Shepard. "Underlying case" meaning the
11 federal actions.
12 Q. When you say "federal actions in the underlying
13 case," just so we're on the same page, these are federal
14 actions initiated against RaPower?
15 A. RaPower by the Department of Justice, correct.
16 Q. This is the U.S. Department of Justice?
17 A. That's correct. But it's possible that it was
18 copied to me. I don't have an independent recollection of
19 that. To preclude any level of confusion, I'll just
20 volunteer this information. It was typical because Greg
21 used a mailing list and, to the extent that you're
22 familiar, that he would bcc everyone. So it's not
23 atypical that the "to" line is blank.
24 Q. Going back to Exhibit 3, do you have this email
25 in your firm files?

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1 A. I don't -- do I have it in my firm file? Yes,
2 that's where I found it.
3 Q. Meaning your email files?
4 A. I don't know the answer. I didn't look through
5 my emails for this.
6 MR. CASTLEBERRY: Justin, is that something you
7 would be willing to look at?
8 MR. ELSWICK: Of course. We can take a look, go
9 back through the archives.
10 THE WITNESS: I can probably take a look when we
11 take a break. I was just trying to find it for you
12 quickly because you asked for it.
13 Q. (By Mr. Castleberry) Yeah, we appreciate that.
14 MR. CASTLEBERRY: Let's mark this as Exhibit 4.
15 (Exhibit 4 marked.)
16 Q. (By Mr. Castleberry) The court reporter has
17 handed you what's been marked as Exhibit 4. And have you
18 seen this document before?
19 A. Before today, yes.
20 Q. And what is it?
21 A. Again, it's another email from Greg Shepard
22 dated May 23, 2016, at 9:40 a.m.
23 Q. Same question: Was this sent to -- to whom was
24 this sent?
25 A. I don't know everyone that received it.

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1 Q. And how did Heideman & Associates get a copy of
2 it?
3 A. Just given the Bates number, I believe it was
4 produced as part of the underlying litigation.
5 Q. Just so the record's clear, let's provide the
6 Bates number for Exhibit 3 and Exhibit 4.
7 A. Exhibit 3 is Bates RaP3 000285 and 000286.
8 Exhibit 4 is 000284.
9 MR. CASTLEBERRY: Let's mark the -- this
10 as Exhibit 5.
11 (Exhibit 5 marked.)
12 Q. (By Mr. Castleberry) The court reporter has
13 handed you what's been marked as Exhibit 5. This is a
14 document you've seen before, correct?
15 A. Yes.
16 Q. And this has a document of -- Bates number
17 RaP3 000287; is that correct?
18 A. Correct.
19 Q. And this looks to be an email from Kevin Gregg
20 to Greg Shepard dated June 24, 2016; is that correct?
21 A. It's actually a list of emails. It looks like
22 the first email is Kevin Gregg to Greg Shepard. Then the
23 second is Greg Shepard to Kevin Gregg.
24 Q. And --
25 A. Or to "all," I guess, of which it would be

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1 Kevin Gregg.
2 Q. Kevin Gregg would be one of the individuals?
3 A. Uh-huh (affirmative). I doubt he would say
4 "with regard to" in a specific email to Kevin Gregg. I
5 don't think he would address it to "all." I think he
6 would say "Kevin." I'm sure this was part of his mailing
7 list.
8 MR. ELSWICK: Just to point out, it looks like
9 it's an email chain in the initial email at the bottom
10 starting the day before.
11 MR. CASTLEBERRY: Correct. Yeah.
12 MR. ELSWICK: That looks like it's from
13 Greg Shepard.
14 Q. (By Mr. Elswick) So Greg Shepard started the
15 email chain, and then Kevin Gregg responded; is that fair?
16 A. That's what it looks like, yes.
17 MR. CASTLEBERRY: Let's mark this as Exhibit 6.
18 (Exhibit 6 marked.)
19 Q. (By Mr. Castleberry) The court reporter has
20 handed you what's been marked as Exhibit 6. Is this a
21 document that you've seen before?
22 A. I actually personally don't think I've ever seen
23 this document before today.
24 Q. And just taking a look at this, it looks like
25 this is an email exchange?

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1 A. Uh-huh (affirmative).
2 Q. Initiated by Samantha Fowlks?
3 A. Correct.
4 Q. Who is Samantha Fowlks?
5 A. She's a legal assistant here in our law firm.
6 Q. Does she still work here at the law firm?
7 A. She does.
8 Q. And this email is dated August 15th, 2016?
9 A. Uh-huh (affirmative).
10 Q. And it's addressed to Kevin, Michelle, and
11 Matthew; is that correct?
12 A. That's correct.
13 Q. And how did you -- and then there's an email
14 from Matt Orth to Samantha Fowlks; is that correct?
15 A. That's correct.
16 Q. And this document does not have a Bates number.
17 You say that you've never seen it before today?
18 A. Nope.
19 Q. How did you obtain a copy of this email? I'll
20 just state for the record that I haven't seen this email
21 before today either. We took a break, and you and your
22 attorney were able to grab some emails. And this is one
23 of the emails that you just provided to us; is that right?
24 A. That's correct.
25 Q. And how was this email obtained? What was the

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1 process that you went to --
2 A. I went out to look for the emails, and this is
3 one that was handed to me when I was making photocopies.
4 Q. And who handed the email to you?
5 A. Sam.
6 Q. Sam handed it to you?
7 A. Uh-huh (affirmative).
8 Q. Is that a yes?
9 A. That's yes.
10 Q. How did Sam -- what did Sam say to you when she
11 handed it to you?
12 A. She said, "Is this an email that -- one you're
13 looking for?" We told here we were looking for the emails
14 that confirmed correspondence between the Oregon
15 individuals.
16 Q. Is this an email kept in the ordinary course of
17 Heideman & Associates?
18 A. It would appear to be an email Sam sent. So,
19 yes, it would be in the ordinary course.
20 Q. This is sent from Sam's Heideman law firm email
21 address?
22 A. That's correct, yes.
23 MR. CASTLEBERRY: Let's mark this as next in
24 line.
25 (Exhibit 7 marked.)

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1 Q. (By Mr. Castleberry) Have you seen what's been
2 handed to you before as Exhibit 7?
3 A. I have, yes.
4 Q. And what is it?
5 A. Well, this is a letter from Gleaves Swearingen,
6 which was our sponsoring counsel when we were admitted
7 pro hac vice. It's issued to Dawn Evans, who is part of
8 the Oregon State Bar Regulatory Services. And it confirms
9 that we have been admitted pro hac vice.
10 MR. ELSWICK: Is there an extra copy of that,
11 David?
12 MR. CASTLEBERRY: All right. Well, why don't we
13 take a break? I mentioned to your counsel that we have a
14 court hearing. We don't believe it should take very long.
15 And --
16 THE WITNESS: Sure. Take your time.
17 MR. CASTLEBERRY: We'll get back on the record.
18 MR. ELSWICK: Not a problem.
19 (Recess taken at 10:25, resuming at 10:55.)
20 THE WITNESS: I went back and had a chance to
21 look in my archives because obviously these are way old.
22 I was on copy for Exhibit 3, Exhibit 4, Exhibit 5. I was
23 not on copy for Exhibit 6.
24 MR. ELSWICK: Well, to clarify, Exhibit 5 you
25 were only on copy --

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1 THE WITNESS: Only on copy for part of it.
2 That's correct. I was not on copy on the response from
3 Kevin Gregg, just the email portion that came out from
4 Greg Shepard.
5 MR. ELSWICK: These are the -- keep those
6 separate.
7 Q. (By Mr. Castleberry) And, Justin, when you
8 looked through your files, the copies that we have as
9 exhibits are true and correct, there's no differences?
10 A. The only thing that's weird, I will tell you
11 this, I -- my copies don't have this funky like Chinese
12 stuff at the top.
13 Q. Okay.
14 A. I have no idea what that is. Never seen that
15 before. I don't know what --
16 MR. ELSWICK: I don't know that that's Chinese,
17 but --
18 THE WITNESS: Well, whatever it is, I don't know
19 what it is. My copies don't have that.
20 MR. ELSWICK: It looks like Latin letters.
21 THE WITNESS: There you go.
22 MR. CASTLEBERRY: With some --
23 MR. ELSWICK: Punctuation.
24 MR. CASTLEBERRY: Yeah. Thank you for doing
25 that. We appreciate that. And, also, I just want to go

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1 on the record. Thank you for accommodating us, for
2 allowing us to hold the hearing. We appreciate that.
3 MR. ELSWICK: No worries.
4 MR. CASTLEBERRY: Also say maybe it was a good
5 thing we're holding this at your office so we can figure
6 out some of these issues.
7 THE WITNESS: Yes. Just for the record, I don't
8 know if Justin has already told you this, but I just told
9 the entire staff I want them to go through our production
10 and make sure there was nothing else that was missed.
11 I'm suspecting, and this is a pure speculation,
12 every one of these documents was in an archive file. It's
13 very, very old. It's a portion of the server that like
14 nobody ever goes there.
15 And the only reason I went there is because I
16 was at home trying to prepare for the deposition, and it
17 was the only thing I could get open. So I went there and
18 I read through it.
19 I'm suspecting it may have just been this very
20 specific file that was missed. There's not a lot of
21 information in there beyond what I've shared with you.
22 And so, anyway, long story short we'll make sure you get
23 everything.
24 Q. (By Mr. Castleberry) Okay. Would it be fair
25 just to hold this deposition open, if we were to get new

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1 and material information, and we can talk about that?
2 A. If you want to ask me about something else,
3 you're welcome to.
4 MR. ELSWICK: Absolutely.
5 Q. (By Mr. Castleberry) Fair enough.
6 MR. CASTLEBERRY: Let's just mark this as
7 Exhibit 8.
8 (Exhibit 8 marked.)
9 Q. (By Mr. Castleberry) The court reporter has
10 handed you what's been marked as Exhibit 8. This is
11 another document that your counsel just handed us today.
12 Have you seen this letter before?
13 A. I have.
14 Q. And what is it?
15 A. This letter was actually issued in response to a
16 statement from the court, the Oregon Tax Court. The
17 reason being is that Gleaves Swearingen identified two
18 attorneys that were going to be on the case and be
19 admitted, but Oregon has a rule that you can only have two
20 attorneys listed.
21 And so they had to identify which of their two
22 attorneys was actually going to come off the case so that
23 I could be admitted to the case. So the letter indicates
24 that Jeff Salisbury, who is a very fine gentleman,
25 absolutely consummate professional and extremely law in

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1 the law, and myself would be listed at the attorneys of
2 record in the case.
3 Q. Karianne Conway, was she someone associated with
4 Salisbury?
5 A. Yes. Uh-huh (affirmative).
6 Q. All right. What I'd like to do is talk about
7 the work you performed for each of the third parties that
8 you listed at the beginning of your deposition.
9 A. Okay.
10 Q. So we'll start with Roger Freeborn. What work
11 did you perform for Roger Freeborn, if you recall?
12 A. You just want me to give a narrative?
13 Q. Yeah.
14 A. Well, I think that's objectionable, frankly. I
15 don't know how to answer that question. We could be here
16 forever.
17 Q. Did you have any -- when you say that you
18 represented Roger Freeborn, did you represent him in any
19 actions?
20 A. So every one of the people on that list were --
21 was an individual that was being audited by the State of
22 Oregon. Perhaps it's easier if I just offer you this.
23 There was a -- there was this default that had occurred.
24 Again, I should have checked this. I keep forgetting to
25 do it. I think it's Peter Gregg that had the default, but

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1 I could be wrong.
2 Anyway, the DOJ was trying to use that. The DOJ
3 in the federal case, Erin Healy Gallagher and her cohort,
4 were trying to use that as some type of precedential or
5 preferential or even res judicata ruling against RaPower
6 to short-circuit the federal lawsuit, which is why RaPower
7 hired us in the first place because that was -- that was
8 the attempt.
9 They were basically trying to violate in my
10 opinion, and I'll use that word intentionally, they were
11 trying to violate RaPower's rights to litigate this by
12 short-circuiting it through the Oregon court.
13 And so they brought us in to get that set aside,
14 and we did so. Our first action in the case was to
15 identify for the court that it couldn't be res jud because
16 under the rules, you have to have a full and fair
17 litigation, and a default doesn't get that done.
18 The court agreed, even though the DOJ fought
19 like crazy. But they lost. And so at that point in time,
20 counsel for the DOJ in Oregon and myself agreed to
21 identify two cases that we would run as test cases for all
22 of the other cases because the issues were the same.
23 So when you ask me did I perform any legal work
24 for Freeborn or Reece or Froyd or Shepard or Pershin, the
25 answer is every one of those individuals agreed to be part

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1 of this test case, which basically put Gregg and Orth --
2 Gregg being Kevin and Michelle and Matthew and
3 Elizabeth -- on the header of the cases because the
4 arguments were the same.
5 Q. So Gregg and Orth were the two test cases as you
6 put it?
7 A. Correct. I don't know if "test" is the right
8 word because it's not like it was a test. They were the
9 class cases. Maybe that's a better way to state it. They
10 were the examples.
11 Q. Were the other cases stayed?
12 A. Yes.
13 Q. And when you say that the DOJ, Erin Healy
14 Gallagher, fought to have these admissions in the case, in
15 what form did she fight that issue? Was it in Oregon?
16 A. Yeah. She was pushing the Oregon litigation.
17 Every time I spoke with Oregon counsel, they would
18 indicate that they were reporting to Erin, that she was
19 the one driving that case, and that the arguments were
20 coming from her.
21 Q. This is the counsel for Oregon?
22 A. Yes.
23 Q. Did Oregon have a case against Greg Shepard?
24 A. Yes.
25 Q. And did you represent Freeborn in the action

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1 brought by the US DOJ in the Utah Federal Court case?
2 A. The only person that I represented in the
3 federal case in Utah was the RaPower defendants.
4 Q. And in your opinion, the argument being put
5 forth by Erin Healy Gallagher with respect to res judicata
6 was incorrect?
7 A. It's totally wrong.
8 Q. Completely wrong?
9 A. It doesn't meet any of the legal standards, and
10 the court in Oregon agreed.
11 Q. Why would the court in Oregon issue an order
12 with respect to res judicata in another case?
13 A. Because the -- it wasn't as to another case.
14 The argument made in Oregon was as to the default. So
15 maybe you're conflating my answer. If that's the case, I
16 apologize. I probably wasn't very clear. So let me see
17 if I can restate it.
18 Peter Gregg, assuming that's the right name, was
19 defaulted. The arguments in his case were the same as the
20 arguments in all the other Oregon cases, and they were the
21 same arguments being raised in the federal case in Utah.
22 The argument with Peter Gregg that was raised by
23 the Oregon DOJ was that there should be no ability to
24 argue any of these other cases because the default was a
25 res judicata preclusive effect, and that it was either

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1 collateral or claim preclusion.
2 That plainly doesn't meet the standard. Even
3 though that argument -- I mean, we went through full
4 briefing, oral argument, the whole nine yards. It was
5 ridiculous how hard they fought that. They had no ability
6 to win in it. It doesn't meet it, and they lost badly.
7 **Q. So let me just stop you there. So when you're**
8 **talking about res judicata, you're talking about the**
9 **default against, by way of example, Gregg against the**
10 **other Oregon lens purchasers?**
11 A. Correct. Erin Healy Gallagher, and -- she was
12 trying to assert that the same position would have at
13 least a persuasive, if not, issue preclusive effect in
14 federal court in Utah.
15 **Q. So just so the record's clear, can you tell me**
16 **who Erin Healy Gallagher is?**
17 A. She was the driving force behind the Department
18 of Justice's prosecution of Neldon Johnson and the RaPower
19 defendants. She was their primary attorney.
20 **Q. Do you know if the US DOJ ever used any of the**
21 **Oregon actions in the federal Utah case?**
22 A. I know they tried to.
23 **Q. Do you know if they actually -- when you say**
24 **"tried to," what do you mean by that?**
25 A. Well, they tried to while we were there. That's

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1 why we were hired to go fight this action.
2 **Q. Was there any filing in the Utah federal action?**
3 A. Boy, that's a good question. So to the -- let
4 me tell you the best of my recollection. The reason why
5 there was a meeting in April with Neldon and I about this
6 Oregon case is because there was either a filing that had
7 been issued, or it was a conversation that I had with Erin
8 that they were going to make that filing.
9 I was making him, "him" being Neldon, aware of
10 it, that this was what was coming down the pipe. And,
11 quite frankly, the argument is if you get a judgment and
12 you don't do anything with it, even if it's a default,
13 eventually it sticks. If it's a judgment, it's a
14 judgment, and it stands.
15 I think the argument is very compelling if you
16 have a ruling that -- on the exact same issues for the --
17 effectively the same parties in one state, you're going to
18 have a hard time with the judge saying that's totally
19 wrong and going a different direction.
20 I think at least it's prejudicial against you.
21 So that's why we wanted to make him aware of it. But your
22 specific question, I don't recall. I don't have the
23 docket off the top of my head. Frankly, I think that
24 docket has over a thousand filings in, so I couldn't tell
25 you.

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1 **Q. As far as the Oregon case with Orth and Gregg**
2 **that you pursued, what was the outcome of that case?**
3 A. So we -- we won the argument associated with the
4 claim preclusion res judicata. The case went ultimately
5 to trial. All the other cases were stayed. My
6 recollection was -- well, this is one of the things that
7 was so interesting.
8 One of the pieces of evidence that we presented
9 in the case is that the Internal Revenue Service audited
10 every single one of these people and approved the
11 deductions that they had -- and credits that they had
12 taken.
13 So the IRS actually said, This is good to go.
14 And then the IRS sued Neldon Johnson, and then the IRS
15 assisted Oregon in coming back against them, which is
16 something I've never really been able to understand.
17 Somebody definitely had a bee in their bonnet and decided
18 that they were going to do this.
19 Anyway, point being, I truly do not recall as I
20 sit here whether or not the ruling was issued before we
21 were -- before we were terminated as counsel. I just
22 don't remember.
23 Ultimately, the cases came down against the
24 clients, but a lot of that had to do with the fact that
25 they waived their appellate rights because new counsel,

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1 Denver Snuffer, did not do anything with their appellate
2 rights when the rulings were issued.
3 If you take a look at the timelines, the initial
4 determination letters, those matters were initiated in
5 2011, and Oregon didn't make its ruling until 2016. So
6 that timeline doesn't shock me that that would take that
7 long.
8 **Q. And just so the record's clear, we're talking**
9 **about cases in Oregon state court --**
10 A. Yep.
11 **Q. -- involving tax issues under Oregon law; is**
12 **that fair?**
13 A. No, that's not fair. It has nothing to do with
14 Oregon law, it's all federal law. It was Oregon State Tax
15 Court dealing with federal deductions, as well as state
16 deductions, but Oregon's tax law on these deductions
17 adopted federal law is my understanding.
18 **Q. Okay. So state tax deductions were at issue as**
19 **well?**
20 A. I'm sure that's the case, yes, but it's all the
21 same law. These credits, to my knowledge, there is no --
22 again, I'm sitting here five years after the fact, so I
23 apologize if my memory is wrong. But my recollection was
24 there was -- there is no difference in the state -- Oregon
25 state tax credits versus the federal state tax credits for

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1 these types of deductions.
2 Q. As far as you know, Justin, can the Oregon tax
3 court issue opinions that are binding on the IRS?
4 A. The way you're asking that question, I would say
5 the answer is likely no. But I certainly think that --
6 well, I'll just simply say likely no, but I don't know the
7 answer directly. It's certainly persuasive.
8 Q. When you say "it's certainly persuasive," why do
9 you say that?
10 A. Because government agencies shake hands. And
11 the IRS is rarely going to come in to a state tax court
12 division and say, You have ruled in a fashion that we're
13 going to appeal.
14 Q. And what's the -- what's the basis for that
15 statement? What --
16 A. I've never seen the IRS appeal a state tax court
17 decision.
18 Q. Have you ever been involved in a case where that
19 was a potential or an issue?
20 A. That's just what I've said, I've never seen it
21 happen. Yes, I've seen those issues, but I've never seen
22 it happen.
23 Q. And how many times have you been in tax court
24 dealing with those types of issues?
25 A. Very few. Very few.

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1 Q. Would it be fair to say that federal courts deal
2 with issues involving deductions under the federal code,
3 the federal tax code, whereas state courts deal with
4 deductions under the state tax code?
5 A. Are you asking me if there's an original
6 jurisdiction issue? I mean, I can opine as a legal expert
7 if you'd like. The answer is you certainly have original
8 jurisdiction in federal court for federal tax issues, but
9 that doesn't mean the state court can't deal with them.
10 They do it all the time. Take a look at a divorce case.
11 Q. When you say "take a look at a divorce case,"
12 what do you mean by there?
13 A. Divorce -- divorce courts rule on federal tax
14 issues all the time and how they apply to the applicants.
15 Q. And then as far as the action that was initiated
16 against RaPower, that had to do under the -- that was
17 brought under the federal tax code by the U.S. Department
18 of Justice; is that correct?
19 A. I apologize. I lost track of my thought there.
20 Will you say it again?
21 Q. Sure. So we have the cases pending in Oregon
22 State Court?
23 A. Uh-huh (affirmative).
24 Q. And then the action that we've been talking
25 about that was brought by the U.S. Department of Justice

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1 against RaPower was in Utah Federal Court?
2 A. Yes. That's correct.
3 Q. Were there any other states where a similar
4 issue arose as did in Oregon, meaning deductions were
5 disallowed, and lens purchasers had issues similar to what
6 they faced in Oregon?
7 A. At the time of our representation for
8 Neldon Johnson, I'm unaware of any.
9 Q. What about today, sitting here today?
10 A. I don't know. I haven't been involved with the
11 case since we were terminated, so I haven't followed it.
12 Q. I'll put in the record then we have a
13 pro hac vice application for Gregg, since we already have
14 the pro hac vice application order for Orth. So this is
15 the next exhibit. We'll mark it as Exhibit 9.
16 (Exhibit 9 marked.)
17 THE WITNESS: Yeah. We'll stipulate, if you'd
18 like, that we were pro hac vice counsel.
19 Q. (By Mr. Castleberry) All right. And you were
20 pro hac vice counsel for -- for Gregg -- for Kevin M.
21 Gregg and Michelle D. Gregg in a case brought by --
22 they're the plaintiffs in a case against the Department of
23 Revenue, State of Oregon; is that correct?
24 A. Yep.
25 Q. And looking at the two cases that you were

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1 admitted pro hac vice, there were no other parties to that
2 case; is that correct?
3 A. There were no other parties to the case, but
4 there are rulings that address the other parties that were
5 being put forward, and all of those parties -- those cases
6 were stayed. And those parties agreed to that stay, and
7 the court agreed to incorporate the rulings from these
8 cases into those.
9 Q. And you're talking about the --
10 A. Reece, Froyd, Shepard, Pershin, Freeborn, yes.
11 Q. No one else?
12 A. Those are the only people that were being
13 audited that we were involved with while we were up there.
14 Q. Were these people who lived in Oregon?
15 A. Yes. Well, actually, I take that back. I don't
16 believe Greg Shepard lived in Oregon, and I always thought
17 that was weird. But he did have a business up there, I
18 think. So the answer to that question is -- your specific
19 question is I don't know. I know some of them do.
20 Q. At least with respect to the two cases that you
21 were admitted pro hac vice in, both of those individuals
22 or those four individuals, I guess?
23 A. They were Oregon residents.
24 Q. Were Oregon residents.
25 A. They were obviously all Oregon taxpayers.

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1 Q. Do you know if RaPower was an Oregon taxpayer?
2 A. I don't know the answer to that.
3 Q. You talked a little bit about the termination of
4 representation. Why did that occur as far as you know?
5 A. My understanding -- state this for the record.
6 My understanding is Mr. Klein is the client, and as a
7 result, there is no attorney-client privilege. I'm going
8 to ask Mr. Klein to state for the record under oath that
9 he is also -- stands in the place of Neldon Johnson, and,
10 therefore, there is no attorney-client privilege. So my
11 answer is -- so I can answer the question.
12 MR. KLEIN: I am receiver for the entities and,
13 as such, I only have legal privilege for the entities. I
14 am receiver for the assets of Neldon Johnson, but I am not
15 the receiver for Neldon Johnson.
16 THE WITNESS: Then I respectfully decline to
17 answer the question based on attorney-client privilege.
18 MR. KLEIN: Let me finish. I do not claim to
19 own privilege for Neldon Johnson or have any ability to
20 waive it.
21 Q. (By Mr. Castleberry) So let's talk a little bit
22 about the contours then of your refusal to answer just so
23 we're clear on the record.
24 You represented as a client RaPower?
25 A. Yes.

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1 Q. Did you represent as a client any other
2 receivership defendants or entities?
3 A. Yes.
4 Q. And what were they?
5 A. They asked specifically anyone that -- any of
6 the entities that were involved with Neldon -- owned by
7 Neldon Johnson that we would deal with their interests as
8 it pertained to the litigation.
9 Q. You represented all of the entities -- when you
10 say "this litigation," just so we're clear?
11 A. Federal.
12 Q. The Utah Federal Court case?
13 A. Yes.
14 Q. So you were counsel for at least all of the
15 listed entities in the Utah Federal Court case?
16 A. RaPower was the only focus, but yes.
17 Q. And was Neldon Johnson also listed as a
18 defendant?
19 A. He -- my recollection was -- is that he was.
20 You'd have to show me the caption for me to be able to
21 tell you, but I certainly developed an attorney-client
22 relationship with him.
23 Q. Okay. Did you represent anyone else in the Utah
24 Federal Court action?
25 A. Glenda Johnson.

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1 Q. Did you represent Glenda in her personal
2 capacity?
3 A. I certainly developed an attorney-client
4 relationship with her, yes.
5 Q. And when you say you certainly developed an
6 attorney-client relationship with Neldon Glenda, what do
7 you mean exactly by that?
8 A. Well, you're familiar with Utah Rules of Ethics.
9 You don't have to necessarily enter into -- in fact, you
10 do not have to enter into a formal attorney-client
11 relationship to develop attorney-client privilege. And I
12 certainly had -- I certainly developed that relationship
13 with them.
14 Q. Okay.
15 A. Believe me, I would love to tell you the answer
16 to that question. Frankly, I don't think it's that hard
17 for you to discover on your own if you want to read
18 between the lines.
19 There was a hearing associated with the
20 conclusion of my representation where a lot of information
21 was elicited by the court. If you read it, you'll figure
22 it out.
23 Q. This is a hearing in the federal court action?
24 A. Yes.
25 Q. And it was shortly after that hearing that the

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1 termination occurred?
2 A. It was immediately after that hearing.
3 Q. Okay. With respect to the contour of the
4 privilege, were there any instances where you were having
5 attorney-client discussions with Neldon Johnson where he
6 is not acting in the capacity as a principal or owner or
7 operator of RaPower?
8 A. I'm sorry. I don't understand your question.
9 Q. I'll restate it if I can.
10 Were there any conversations that you had with
11 Neldon Johnson where he was not acting in his capacity as
12 a manager --
13 A. Sure.
14 Q. -- or owner of RaPower?
15 A. Yeah. He loved to fish, told me all about his
16 fishing escapades.
17 Q. I'm talking about conversations that are
18 material to the representation of RaPower in the federal
19 lawsuit.
20 A. I don't even know how you could have a
21 conversation that would be material to the litigation
22 where it wouldn't be involved in attorney-client
23 privilege.
24 Q. And -- and my point is that if Neldon Johnson is
25 there acting as the representative of RaPower, RaPower is

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1 part of the conversation?
2 A. Sure.
3 Q. And Mr. Klein as receiver for RaPower is
4 entitled to that information?
5 A. I agree with that.
6 MR. ELSWICK: Can we take a break? I want to
7 just briefly discuss this.
8 MR. CASTLEBERRY: Sure.
9 MR. ELSWICK: I think maybe we can get some
10 clarity.
11 MR. CASTLEBERRY: Sure.
12 (Recess taken at 11:20, resuming at 11:33.)
13 Q. (By Mr. Castleberry) Well, let's go back on the
14 record. Just to state for the record our position,
15 whenever Neldon Johnson is acting as a principal or
16 officer of RaPower regarding a legal issue with you, those
17 conversations belong to the receiver of RaPower, and you
18 may tell us. We may waive -- the receiver may choose to
19 waive that privilege, and you may provide information
20 about those conversations.
21 Do you agree with that?
22 A. I believe that that is the court order, yes.
23 Q. Okay. And you were also representing
24 Neldon Johnson in his individual capacity; is that
25 correct?

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1 A. If you take a look at the document that I've
2 just provided you, it was the motion to withdraw that was
3 submitted to the court, and it identifies exactly who we
4 were -- who we were representing and who terminated us.
5 MR. ELSWICK: I think on the first page.
6 THE WITNESS: And, of course, it indicates
7 Mr. Johnson personally.
8 Q. (By Mr. Castleberry) Just so we have this for
9 the record, I've been handed a Motion to Withdraw as
10 Counsel for Defendants RaPower-3, LLC, International
11 Automated System, Inc., LTB1, LLC, and Neldon Johnson.
12 This is in case United States of America v.
13 RaPower-3, LLC, et al., and this is a document number 164
14 in case 00828. So we won't make this an exhibit, but it
15 would be nice to have this referenced for the record.
16 Did you represent any of the other affiliated
17 entities to RaPower-3 who are not named in the caption?
18 A. No, I was only involved in the litigation. I
19 was not representing anyone else outside of the
20 litigation.
21 Q. Did you perform any legal work or represent
22 Cobblestone Center?
23 A. I don't even recognize that name.
24 Q. Okay. What about MP Johnson Family LP?
25 A. I don't recognize that name either.

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1 Q. Star Life Enterprises?
2 A. I don't think I've ever heard that name. If I
3 have, it would be in passing only.
4 Q. Black Night Enterprises?
5 A. I have heard of Black Night. I don't recall who
6 or what they are, and I'm not sure if I heard that in
7 correlation to this company.
8 Q. Have you done any legal work for Black Night
9 Enterprises?
10 A. The one that I work for is based out of -- I
11 work for them currently is based out of California, and
12 they have no affiliation with Neldon Johnson.
13 Q. When you say the one you work for currently,
14 what do you mean?
15 A. I have another case where I represent -- kind of
16 represent a company called Black Night. They're based in
17 California.
18 Q. Okay.
19 A. And they -- I only met them three months ago,
20 and they have nothing to do with Neldon Johnson.
21 Q. Got it. What about SOLCO 1?
22 A. I have heard of SOLCO 1. I don't believe I ever
23 did any work for them, but I know who they are.
24 Q. And XSun?
25 A. I know who XSun Energy is, and I did not do any

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1 work for them, but I do know who they are.
2 THE WITNESS: Off the record for a minute.
3 (A discussion was had off the record.)
4 Q. (By Mr. Castleberry) Back on the record.
5 We went through a number of companies, and I was
6 asking whether you had done work for them or whether
7 you've represented in any capacity. You said no.
8 Some of these companies you are familiar with,
9 and you do know -- you do have information about them?
10 A. Yes.
11 Q. Which companies do you have information about?
12 A. The last two that you mentioned, SOLCO and XSun,
13 I have information pertaining to at least one of them.
14 Q. And -- and which one do you have information
15 about?
16 THE WITNESS: My understanding is that's a
17 receivership defendant; is that correct?
18 MR. KLEIN: Correct.
19 THE WITNESS: I'm not 100 percent sure which --
20 which of those companies this information pertains to,
21 could be both, but I do have information about them.
22 Q. (By Mr. Castleberry) Okay. What information do
23 you have?
24 A. In light of the fact that the receiver is here,
25 those companies have substantial economic accounts in

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1 Nevis, in Costa Rica, in the Cayman Islands.
2 Q. And what would be a way of gaining access or
3 information about those accounts?
4 A. The only -- the way I found that out is I was --
5 I was at Mr. Johnson's home in Delta, Utah, when he was on
6 a telephone call, and I was in his office. And he was
7 talking about his bank accounts for those companies, and
8 that they would never be found, and that they were in
9 those countries.
10 Q. Do you know the individual with whom
11 Neldon Johnson was speaking?
12 A. I was not a party to the phone call. I was just
13 in the home in the office overhearing it.
14 Q. What else do you recall from that conversation?
15 A. I was -- I came to the home because I had to
16 pick up some documents for a production request is my
17 recollection. And I was driving back from our St. George
18 office.
19 Glenda Johnson let me in. They had a very nice
20 home, actually. It was out by kind of the lake, which I
21 didn't even know there was a lake area in Delta. As far
22 as I'm concerned, it's like a big dust bowl.
23 Q. The sand dunes is what I picture.
24 A. Apparently there is like an aquatic community,
25 if you will, or something that had boat docks and

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1 everything.
2 MR. KLEIN: Sherwood Shores.
3 THE WITNESS: Something like that. I would
4 never be able to tell you the name, but yes. It took me
5 forever to find their house.
6 But I got there, and Glenda let me in. She
7 indicated Neldon was in the office. I remember we
8 proceeded into the house. I went down the hall to the
9 right. He was on the phone, and I stood outside the door,
10 and he had his back to me. And when he turned around, he
11 saw me there, got up, and shut the door.
12 Q. (By Mr. Castleberry) How much of the
13 conversation did you overhear?
14 A. Maybe five minutes or less.
15 Q. Anything else that you recall from that
16 conversation?
17 A. He was just very, very proud that he had moved
18 those assets to those areas.
19 Q. When you talk about assets, you're talking about
20 money?
21 A. Sounded like cash, sounded like -- it sounded
22 like he had physical assets that he had moved. My
23 recollection was he indicated he had gold bars or coins,
24 some type of -- obviously an economically fungible item.
25 Q. Okay. Anything else you recall from that

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1 conversation?
2 A. No.
3 Q. Did you ever talk to Neldon about that
4 conversation?
5 A. I did not.
6 Q. Talk to anyone else about that conversation?
7 A. I did not. In fact, I've never mentioned that
8 to a soul until today.
9 Q. Okay.
10 A. Because I didn't ever have anybody that waived
11 attorney-client privilege.
12 Q. Makes sense.
13 All right. Going back to your representing --
14 your representation of Orth and Gregg, you conducted the
15 trial, and then before a decision was entered, as best you
16 can recall, your representation ended?
17 A. Yeah. My recollection is that the court took
18 the rulings under advisement, which is not atypical for a
19 tax court to do. They almost always issue a written
20 ruling. And I -- can I see the exhibit, the withdrawal
21 notice, the motion? That might help my memory. Yeah,
22 this was May. Okay. So my recollection was that the
23 hearing --
24 MR. ELSWICK: This is 2017.
25 THE WITNESS: It is. My recollection was that

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1 the trial for the tax court issue -- we can, of course,
2 check this on the record, I'm sure it's out there, I'm
3 just going off of memory, but my recollection was that it
4 was around -- it was around a holiday.
5 And I'm relatively certain it was Valentine's
6 Day because there was a stretch for about 10 straight
7 years I ended up with a hearing over my wife's birthday,
8 which is right next to Valentine's Day. In fact, to be
9 blunt, it's four days from now.
10 So she was kind of upset that I was gone because
11 I think it was like a 15- or 10-year anniversary or
12 something like that. Well, I guess it was 17. It would
13 have been a 17-year anniversary. Our anniversary is
14 March 17. Moving on. Just trying to find an association
15 here for a timeline.
16 When we came back from the hearing, my memory
17 was there was a very short period of time between the time
18 that the hearing concluded and the time we were
19 terminated. And if it was February to April, that would
20 be pretty consistent. It might have even been earlier.
21 It may have been around Christmas. But there wasn't a lot
22 that happened between the time of the conclusion of the
23 trial and the time that we withdrew.
24 Q. (By Mr. Castleberry) Okay.
25 A. Well, fired. Whatever. Whatever the word is.

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1 Q. Okay. And when you say that you were fired,
2 what conversations, if any, did you have with Gregg and
3 Orth about the termination of the representation?
4 A. We sent a notice to them that we had been
5 terminated as legal counsel, and that RaPower would be
6 providing new counsel for them. And we also notified --
7 gosh, my memory sucks. Here we go. Gleaves Swearingen,
8 specifically my buddy, whose name I can't think of.
9 Q. Jeffrey?
10 A. Thank you. That we had been terminated as
11 counsel. Yeah, Mr. Salisbury. And that new counsel,
12 Denver Snuffer, was likely going to be taking over.
13 Jeffrey also, as I understand it, has been sued by
14 Mr. Klein. He doesn't have a lot of love for Mr. Neldon
15 or for Mr. Klein either.
16 MR. CASTLEBERRY: Let's go off the record.
17 (A discussion was had off the record.)
18 MR. CASTLEBERRY: Go back on the record. Let me
19 hand to you an email, we'll mark this as next in line,
20 Exhibit 10.
21 (Exhibit 10 marked.)
22 Q. (By Mr. Castleberry) What I'd like you to do is
23 just authenticate this email exchange. These are emails
24 between Jeffrey Salisbury and you and Samantha Fowlks and
25 Kymbreynn Borden and Karianne Conway; is that correct?

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1 A. Uh-huh (affirmative).
2 Q. And who is Kymbreynn Borden?
3 A. My recollection is she was an assistant. She
4 may have been an associate there. I don't know.
5 Q. At Jeffrey's office?
6 A. I don't recall her exact role.
7 Q. And Karianne Conway was co-counsel with Jeffrey;
8 is that right?
9 A. Yes. I guess Karianne -- yeah, that's correct.
10 Q. And this is a document that's been produced in
11 this litigation as H&A 002090; is that correct?
12 A. That's correct.
13 Q. Going to H&A 002092; is that correct?
14 A. Yeah. Uh-huh (affirmative).
15 Q. And these were emails that you were a party to
16 that you have --
17 A. My name's on it, yes.
18 Q. -- you received?
19 A. Uh-huh (affirmative). That's correct. It looks
20 like I'm on the entire chain.
21 Q. When you were retained by Gregg and Orth to
22 represent them in the Oregon State Court action, there
23 are -- I just want to be clear.
24 Other than what we've looked at already, there
25 are no other engagement letters or client information

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1 forms relating to -- that Gregg or Orth have signed, at
2 least as far as you know that are in your files?
3 A. When you say "client information," you're
4 talking about my client agreement? I do not believe
5 there's any additional documentation of that type.
6 Q. Yeah. So we have a client information or you
7 call it the client agreement?
8 A. Yep.
9 Q. This says "Fee Agreement" as well.
10 There is not such a document executed by Gregg
11 or Orth in your files?
12 A. I do not believe so.
13 Q. Or any of the other individuals that we've
14 talked about?
15 A. I do not believe --
16 MR. ELSWICK: Obviously we'll go back in, as
17 indicated, and make sure that's the case.
18 MR. CASTLEBERRY: But right now we're operating
19 under that --
20 MR. ELSWICK: Yeah, I have not seen anything
21 myself.
22 THE WITNESS: It would surprise me if there was.
23 Q. (By Mr. Castleberry) And any of these
24 individuals who we've mentioned, have any of them actually
25 paid you or your firm for the legal work that you

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1 performed in Oregon?
2 A. No. The payment was issued and arranged and
3 done by RaPower because they were the entity that hired
4 us.
5 Q. And are you familiar with the Utah Professional
6 Rules of Conduct that require informed consent --
7 A. Yeah.
8 Q. -- when a third party pays the legal fees of
9 another's?
10 A. Yes.
11 Q. And in this case, did you receive informed
12 consent from -- we'll just call them the Oregon lens
13 purchasers?
14 A. Absolutely.
15 Q. And --
16 A. You've seen one of the emails. You've got it in
17 your hand that I wasn't even copied on. It was submitted
18 by Mr. Gregg directly to Mr. Shepard.
19 Q. And speaking hypothetically, could you conceive
20 of any potential conflicts?
21 A. No.
22 Q. You couldn't conceive of any potential
23 conflicts?
24 A. No, not in this situation.
25 Q. What if it were to be the case that one of the

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1 Oregon lens purchasers would make the argument or the
2 statement that they received bad advice relating to the
3 tax deductions at issue from RaPower?
4 A. If that argument had been made, then they would
5 have effectively -- if that had been made, then that would
6 have created a conflict. But that was not their position.
7 They all took the deductions.
8 Q. Did you ever -- and we don't need to get into
9 the substance for now, but as far as the informed consent
10 that you provided, did you talk about potential conflicts
11 with the Oregon lens purchasers?
12 A. Yes.
13 Q. Did you talk about potential conflicts with
14 the -- with RaPower?
15 A. Yes.
16 Q. And with respect to RaPower, what were the
17 potential conflicts that you discussed and addressed?
18 A. Well, we indicated to RaPower that if there was
19 ever litigation between themselves, i.e., the --
20 MR. ELSWICK: Oregon lens purchasers?
21 THE WITNESS: -- Oregon lens purchasers as
22 you've tab them, we would be not able to be involved in
23 that because we would effectively be representing both
24 sides of that in the appellate actions.
25 Q. (By Mr. Castleberry) And what conflicts were

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1 identified with respect to the Oregon lens purchasers to
2 them?
3 A. To the Oregon lens purchasers? The same thing.
4 If at any point in time that they believed that they were
5 in opposite position to RaPower-3, then there would be --
6 it would be impossible for us to represent either side.
7 But every one of them was zealously in favor of
8 RaPower-3. They believed in it. They believed in the
9 technology. They saw it work. And as a result, they were
10 ready to go.
11 Q. Were any of these -- any of the informed
12 consent, was it provided in writing and signed by the
13 clients?
14 A. There is -- well, for instance, on the agreement
15 to consolidate all the cases. I guess the question is --
16 I don't know. I'd have to look -- I don't recall the --
17 as I sit here right now what documentation would address
18 that directly.
19 Q. And I'll just represent to you, I haven't seen
20 any such document, but -- so we're in the same boat.
21 Was there anytime when you told the Oregon lens
22 purchasers that they were not your clients?
23 A. No.
24 Q. Was there anytime when you told the Oregon lens
25 purchasers that RaPower was your client?

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1 A. Yes. RaPower told them that. RaPower
2 specifically informed them that they hired us to represent
3 RaPower's interest and them in the -- because it was the
4 same interest.
5 Q. In your opinion, were the interests of the
6 Oregon lens purchasers and RaPower completely aligned with
7 each other?
8 A. I think they're identical as to the legal issue.
9 Q. What were exactly the nature of the claims
10 against the Orths and the Greggs by the Oregon Department
11 of Justice?
12 A. It's in the pleadings.
13 Q. Can you describe it for me in a summary fashion?
14 A. They disallowed or disagreed with the deductions
15 that had been taken.
16 Q. That there were improper deductions and tax
17 credits?
18 A. That's correct.
19 Q. What would you have considered a complete
20 success for the Oregon lens purchasers in the action
21 that -- before the Oregon Tax Court?
22 A. A complete success?
23 MR. ELSWICK: Object on grounds of relevance.
24 THE WITNESS: I don't know that it matters what
25 I would have considered, it's what the clients would have

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1 considered.
2 Q. (By Mr. Castleberry) Did the clients ever tell
3 you what they would have considered a success?
4 A. Yes.
5 Q. And what was that?
6 A. To have their deductions and credits allowed.
7 Q. Are you aware of any authority that would hold
8 that a ruling by the Oregon Tax Court in favor of the
9 Oregon lens purchasers would assist RaPower?
10 A. Sure.
11 Q. Can you identify that?
12 A. I think it's the ones I've already talked about.
13 Seriously, are you asking me to quote chapter and verse in
14 the middle of a deposition? I can go pull the legal
15 research if you want it.
16 Q. No, I'm not asking you to do that.
17 A. Okay.
18 Q. But other than the persuasive effect, is there
19 any other effect as far as you believe?
20 A. I -- I don't believe that there is any -- let's
21 put it this way. Had RaPower and the -- and/or the tax --
22 Oregon taxpayers prevailed, I think there is a strong
23 argument that it could be res jud.
24 Q. That it could be res judicata?
25 A. Uh-huh (affirmative).

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1 Q. And what would that argument be?
2 A. Because I think you have the same or very
3 similar partners on both sides of the argument being able
4 to litigate it.
5 Q. And then just to be clear though, RaPower was
6 never a party to any of those proceedings?
7 A. RaPower was never a party listed, but RaPower is
8 the entity taking or promulgating the deductions. And the
9 deductions were taken by what they call partners of
10 RaPower.
11 And so if you look at basic partnership law, the
12 argument would be that although they're not directly
13 parties, they certainly had the opportunity to fully and
14 fairly litigate the issue because their partner was
15 arguing.
16 Q. Now, with respect to the partnership issue, are
17 you aware of any documents that would support an argument
18 that RaPower was ever a partner with any of these lens
19 purchasers?
20 A. So you're asking for my legal opinion as to
21 whether or not the lease documents were legitimate or
22 whether or not they formed a partnership or joint venture
23 agreement? I'm happy to answer that as a legal -- I guess
24 in the hypothetical.
25 Q. Yeah.

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1 A. So as an expert witness, I believe that the
2 joint venture relationship probably existed to the extent
3 that they would be partners.
4 Q. And are you aware of any documents that would
5 support that?
6 A. That they were joint ventures, yes.
7 Q. Are you aware of the equipment purchase
8 agreement?
9 A. Yes.
10 Q. And are you aware -- well, let's take a look at
11 that.
12 (Exhibit 11 marked.)
13 Q. (By Mr. Castleberry) The court reporter has
14 handed you what's been marked as Exhibit 11. And I'll --
15 I'll represent to you that this is a document that we
16 received from -- from your office as part of the
17 production in this case.
18 Have you ever seen this Equipment Purchase
19 Agreement before?
20 A. I have, yes.
21 Q. This is an agreement between -- purports to be
22 an agreement between Matthew Orth, the purchaser, and
23 RaPower --
24 A. Yes.
25 Q. -- the agreement; is that correct?

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1 A. That's what it purports to be, yes.
2 Q. And in this agreement, why don't -- I'll read a
3 part of paragraph 2 where it says, "However, Purchaser
4 hereby expressly acknowledges that neither Seller nor any
5 other person or entity affiliated with Seller has made
6 representations to Purchaser regarding potential tax
7 benefits of this Agreement to Purchaser, and Purchaser has
8 relied entirely on his/her own analysis of potential tax
9 benefits.
10 "Purchaser hereby waives any and all claims
11 against Seller and its employees, agents, officers,
12 affiliates and representatives relating to Purchaser's
13 failure to receive any anticipated tax benefit."
14 Did I read that correctly?
15 A. You did.
16 Q. And then in paragraph 12, there is a limitation
17 of liability. And I can read that for the record, but we
18 have that as an exhibit, that neither party may claim
19 damages against the other.
20 And then in paragraph 25, this agreement states
21 that, "The Purchaser will obtain his or her own tax
22 attorney or accountant for any tax matters."
23 You're familiar with these provisions, correct?
24 A. Yes.
25 Q. Did you draft this agreement?

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1 A. No.
2 Q. Do you know who did?
3 A. No.
4 MR. CASTLEBERRY: Let's mark this as Exhibit 12.
5 (Exhibit 12 marked.)
6 Q. (By Mr. Castleberry) Again, I'll represent to
7 you that this is a document that we received in this case.
8 It looks to be the first page and the last page starting
9 on H&A 003973 going to H&A 003982.
10 It appears to be similar in scope and wording to
11 the agreement we just read, but, unfortunately, we don't
12 have the other pages to the agreement. Do you know if you
13 ever had a full and complete copy of an agreement with
14 Gregg?
15 A. I did not.
16 Q. You did not?
17 A. What I have is what you've got.
18 Q. But these files -- the two purchase agreements
19 that we've just gone over, these are -- were in your
20 files, these are documents that you received from the
21 clients?
22 A. Yes. At some point, yes.
23 Q. Do you know of any material difference between
24 the agreement with Gregg and the agreement with Orth with
25 RaPower?

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1 A. I have no knowledge of that information as I sit
2 here.
3 **Q. When were you first engaged by RaPower?**
4 A. Overall?
5 **Q. Overall. The first engagement with RaPower.**
6 A. I don't know. I would have to check the files.
7 **Q. Do you recall the purpose of the engagement at**
8 **the very, very beginning?**
9 A. Yeah, I would have to look at the client
10 agreement.
11 **Q. Is there another client agreement than what**
12 **we --**
13 A. There's an original, yeah.
14 **Q. And in the document request, we have asked for**
15 **all documents concerning RaPower?**
16 A. I know that document was produced. I'm
17 100 percent sure on that.
18 **Q. And I'll represent that we've -- during these**
19 **breaks, we've been looking for those documents as well,**
20 **and we have not seen any --**
21 A. I can just tell you I know that document was
22 produced.
23 MR. ELSWICK: Let me make sure I'm clear too so
24 when I'm conducting my review of everything. What you're
25 looking for is any client agreement related to RaPower

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1 other than the Oregon one we produced?
2 MR. CASTLEBERRY: Correct.
3 MR. ELSWICK: That one I'll produce additional
4 copies. I will double-check and look at our production
5 and see if it's...
6 MR. CASTLEBERRY: Okay. Yeah, we just asked for
7 any documents concerning the retention of counsel or
8 concerning conflict of interest that mention, refer to
9 RaPower.
10 THE WITNESS: The only way the original document
11 would not have been produced is if it was created only as
12 to Neldon, which I guess is possible. I hadn't thought
13 about that. Somebody may have reviewed that for an
14 objection.
15 **Q. (By Mr. Castleberry) Have any documents been**
16 **withheld as far as you know?**
17 A. As I'm sitting here, I don't have any knowledge.
18 I thought everything had been produced.
19 MR. ELSWICK: I don't think there was anything
20 withheld because of the attorney-client privilege once it
21 was waived. I think the question, again, is that whether
22 there are communications, just some additional things we
23 need to provide.
24 THE WITNESS: Well, if the original agreement
25 was only as to Neldon, that would not have been waived.

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1 As we've identified, that one hasn't been waived. If that
2 was the original agreement, then that would not have been
3 produced.
4 MR. ELSWICK: I'll look for it.
5 MR. CASTLEBERRY: Maybe on that issue, provide a
6 privilege log just so we know, and we're not guessing.
7 THE WITNESS: Well, that wouldn't even be a
8 privilege log necessarily because your question asked as
9 to RaPower. If the original engagement was done with
10 Neldon only, then there wouldn't be a privilege because
11 you didn't ask for that.
12 **Q. (By Mr. Castleberry) Okay. Well, we can talk**
13 **about that hypothetical. It's all hypothetical right now**
14 **because we don't know.**
15 A. It is.
16 **Q. Were you retained by RaPower before the US DOJ**
17 **filed suit in November 2015?**
18 A. No. I know that. We took over for another
19 counsel.
20 **Q. Who was prior counsel?**
21 A. To the best of my recollection, and I cannot do
22 this in any particular order, but there were multiple
23 prior counsels. I believe Paul Jones had been involved.
24 I believe Denver Snuffer had been counsel. I believe
25 Sam Alba had been counsel.

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1 I want to say there was one other one whose name
2 doesn't come to mind. I think it was Sam Alba that was
3 immediately prior to us, but I'm not -- as I sit here, I'm
4 not 100 percent sure. We were only in the case about 18
5 months, something like that, and the case was way older
6 than that.
7 **Q. Okay. So what I'd like from you, Justin, is**
8 **just a brief description of what RaPower's business**
9 **entailed. As best as you understand and -- and with**
10 **respect to how -- I'd like to know your understanding of**
11 **the technology, to the extent that you have an**
12 **understanding, and then I'd also like to know the**
13 **understanding of their business model with respect to**
14 **generating profits and revenues.**
15 A. The -- I don't know that I have an understanding
16 as to their business model. That was not part of -- part
17 and parcel to my representation per se. The
18 representation or the information I can give you as to
19 their technology, which part?
20 **Q. With respect to the technology that would create**
21 **electricity and power?**
22 A. Which part?
23 **Q. Are there multiple parts?**
24 A. Yes.
25 **Q. Can you describe the parts for me?**

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1 A. Sure. So the first one is obviously the Fresnel
2 lens. They were in the process of -- and had obtained
3 patents is my understanding associated with the
4 redistribution or creation or restructure of the Fresnel
5 lens. I don't know exactly what the details would be.
6 That's beyond my science level.
7 But it was impressive. The Fresnel lens was
8 then mounted on a tower. Another portion of that was the
9 construction of a gear box, which was equally impressive.
10 The towers themselves were tons. They were very, very,
11 very heavy, and they were big.
12 And they had an automated system that allowed
13 them to track both the -- I'm going to use the wrong word
14 here -- azimuth? The azimuth of the sun in relation to
15 the lenses, as well as the position of the sun in
16 micromillimeter adjustments without creating a vibration
17 that would defocus the lenses.
18 If you've ever tried to move multiple tons in a
19 perfect circle on an oblique plane without coming out of
20 focus for any one of I think it was 148 lenses, that's a
21 very difficult piece of machinery to manufacture, and they
22 had built it.
23 In addition to that, they had built a heat
24 exchanger, which was very impressive, the results of which
25 were shocking. The one that blew my mind, and to this day

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1 I can't explain it, I have a video of it, and I've offered
2 it multiple times, nobody's ever wanted it, I went over to
3 his home to pick up another document for another part of
4 the case in south -- south of here, south of -- southern
5 Utah County. Name of the city?
6 MR. KLEIN: Salem?
7 THE WITNESS: Salem. Thank you. While I was
8 in -- at his home, Glenda again met me at the door and
9 told me that Neldon was down in the basement. I went
10 down, and he had a circuit board.
11 And I personally -- I videoed it. I watched him
12 connect a regular solar lens to the inputs -- the output
13 side, I guess input side of the circuit board, and put it
14 underneath a lamp. And then he had a multimeter. Do you
15 know what that is?
16 **Q. (By Mr. Castleberry) I don't know.**
17 A. A multimeter is a tool you use, I used it all
18 the time before I went to law school. It measures the
19 amount of electric current flowing into a particular area.
20 It will measure both voltage and amps, amperage. Some of
21 them are very expensive and go quite high.
22 My recollection was, and I think this is
23 accurate, I think it was pushing into the circuit board I
24 want to say it was like 1 or 2 amps -- sorry. Volts.
25 Volts. I think that's correct. Again, I can watch the

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1 video if I needed to.
2 And then I watched him take his multimeter and
3 connect it to the other side of the circuit board, and I
4 watched the multimeter. My jaw just hit the floor. It
5 was producing three times the amount of electricity that
6 was going into the circuit board. He was creating power
7 through a circuit board. I don't know how you do that.
8 To this day I don't know how you do that.
9 The fact that there's anybody that could look at
10 that and say that this technology didn't work, they're an
11 idiot. It's the most remarkable thing I've ever seen in
12 my life. It's like cold fusion. You can't --
13 theoretically, you can't do that. You can't get more out
14 than you put in, but I have it on video. It was shocking.
15 And so -- and he was doing this with just a
16 regular solar lens, not even one of his manufactured
17 Fresnels. Then we also went down on another day, we had
18 Erin Healy Gallagher who didn't believe that any of this
19 stuff worked, so she wanted to do a site inspection.
20 And I will be the first to tell you if I had I
21 don't know the federal attorneys were going to be coming
22 to my location, I would have made sure that place looked
23 perfect, and they didn't. They didn't do anything to
24 dress it up. It was in a state of awful disrepair. By
25 the time this inspection took place, litigation had been

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1 going on for a long time.
2 But we went down there, and they -- Erin and her
3 attorney had brought an expert witness to view the
4 operation of the lenses and the towers. And they took him
5 inside. They had a bunch of towers that were just beat
6 up. They didn't look anything like they had in the
7 previous pictures. A lot of lenses were missing or
8 broken. They did have stacks and stacks and stacks, they
9 had an entire warehouse of lenses that was there.
10 But in this particular instance, they had lenses
11 that were up above. And the engineer/expert, they had
12 wanted to see the towers rotate, so they went in and
13 turned it on.
14 Again, I was just blown away. I'm standing
15 there, and I'm watching this focal point. You can see
16 where the sun was coming through the lens, and it was down
17 on the ground.
18 And they started to rotate that -- that tower.
19 And one of the people that was there that was working at
20 the site walked over and picked up a 2-by-4, and he put it
21 in that beam of light, and it was on fire in 90 seconds,
22 not like smoking, I mean up in flames. The amount of heat
23 that was generated, it was just crazy. This was on a
24 cloudy, dank winter day with a broken lens that wasn't
25 even focused.

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1 So my understanding is that this technology was
2 designed to drive or create solar powered heating for the
3 purpose of going through an exchanger, which would then go
4 through the circuit board, which would, of course, drive
5 pistons and create electricity that could be plugged into
6 the grid.
7 I saw where they had actually tapped into the
8 grid. I later discovered they tapped in without
9 permission from the power company, which I don't think is
10 probably a good idea. But they were definitely pushing
11 power out into the grid using this -- this site.
12 **Q. When you say "they had tapped into the grid,"**
13 **who is "they"?**
14 A. Neldon and his companies.
15 **Q. Okay. What would a lens purchaser receive?**
16 A. The lens.
17 **Q. And can you describe how big these lenses are?**
18 A. Yeah, they're huge. They would probably cover
19 most of this table for a single one. They're probably,
20 oh, I don't know, maybe a quarter of an inch thick.
21 **Q. Is this table about 12-14 feet in length?**
22 A. Roughly. I've got a picture of them, if you
23 want to see it.
24 **Q. Yeah. Why don't you produce a picture along**
25 **with the video. We would love to see that.**

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1 A. You are the first -- I've offered this to
2 Mr. Klein. I've offered this to the plaintiff's counsel.
3 I've even offered it to the government. Nobody's ever
4 asked for it. I would love to give it to you.
5 **Q. If you're offering, we'll take it.**
6 A. That's great. I can produce that whenever we
7 have a break.
8 **Q. Okay. And as far as you know, did any of the**
9 **lens purchasers, at least in Oregon, ever tie into the**
10 **grid?**
11 A. That's a good question. I don't know the answer
12 to that question. They would not have been able to in my
13 thought process, unless they were to build the towers down
14 below. Their job was not to tie into the grid. I think
15 you may be mistaking what the purpose of that was.
16 **Q. What was the purpose of it?**
17 A. My understanding is that they were obtaining --
18 they were buying the lenses and basically providing the
19 revenue necessary to develop them. A Fresnel lens, that's
20 one of the things -- frankly, it's one of the problems
21 with solar power in general is that if you go to these big
22 solar power farms out in California, the first thing you
23 notice, of course, is the lenses get dirty.
24 So that defocuses the lens and reduces its
25 efficiency. And they're massive. A solar panel for your

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1 house is going to -- even to run a small home, you have to
2 have most of your roof covered with these panels.
3 These Fresnel lenses are -- they don't care
4 about necessarily the focal point. For instance, on a
5 regular solar lens you probable will have a focal point
6 that maybe is the size of the tip of that pen, whereas a
7 Fresnel lens, it could be three times the size of the
8 bottom of that bottle.
9 **Q. This is a just a water bottle you're pointing**
10 **to?**
11 A. Yeah. As I understand it, again, I'm not an
12 engineer, but as I understand it and as I saw it, the
13 focal point was so much larger that the efficiency ratio
14 as things would tilt or whatever, it wouldn't be lost. So
15 you would be operating at that near peak efficiency all
16 the time.
17 And in addition to that, the grooves in the
18 lens, that was one of the things that they developed,
19 really was kind of remarkable, it allowed for the focal
20 point to happen inside the lens and then broadcast down,
21 which is why they were able to start a 2-by-4 on fire in
22 90 seconds. Again, I have a video of it.
23 My favorite part of that is, as I recollect, we
24 were sitting there with Erin, who refused to believe that
25 any of these things worked, didn't produce any heat at

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1 all. And then when it caught on fire, I just looked at
2 her and said, "No heat, huh?" She said, "I have no
3 comment on the matter." I was like, okay, well, you can
4 deny what you just saw, but it's right there.
5 **Q. Was anyone else taking video of that**
6 **demonstration?**
7 A. I don't think so. I think I was the only one
8 taking videos. There were multiple attorneys there.
9 **Q. So how did RaPower actually generate revenue?**
10 **Was it only in the sale of these lenses?**
11 A. I don't know the answer to that. That was not
12 something that I was involved in. I didn't run the books
13 for them. I didn't manage their companies. I didn't
14 have -- I heard them talking about government contracts
15 that they were working on with regard to their engines
16 that they were building for -- in fact, I actually saw a
17 CAD program where they had developed a fighter jet, and it
18 was being powered by kind of a unique power structure. I
19 don't understand or even know what that necessarily was as
20 I sit here.
21 I know they were talking about government
22 contracts. They certainly did derive revenues from the
23 sale or lease of these lenses. I know that they were also
24 engaged in -- they had sold and were building solar -- and
25 were consulting in solar farms in South American countries

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1 that I heard them talking about, but you're asking stuff
2 that's way outside the scope of what I was doing for them.
3 Q. Okay. Did you ever have to deal with any claims
4 made by customers against RaPower?
5 A. I was never ever aware of any.
6 Q. Were you aware that -- that customers would make
7 a partial down payment on the lenses, and then further
8 payments would be received by RaPower if they were placed
9 into service or leased or anything along those lines?
10 A. I've read contracts, but I don't know what the
11 terms -- as I sit here today, I don't know what the terms
12 are. I know that there was a big to do about the placed
13 in service issue. We actually ended up litigating that up
14 in Oregon.
15 We were able to show the placed in service
16 letters that they had obtained as legal opinions verifying
17 that the lenses, even though -- quite frankly, the legal
18 research supports that.
19 It's a little bit ridiculous to say that every
20 single thing that's -- that would be admissible as a
21 deduction has to be placed in service. If that were the
22 case, you would never have anything in inventory. In
23 fact, inventory by definition is placed in service.
24 I personally saw -- I would hesitate to guess
25 the exact number of lenses, but it was -- I would say

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1 thousands of lenses that had been produced that were in
2 this warehouse.
3 Q. So the opinion up in Oregon at least was that
4 they had not been placed in service, and you disagree with
5 that?
6 A. No. My understanding is that the argument in
7 both Oregon and in Utah was that they were not placed in
8 service. And based on the research I saw, that was
9 incorrect.
10 Q. Do you know if the Oregon court reached that
11 issue?
12 A. I don't know the answer to that question as I
13 sit here. I don't remember. Like I said, I don't
14 remember if they even ruled before we were even out of
15 case.
16 Q. Do you know if the customers of these lenses
17 could always receive their money back? Do you know if
18 that was one of the terms?
19 A. I have no -- again, I had nothing to do with
20 that issue. I was not involved in the operation of the
21 company.
22 Q. Do you know if -- how IAS generated revenue, if
23 it did?
24 A. I don't know the answer to that question beyond
25 what I've told you. I don't know what companies were

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1 doing what. I know he had a bunch.
2 Q. And you have no idea how any of them were
3 generating revenue. That's your testimony today?
4 A. That's not what I said. I just told you what I
5 knew. Those were items I believed helped him generate
6 revenues, but I don't know which companies did which and
7 what revenues were generated by that.
8 Q. And the issues for revenue are potential
9 government contracts and sale of the lenses or leases of
10 the lenses to customers?
11 A. They were consulting down in South American
12 countries is what I understood. I also understood they
13 were working through things with power grids. But I don't
14 know what that -- where that left off. Way beyond the
15 scope of my representation.
16 MR. CASTLEBERRY: Let's mark this as next in
17 line.
18 (Exhibit 13 marked.)
19 Q. (By Mr. Castleberry) The court reporter has
20 handed you what's been marked as Exhibit 13. This is a
21 document that we received from your office with the Bates
22 number on first page H&A 003994; is that correct?
23 A. Yes.
24 Q. And these look to be email exchanges between
25 Matt Orth and Greg Shepard --

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1 A. Uh-huh (affirmative).
2 Q. -- in February 2013; is that correct?
3 A. Yeah. That's what it says.
4 Q. And how did you come -- and there's other emails
5 on February 16th, and also on February 2nd in the same
6 email chain; is that correct?
7 A. Yes.
8 Q. Actually, going back to 2012?
9 A. Uh-huh (affirmative).
10 Q. Did you receive this email as part of your case
11 involving Matthew Orth?
12 A. No.
13 Q. Why did you receive a copy of this email?
14 A. My understanding of this document is that it was
15 received as part of the federal litigation during the
16 deposition of Greg Shepard. It was produced as an exhibit
17 by the Department of Justice.
18 Q. Okay. And this has what you called it Chinese
19 writing at the top?
20 A. Yeah.
21 Q. You're not sure what that is?
22 A. Well, again, everything that I've seen that has
23 this is a document that -- it's not a native document to
24 us. That's why I'm saying I'm pretty sure this was
25 something that was produced to us. This particular

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1 document, I'm -- my recollection is it was produced during
2 Shepard's deposition conducted by Gallagher.
3 Q. Did you attend that deposition?
4 A. Boy, I'm going to -- let me just say this.
5 Ms. Gallagher was prodigious in her depositions. I
6 attended more depositions in the course of this case than
7 any other case I've ever done in 21 years. And she never
8 had a deposition last less than the entire amount of time
9 allotted under the federal law, regardless of whether or
10 not the individual was pleading the Fifth Amendment.
11 In fact, there are multiple depositions where I
12 sat there for hours listening to the individual repeatedly
13 plead the Fifth Amendment, even though there was an offer
14 to stipulate that every question she was going to ask
15 would be a Fifth Amendment response, but she insisted on
16 asking every single one of them. It was brutal.
17 That having been said, because of the number of
18 depositions that were taken, there were two people in the
19 firm that were attending the depositions. Chris Austin,
20 is that the last name?
21 MR. ELSWICK: Yep. I believe that's correct.
22 THE WITNESS: Chris Austin would attend some
23 depositions, but the bulk of them were attended by me.
24 The reason I'm telling you that is because I'm relatively
25 certain that I attended this deposition, but I don't have

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1 an independent recollection of that.
2 Q. (By Mr. Castleberry) Fair enough. Did you ever
3 talk with Matthew Orth about this email?
4 A. No. The -- the issue associated with this
5 deposition was done after the trial up in Oregon. So --
6 Q. Okay.
7 A. -- this was never -- I don't even think this was
8 in the record when we did the case up in Oregon.
9 Q. Okay.
10 A. The Oregon DOJ didn't use it.
11 Q. And do you know who Bryan Bolander is?
12 A. I have no idea who he is.
13 Q. Okay.
14 A. Other than it says I guess he has something to
15 do with tax returns. That's in the letter.
16 Q. It's your testimony you received this email
17 after the conclusion of the work you did in Oregon?
18 A. That is my recollection as I sit here today. It
19 was never -- I do not believe this was ever an exhibit in
20 the Oregon Tax Court.
21 Q. Did it ever come to your attention while in the
22 course and scope of representing either RaPower or the
23 Oregon lens purchasers that people were very nervous about
24 a CPA no longer willing to do tax returns?
25 A. Yeah. That was something I was aware of towards

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1 the end of our representation.
2 Q. Okay. How did you become aware of it?
3 A. Well, there was a conversation between -- can't
4 even remember the names. There was a letter that was
5 issued by Kirton McConkie. There was also a letter issued
6 by another attorney, and I asked somebody why those
7 letters had been issued, what prompted that?
8 And the response that I got was, well, there was
9 someone concerned that -- about the validity of the
10 deductions, so they went and got an opinion letter. I was
11 like, Okay. There you go.
12 Q. Okay.
13 A. Which actually cracks me up. That's the whole
14 point of the lawsuit is somebody was concerned about the
15 deduction. So, of course, I was aware.
16 Q. Okay. So you mentioned a memorandum by Kirton
17 McConkie?
18 A. Yes.
19 Q. Let's put that on the record and make sure we're
20 on the same page.
21 (Exhibit 14 marked.)
22 Q. (By Mr. Castleberry) Is this the -- the court
23 reporter has handed you what's been marked as Exhibit 14.
24 Why don't you take a moment and look it over to see if it
25 is the memorandum that you were talking about?

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1 A. Yeah, this looks like it.
2 Q. As best as you can tell then, when was the first
3 time you became aware of this memorandum?
4 A. I have no idea. I -- I do not have any clue
5 when that timeframe would be as I sit here. I guess I
6 could go back and maybe look through records and see if
7 something jogs a date. I don't recall.
8 Q. Just for the record, this memorandum is dated
9 October 31, 2012; is that correct?
10 A. Oh, yeah. Yeah. But we weren't even in the
11 case then.
12 Q. And -- and this has a Bates number of H&A
13 004002?
14 A. Yes.
15 Q. And it runs to 4013; is that correct?
16 A. Yep.
17 Q. And this is a memorandum from Kenneth Birrell to
18 SOLCO 1 with attention to Neldon Johnson; is that correct?
19 A. Yep. That's what it says.
20 Q. Do you know who Mr. Birrell is.
21 A. As I sit here today, my understanding, if my
22 recollection is correct, he's an attorney that worked for
23 Kirton McConkie, but I'm not sure that's true.
24 Q. It looks like his deposition was taken in the
25 underlying -- in the federal case against RaPower.

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1 A. Okay.
2 Q. Did you attend that deposition?
3 A. That was, I think, after we were terminated.
4 Q. Do you know if Chris Austin attended that
5 deposition?
6 A. Again, if it was after we were terminated, then
7 neither of us would have. But I truly don't know for
8 sure.
9 Q. And --
10 A. I don't recall being at that deposition
11 personally, no. But if you tell me the date, we can look
12 at the record.
13 Q. Yeah. Looks like the date of the deposition was
14 February 14th, 2017.
15 A. And we were out on the 11th; is that right?
16 Q. Looks like in May 2017.
17 A. So my guess is -- well -- oh, that might answer
18 the question. That date may have been right -- we would
19 have to check, but that would be in conjunction with when
20 the hearing -- the trial was happening in Oregon, so Chris
21 would have attended, if we attended.
22 Q. Okay.
23 A. Again, if my timeline is remotely accurate, I
24 don't know. I'd have to check.
25 MR. CASTLEBERRY: Okay. So let's just make sure

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1 this is -- let's mark this as exhibit next in line.
2 (Exhibit 15 marked.)
3 Q. (By Mr. Castleberry) So the court reporter has
4 handed you what's been marked as Exhibit 15. This is a
5 letter from Mr. Birrell to Neldon Johnson and Greg Shepard
6 dated January 10th, 2014. And I'll also make a reference
7 for the record that it is an Exhibit 370 for the witness
8 Birrell with the date of February 14th, 2017.
9 Do you see that?
10 A. Yeah. Uh-huh (affirmative).
11 Q. And is this -- do you recall seeing this letter
12 before?
13 A. I don't.
14 Q. Do you recall talking with Chris Austin about
15 this letter?
16 A. I don't. Not as I sit here.
17 Q. Did Neldon Johnson or Greg Shepard ever talk to
18 you about this letter?
19 A. Let me read it.
20 Q. Sure. Go for it.
21 A. I don't have any recollection of that or
22 information on it to the best of my knowledge.
23 Q. Take your time to look through it, and let me
24 know when you're done.
25 A. I've read the letter. You want me to read the

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1 whole 37 pages?
2 Q. No.
3 A. I can.
4 Q. Yeah, just so the record's clear, the letter is
5 two pages, and then there is a memorandum that has
6 exhibits. In fact, this is the memorandum that we looked
7 at as part of the previous exhibit; is that correct?
8 A. So are you saying that this memo was attached to
9 this letter?
10 Q. Correct.
11 A. Even though they're two years apart?
12 Q. Correct.
13 A. Okay. I don't have any reason to dispute that.
14 Just seems odd that you would attach a letter to a memo
15 that's two years old.
16 MR. ELSWICK: I think it's because of the
17 clarification.
18 THE WITNESS: It's a long time to go for
19 clarification. If you're going to clarify something,
20 let's wait two years, and then we'll clarify.
21 Q. (By Mr. Castleberry) Just -- I'll make the
22 representation, Justin, that this January 2014 letter is
23 making the point that this October 31, 2012, memorandum is
24 not an opinion letter.
25 A. Okay.

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1 Q. Do you know the difference between a tax opinion
2 letter and a tax memorandum?
3 A. I do.
4 Q. What is the difference?
5 A. Well, there's a defense called reliance on the
6 existence of counsel. If you rely on counsel's advice in
7 certain areas, particularly it's -- it's most particularly
8 allowed in the area of SEC or securities compliance -- and
9 you're wrong, but you have a good faith basis based on the
10 reliance of counsel, then it shifts liability to the
11 attorney that gave the opinion.
12 Q. Any difference between an opinion letter and a
13 memorandum, a tax memorandum, as far as you know?
14 A. Well -- okay. As far as I know? I can
15 speculate, but I -- I don't know.
16 Q. That's fine. I'll -- I'll represent at that
17 point made by Mr. Birrell in this January 2014 letter is
18 that this memorandum is not an opinion letter because it
19 does not reference a specific transaction.
20 A. I think that that's -- that would not be
21 sufficient as a defense.
22 Q. In your opinion?
23 A. In my opinion. If you give a hypothetical
24 circumstance and offer an opinion on that and indicate to
25 them that under these circumstances, there would be an

1 application, that would be -- that would be sufficient.
2 If I were the one drafting it, I would expect someone
3 would rely on that.
4 Q. And you said that you read through Exhibit 15,
5 at least the --
6 A. The two pages, yeah.
7 Q. -- the two pages?
8 A. Uh-huh (affirmative).
9 Q. And do you understand also that the opinion --
10 the memorandum references tax deductions that can be taken
11 by subchapter C corporations and not individuals?
12 A. Okay.
13 Q. Are you aware of that?
14 A. That's what I -- I read the letter, yes.
15 Q. Can you tell me who Rod King is? Have you ever
16 dealt with him? Does that name ring a bell?
17 A. The name does. Is it Rodney King or Rod King?
18 Q. Well, I'll give you the letter.
19 Do you know -- you said that Bruce A. Reece and
20 Danielle Reece were two of the Oregon lens purchasers?
21 A. That's who's on my list.
22 Q. Did you send -- I'll represent that you sent a
23 letter to Rod King on behalf of the Reeces.
24 A. Okay.
25 Q. So let's just get that in front of you.

1 (Exhibit 16 marked.)
2 MR. CASTLEBERRY: Mark this as Exhibit 16, and
3 let's just mark this next letter as 17 so we can have it
4 side by side.
5 (Exhibit 17 marked.)
6 Q. (By Mr. Castleberry) Have you had a chance to
7 look over Exhibits 16 and 17?
8 A. I see them. They're letters. I haven't read
9 them.
10 Q. Okay. And on both of Exhibit 16 and 17, these
11 are letters that are signed by you; is that correct?
12 A. Looks like it.
13 Q. And Exhibit 16 is a letter dated September 1,
14 2016?
15 A. Yeah.
16 Q. To Rod King?
17 A. Uh-huh (affirmative).
18 Q. With Bates number H&A 004558; is that correct?
19 A. Yeah.
20 Q. And then Exhibit 17 is a letter from you to
21 Rod King dated September 19th, 2016, with Bates number
22 H&A 004562; is that correct?
23 A. That's correct.
24 Q. And so looking over this -- these two letters,
25 does that refresh your recollection as to who Rod King is?

1 A. He was somebody with the state -- the Department
2 of Revenue for Oregon.
3 Q. And can you tell me why you sent the letter?
4 A. I can't remember. Obviously we were trying to
5 resolve the case.
6 Q. When you say you were trying to resolve the
7 case, this is the case against the Reeces?
8 A. Uh-huh (affirmative).
9 Q. Is that a yes?
10 A. That's a yes.
11 Q. And it looks like we have the same letter except
12 for some formatting differences twice. Do you know if
13 this letter was sent more than once and, if so, why?
14 A. I -- I don't know the answer to that question.
15 And I don't -- it looks like one might have been a draft
16 because they both have digital signatures. And I would
17 guess the September one was not actually sent, it was just
18 a draft of a document that was put together.
19 Q. The September 1st?
20 A. Yeah. The September 19th would have been the
21 final document that was actually mailed would be my guess.
22 Q. So one of my -- my questions is at the time you
23 sent this letter, you do reference this Kirton McConkie
24 memorandum?
25 A. Uh-huh (affirmative).

1 Q. -- from October 2012. At the time you sent this
2 letter on behalf of the Reeces to Rod King, were you aware
3 of the Birrell 2014 letter to Neldon Johnson?
4 A. I've already answered that.
5 Q. The answer is?
6 A. No, to the best of my knowledge as I sit here
7 today. Although I think I'm going to change what I just
8 told you about which letter was sent. The -- the
9 September 19th letter doesn't look to be complete.
10 So if you look on page 2, it's got a bonus and
11 then a question mark. That looks like it would have been
12 a note. So I would guess the September 1 letter was sent.
13 And then I was probably drafting another letter or in the
14 process of drafting another letter and just had taken the
15 name off, and then the production happened, and they tried
16 to be inclusive and sent you the September 19th letter as
17 well.
18 Q. Like, for example, on the last page of the
19 September 19th letter, it says "example of office
20 equipment" on the last page, like in parentheticals.
21 A. Yeah. That would probably be an incomplete
22 document. Those would just be notes to myself as I was
23 working through it.
24 Q. And this letter references the tax memorandum
25 from Kirton McConkie, and you advised Rod King to actually

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1 go on the website and look at the tax opinion; is that
2 correct?
3 A. It says what it says.
4 Q. Do you recall seeing the tax opinion of
5 Kirton McConkie or the legal memorandum of Kirton McConkie
6 as of 2016 on the RaPower website?
7 A. That's how I would know it was there. That's
8 probably where I had it.
9 Q. Other than sending this letter to Mr. King, did
10 you do any other work for the Reeces?
11 A. Other than what we've already discussed?
12 Q. Other than what we've already discussed.
13 A. Yeah, that's -- that's all to the best of my
14 recollection as I sit here.
15 Q. Okay.
16 A. I think it was shortly after that -- this would
17 fit my timeline again. I think it was shortly after that
18 that everybody agreed to stay all the other cases
19 consolidated into the Gregg and Orth decision.
20 Q. Okay.
21 A. So I -- yeah, I mean that fits the timeline
22 that's in my head.
23 MR. CASTLEBERRY: Okay. Well, why don't we take
24 a quick break. I know the court reporter always
25 appreciates breaks.

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1 (Recess taken at 12:41, resuming at 1:04.)
2 Q. (By Mr. Castleberry) Let's go back on. What I'm
3 going to do is mark this document as Exhibit 18.
4 (Exhibit 18 marked.)
5 Q. (By Mr. Castleberry) All right. We just had a
6 break. Just to get on the record, the "confidential
7 information - attorneys' eyes only," the parties have
8 stipulated and agreed that that does not apply to any of
9 the documents that have been produced in this case, is
10 that correct, Justin?
11 A. Correct.
12 MR. ELSWICK: What I'm going to do real quick
13 actually, give me 30 seconds. I'm going to go back and
14 have them pull up this. Just I want to confirm that --
15 I've already looked at everything. I want to make sure
16 since I'm representing. Let me do a quick check, and then
17 I'll feel comfortable.
18 MR. CASTLEBERRY: Okay. So you're just looking
19 at the portion that is redacted?
20 MR. ELSWICK: Correct.
21 (A discussion was had off the record.)
22 MR. ELSWICK: Right. So with regard to this, we
23 have re-sent all the emails with the redactions. The only
24 thing that's at the top of this email is the forwarding
25 from in staff, in office between two staff members.

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1 It did have a list of the associated exhibits,
2 but all the exhibits have been produced. That's what's
3 listed at the top. But we have reproduced these a second
4 time without the redaction.
5 MR. KLEIN: This is Exhibit 18?
6 MR. ELSWICK: Correct.
7 MR. CASTLEBERRY: Okay. So you have reproduced
8 Exhibit 18 without the redaction and without the
9 "confidential information - attorneys' eyes only" at the
10 top?
11 MR. ELSWICK: Yes. That's -- I've had it
12 removed, redaction. But again, in the original email,
13 again, if there's an issue with this, we'll give you the
14 whole thing.
15 Again, I wasn't part of the original production.
16 I would have simply not done it because it's a list of
17 in-staff forwarding, and then it lists actually what the
18 attached exhibits to the email were. That's the only
19 information.
20 MR. CASTLEBERRY: And so just --
21 MR. ELSWICK: So there's no textual information
22 that's different.
23 MR. CASTLEBERRY: And did you already do that,
24 or is this something that you're going to do?
25 THE WITNESS: No, you've already received it.

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1 MR. ELSWICK: I believe when you asked me, I
2 said we'll re-reproduce those. I told them to take out
3 the redaction. However, I'm -- that's what I was trying
4 to find is the second production we did to remove this.
5 So we can go ahead knowing that -- again, if
6 there's an issue, I'm going to look again to make sure
7 that the second production -- technically, there doesn't
8 need to be a redaction because it's in staff, it was
9 between Sam and Wendy.
10 It lists in blue text what -- when you convert
11 it to a PDF, what it does is it puts that data up at the
12 front instead of your typical attachment window. It just
13 lists your exhibits. That's the only thing that's there.
14 It has nothing to do with, again, changing the context, or
15 there's not another communication that is of any
16 relevance.
17 MR. CASTLEBERRY: Nothing material?
18 MR. ELSWICK: Nothing material. Correct.
19 MR. CASTLEBERRY: What we can do with the next
20 two exhibits, just proceed with the stipulation that the
21 text at the top no longer applies, and anything redacted
22 is nothing material?
23 MR. ELSWICK: Correct.
24 MR. CASTLEBERRY: Okay.
25 Q. (By Mr. Castleberry) So with Exhibit 18, are

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1 these emails that you sent and received in December 2019,
2 Justin?
3 A. Yes.
4 Q. Is it true and accurate as far as you are aware?
5 A. Yeah.
6 MR. CASTLEBERRY: Okay. And what we'll do is
7 mark this as Exhibit 19.
8 (Exhibit 19 marked.)
9 Q. (By Mr. Castleberry) And is this an email that
10 you've seen before, Justin?
11 A. Yes.
12 Q. Email from Norman Peat to you dated
13 December 4th, 2019, H&A 2272; is that correct?
14 A. Yep.
15 Q. This is a true and accurate copy of the email
16 that you received?
17 A. It is a copy of the email I received.
18 Q. And the "confidential information - attorneys'
19 eyes only" at the top and the redaction we've agreed to
20 remove; is that correct?
21 MR. ELSWICK: That's correct.
22 Q. (By Mr. Castleberry) Mark this as Exhibit 20.
23 (Exhibit 20 marked.)
24 Q. (By Mr. Castleberry) You've been handed what has
25 been marked as Exhibit 20. And these have been Bates

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1 numbers H&A 3953 to 3959; is that correct?
2 A. That's what it appears.
3 Q. And these are documents that we've received from
4 you. I'll -- can you tell me what this document is?
5 A. It says it's the payments by receivership
6 entities to Heideman & Associates for work on Oregon Tax
7 Court matters.
8 Q. And have you had any discussions with the
9 receiver about the information in this -- in these
10 documents?
11 A. Have I talked to Wayne Klein about the
12 documents? No.
13 Q. Have you talked about the -- do you have any
14 issue with the calculations in these documents with
15 respect to the amounts paid by RaPower to your firm for
16 work on the Oregon tax matters?
17 A. I don't understand what you're asking me.
18 Q. In other words, if you look, there's a total at
19 the end of $134,099.06. Do you have any dispute that that
20 is the amount RaPower paid you, your firm, for work on the
21 Oregon tax matters?
22 A. I believe that the purpose of this document was
23 to identify the funds that had been paid by any of the
24 receivership entities to Heideman & Associates for work on
25 the Oregon Tax Court matters.

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1 Q. Okay. My question is do you have any dispute
2 with this accounting?
3 A. Not as I sit here today, no.
4 Q. Have you done any independent investigation into
5 this accounting?
6 A. In terms of did I look it over and did I assign
7 my accountant to put it together? Yes.
8 Q. You assigned your accountant to put it together?
9 A. Yes.
10 Q. When you say you assigned your accountant to put
11 it together, what do you mean by that?
12 A. I mean that Alex Hamblin is our internal
13 accountant, and he put it together.
14 Q. So this document was created by Hamblin?
15 A. Uh-huh (affirmative).
16 Q. And provided to the receiver?
17 A. Correct.
18 Q. Okay. As far as you know, this information is
19 accurate and complete?
20 A. Yes.
21 MR. CASTLEBERRY: Let's mark this as next in
22 line.
23 (Exhibit 21 marked.)
24 Q. (By Mr. Castleberry) So the court reporter has
25 handed you an exhibit marked as Exhibit 21. And these

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1 have Bates numbers H&A 004184, and then it runs to H&A
2 004279; is that correct?
3 A. Yes.
4 Q. Have you ever seen these documents before?
5 A. Yes.
6 Q. What are they?
7 A. Well, this is a billing slip that I personally
8 prepared, not the slip itself, but the highlights on it.
9 And there was an email that came with it that explained
10 the color key, which you've not included in the exhibit.
11 Q. I don't have a copy of the email.
12 A. Well, you would -- of course, you wouldn't have
13 this if you didn't have the email because it was attached
14 to it.
15 Q. Okay. When you say this is something that you
16 prepared, you're talking about the highlighting?
17 A. Correct.
18 Q. Okay.
19 A. The document itself is produced through our --
20 our time billing program called Pro Law.
21 Q. Who is the email sent to? Who is the recipient
22 of the email?
23 A. It would have been sent pursuant to the -- okay.
24 So I've got to remember. If this was sent before the
25 litigation was initiated, because there was a series of

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1 letters sent by Mr. Klein asking for information, and we
2 volunteered in an effort to try and be cooperative, then
3 he thoroughly beat us over the head with our olive branch.
4 But that having been said, if that was the case,
5 I would have sent it directly to him. If it was after
6 litigation, then it would have been produced pursuant to
7 the request for supplement, and it would have come
8 probably to you.
9 Q. Okay. And this is something that you personally
10 prepared?
11 A. I did. Yes. I was the one that put the
12 highlights in.
13 Q. Sitting here today, do you recall what the
14 highlights reference?
15 A. I do not. I recall what the purpose was for,
16 but I do not recall which ones were which. The highlights
17 were done to identify specific -- there were topics. It
18 was pursuant to the request, and the request either asked
19 us to identify either a topic or -- anyway, there was a
20 designation in the request.
21 So I highlighted the items based on the request
22 designations, and then I provided the color key. But I
23 don't recall as I sit here what the key means. I'd have
24 to go pull that out of that email.
25 Q. Okay. And it looks like there are dates when

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1 the work was performed?
2 A. Correct.
3 Q. And so the first work was performed on -- at
4 least relating to the Oregon tax cases was performed on
5 April 5th, 2016?
6 A. That's the first date on this document, yes.
7 Q. And was there any other work performed before?
8 A. It's possible, sure.
9 Q. But we don't have records of that?
10 A. It -- it wasn't billed, if it was.
11 Q. So this is all the work that was billed?
12 A. Yes.
13 Q. Okay. And then the last work that was billed or
14 at least an expense was billed, it looks like June 30th,
15 2017; is that correct?
16 MR. ELSWICK: Which page are you looking at
17 there?
18 THE WITNESS: He's on Bates 206, I believe.
19 That's July 21, 2017, right?
20 Q. (By Mr. Castleberry) 206?
21 MR. ELSWICK: 4?
22 THE WITNESS: 4206.
23 MR. ELSWICK: Okay.
24 Q. (By Mr. Castleberry) The last Bates number is
25 4279.

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1 A. I'm looking at 4206.
2 Q. 4206. So the last expense was 7/21/2017, is
3 that --
4 A. Correct.
5 Q. -- correct?
6 A. That looks like it was a no bill. So somebody
7 put in a half hour of work but didn't charge for it.
8 Q. Right. And is this a -- what are the redactions
9 in this -- in this document?
10 A. I can only speculate on that as I sit here. But
11 I'm going to guess that it was work billed on cases
12 unrelated to the Oregon matter and, therefore, not
13 responsive to the request.
14 But because we try to be complete in our
15 disclosures, we would produce the entire printout that
16 came from the -- the report, the entire report. And so
17 I'm guessing that they redacted items that did not apply
18 to the Oregon case.
19 Q. Are the redacted items issues that apply to the
20 RaPower matters?
21 A. Probably, yeah, like the federal case.
22 Q. And I'll just, again, make the point that the
23 receiver owns those --
24 A. Uh-huh (affirmative).
25 Q. -- documents.

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1 And if that is the case that these are
2 redactions relating to RaPower cases --
3 A. Yep.
4 MR. ELSWICK: We need to produce --
5 THE WITNESS: No, that's not correct.
6 MR. ELSWICK: If they're related to RaPower.
7 THE WITNESS: Not if they weren't requested. If
8 the request was, "Please produce only information
9 associated with Oregon," that's what would have happened
10 is we would have --
11 MR. ELSWICK: Do you have those discovery
12 requests?
13 MR. CASTLEBERRY: Yeah, I do.
14 MR. ELSWICK: Let's just do a read so we're on
15 the same page.
16 THE WITNESS: We don't have a problem producing
17 it. I'm not trying to tell you we have a problem
18 producing it. What I don't like is the tone of the
19 question because what you're saying -- what you're
20 indicating as if I didn't know that he is the receiver for
21 those entities.
22 What I'm telling you is that there was not a
23 redaction because we were trying to keep it from being
24 disclosed. We've already produced everything that we have
25 associated with all of them to Mr. Klein.

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1 But the request very likely was, "Please
2 identify only that which is relevant to Oregon." So we
3 would have identified that and prevented confusion by
4 showing you the entire report and everything that was kept
5 out.
6 Q. (By Mr. Castleberry) Okay.
7 MR. ELSWICK: We'll just take a look and see if
8 that's the case. If it's exclusive to the Oregon, that
9 would -- that would all make sense.
10 MR. CASTLEBERRY: I'm at a disadvantage because
11 I don't know what's behind the redactions, right? That's
12 why I'm asking these questions.
13 THE WITNESS: You're welcome to ask. And we
14 have no problem producing the entire report unredacted.
15 But I don't like the inference that your question offered
16 that we were for some reason preventing the receiver from
17 receiving information that he would otherwise be entitled
18 to.
19 That would never be the case. There has never
20 been a response that you or the receiver has made that has
21 not been fully responded to or that we have ever tried to
22 not fully respond to. There's never been an assertion
23 that that's been the case.
24 Q. (By Mr. Castleberry) Yeah. Can you tell me who
25 the billers were?

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1 A. Yeah.
2 Q. So --
3 A. That's also in that email.
4 Q. Okay.
5 A. SS is Sam -- it would be Sam Folkes. Her prior
6 name was Sam Stelmasek. She's recently married at this
7 time.
8 Q. WP?
9 A. Wendy Poulsen.
10 Q. JDH is you?
11 A. That's me.
12 Q. SP?
13 A. I've got to look. SP? It would be a former
14 employee.
15 MR. ELSWICK: I can't assist on the
16 recollection.
17 THE WITNESS: I'll have to pull it up.
18 Q. (By Mr. Castleberry) CDA?
19 A. Chris Austin.
20 Q. JRJ?
21 A. Justin.
22 MR. ELSWICK: Is it JRJ? That's James Jackson.
23 THE WITNESS: Sorry. James Jackson.
24 MR. ELSWICK: I'm JRE.
25 Q. (By Mr. Castleberry) RS?

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1 A. Tom -- no, I would have to look at my key. I
2 don't recall.
3 Q. Okay. PSY?
4 A. Paul Young.
5 Q. LA?
6 A. Lilly Alvidrez.
7 Q. JRE?
8 A. Justin Elswick.
9 Q. TRM?
10 A. Tom McCosh.
11 Q. Okay. And I think I do recall a reference to a
12 color-coded key, and then we had a follow-up because it
13 was not provided by accident, but I think we did receive
14 it. So I will -- I will look for that.
15 A. And it includes the -- the SSs and all that, all
16 the acronyms, it identifies who they are.
17 Q. Okay. So sitting here today, you're not -- so
18 what was the purpose of the highlighting then?
19 A. It was responsive to the question. There was --
20 there was a request that we identify very specific items
21 within the accounting, and so I highlighted it rather than
22 try and break it out. I just said all these colors
23 identify that, all these colors identify that.
24 Q. Okay.
25 MR. CASTLEBERRY: Let's mark this as Exhibit 22.

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1 (Exhibit 22 marked.)
2 Q. (By Mr. Castleberry) All right. This is --
3 we've handed to you what looks to be a civil trial
4 subpoena to Leslie Bick. Can you tell me who Leslie Bick
5 is?
6 A. I have no idea. I don't know that I've ever
7 seen this document before.
8 Q. Okay. I'll represent to you that, again, this
9 is a document that we received from your office. If you
10 look at the Bates numbers, H&A 00374?
11 A. Yeah. I have no idea what that is or who that
12 is. I don't even know what that case is.
13 Q. Okay. We're trying to find out too -- let's
14 mark an email that may refresh your recollection. Again,
15 it has the redaction "confidential information -
16 attorneys' eyes only" that we stipulate doesn't apply.
17 MR. ELSWICK: Just so you know, I have a copy of
18 the one we already submitted so you can see what's at the
19 top so we can alleviate any concern.
20 (Exhibit 23 marked.)
21 Q. (By Mr. Castleberry) We just handed you an email
22 exchange involving you, Samantha Fowlks, Wendy Poulsen,
23 and Lilly Alvidrez?
24 A. Alvidrez.
25 Q. In October 18th, 2016.

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1 A. This is a totally unrelated case. Isn't that --
2 THE WITNESS: Off the record for a minute.
3 (A discussion was had off the record.)
4 Q. (By Mr. Castleberry) Exhibit 22 and 23 relate to
5 Leslie Bick and a deposition to which she was subpoenaed
6 to testify. And your testimony is that this has nothing
7 to do with any of the issues in this case?
8 A. No. My -- as I'm sitting here, my recollection
9 is not perfect by any stretch, but I believe this was a
10 building construction defect case. My client, I think,
11 was Mr. Pascal Mahvi.
12 And he resolved his issues in the litigation
13 light years before this -- this subpoena ever happened.
14 It just -- it just happened to be in Oregon. So as they
15 did the search for Oregon documents, somebody pulled this.
16 Q. Well, and Neldon Johnson is also referenced in
17 the email.
18 A. Well, it just simply says --
19 Q. Or Gregg is referenced there.
20 A. What it says in the email is that there's a
21 hearing in this case, "this case" being the C160243CV
22 case, that references Pascal Mahvi on the same day that
23 I'm doing matters for Gregg Orth in Oregon, so the Gregg
24 trial. They just happened to have the same day, but they
25 don't have any correlation.

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1 Q. Can you tell me who Christian Gomez is?
2 A. I can't. Not as I sit here.
3 Q. I'll represent to you that this is a name
4 included in the initial disclosures, a witness who has
5 discoverable information. It's also mentioned that it's
6 in care of our firm, but --
7 A. It probably would be a name we saw disclosed in
8 one of your documents.
9 Q. Okay. Do you know -- do you know -- but you
10 don't know who he is?
11 A. Not as I sit here, I don't.
12 Q. What about Randale Johnson?
13 A. That name is familiar. I think that is a
14 relative or a son of Neldon perhaps. That's the best I
15 can do.
16 Q. And LaGrand Johnson?
17 A. Another relative of Neldon. Again, we try to be
18 totally complete, so we go through our documents. If
19 there's a name in there we think might have something, we
20 produce it.
21 Q. Okay. We've talked about some conversations
22 that you've had with Neldon Johnson in his capacity as an
23 operator/owner of RaPower?
24 A. Yep.
25 Q. And the first conversation you recall having

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1 with him about the Oregon lens purchasers matters was
2 here, close to the time he signed the client information
3 sheet; is that correct?
4 A. No. That's not correct.
5 Q. Okay.
6 A. We -- we were engaged with him as his legal
7 counsel in the federal case before the Oregon case came
8 up, if my memory serves. The first conversation I had
9 with him I think was a telephonic conversation. I think
10 that was before we were retained.
11 Q. Before you go too far, I'm just talking about
12 the first conversation you had with Neldon Johnson about
13 the actions in Oregon.
14 A. Yeah, it would be -- it was done -- definitely
15 done on the telephone. It was definitely within a couple
16 of days, maybe even the day before the execution of the
17 information agreement.
18 Q. Okay. And in that first conversation, can you
19 recall what the substance of the conversation was?
20 A. I really wrote down pretty much everything that
21 was told to me in -- as a summary of both conversations.
22 I don't recall which time I got all of the information,
23 but everything that I wrote in the -- the agreement on
24 page 2 that tries to define what the agreement is, that's
25 effectively what I learned during those two conversations.

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1 Q. And this is Exhibit 2?
2 A. Yes.
3 Q. And page 2 of Exhibit 2?
4 A. Yes.
5 Q. How many other conversations did you have with
6 Neldon Johnson about the Oregon action?
7 A. Every time I spoke with him, he would ask for an
8 update on every case he was engaged in.
9 Q. What was the last conversation you had with
10 Neldon Johnson about the Oregon purchasers, if you
11 remember?
12 A. That would definitely be part of the
13 termination, and that would be attorney-client privilege.
14 Q. Did you ever represent Neldon or Glenda in legal
15 matters separate from the US DOJ case?
16 A. Yes.
17 Q. And -- and what were those matters?
18 A. Well, the receiver has the documentation, as do
19 you. It's the Millard County case, and I think there were
20 two of those actions. One, if I'm not mistaken.
21 Q. Okay. Just so we're on the same page, is it
22 your position then that any conversation with
23 Neldon Johnson about your termination in the Oregon tax
24 case, that RaPower wouldn't pay you anymore for that work,
25 is not subject to -- or is protected by the

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1 attorney-client privilege because it only deals with
2 Neldon Johnson?
3 A. No. That's -- that's not what I've said.
4 Q. Okay. Why can't you talk -- disclose to us the
5 substance of the conversation with Neldon Johnson about
6 your termination in the Oregon tax proceeding?
7 A. I was terminated for all proceedings, for all
8 activities associated with Mr. Johnson because of an
9 action that was only Mr. Johnson.
10 Q. Would it be fair to say that --
11 A. Or, I guess, I better amend that. Because it's
12 not -- it's not accurate. If you look at the document we
13 provided you with the notice of withdrawal, the event that
14 occurred occurred as to all entities.
15 There was a -- I can tell you what's public
16 record. There was a notice of deposition that was put
17 forward. That notice of deposition was to depose
18 Mr. Johnson in his capacity as -- in the companies, as
19 well as individually. There was an event that then
20 occurred, and the conversations that take place, I don't
21 know where to draw that line.
22 MR. ELSWICK: Left me correct though. The
23 notice of deposition that I saw was actually not a
24 30(b)(6).
25 THE WITNESS: It was just him personally?

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1 MR. ELSWICK: Right.
2 THE WITNESS: That's even harder.
3 MR. ELSWICK: That's the only thing that I could
4 find in the file on that in that federal case.
5 Q. (By Mr. Castleberry) Okay. For the action
6 involving Neldon Johnson, who paid for your work that you
7 performed for him?
8 A. Well, the work associated with Neldon was as a
9 defendant in the federal case, so all of those payments
10 were made by RaPower.
11 Q. Do you know of any other source for any of those
12 payments?
13 A. Well, the source -- when I say RaPower, I
14 believe that the checks demonstrate there were payments by
15 multiple receivership defendants, but it was the
16 receivership defendants that paid.
17 Q. And when you -- when the decision was made to
18 terminate all representation on behalf of anything related
19 to RaPower, did you then file notice of withdrawals in the
20 Oregon tax proceedings?
21 A. Yes. We had to file those withdrawals. Because
22 there was a pending decision, we had to make a motion, I
23 believe.
24 Q. Was it a substitution of counsel rather than a
25 withdrawal?

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1 A. No, because they had to get pro hac vice. They
2 already had counsel, obviously, in the form of their
3 sponsoring counsel, so they stayed, Swearingen did. And
4 then new counsel had to come in as pro hac. My
5 understanding is that was going to be Denver Snuffer's
6 firm. I don't know if that happened, but that was my
7 understanding.
8 Q. Okay. Do you recall having any conversations
9 with the Oregon lens purchasers about the termination of
10 your representation of them?
11 A. Yes. We called and notified them and sent them
12 all a letter.
13 Q. And -- and did you get into any of the details
14 behind the termination, meaning the reason for the
15 termination?
16 A. Did I give them that information?
17 Q. Correct.
18 A. I did not. It was attorney-client privilege.
19 Q. Did they ask you for --
20 A. Yes.
21 Q. -- clarification?
22 A. They did.
23 Q. And what was the response to that?
24 A. I indicated to them I couldn't disclose that
25 information. It was attorney-client privilege.

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1 MR. CASTLEBERRY: I think we're getting close to
2 the end. What I'm going to do is maybe just take a few
3 minutes, look over my notes, and we could be close to
4 done.
5 THE WITNESS: Okay.
6 (Recess taken at 1:42, resuming at 1:52.)
7 Q. (By Mr. Castleberry) So just to go back on the
8 record, one thing I wanted to ask you, Justin, was related
9 to the accounts, the foreign accounts, held by Neldon, did
10 you make any type of contemporaneous notes or memorandum
11 regarding that?
12 A. No. I gave you everything -- I volunteered
13 everything I knew.
14 Q. Correct. And since the time you've provided
15 that testimony earlier today until now, can you recall
16 anything else about that conversation that would assist
17 the receiver in obtaining those funds?
18 A. The only other thing I would offer by way of
19 emphasis, and this is -- this is why it stuck out in my
20 mind, so I'm going to just tell you what -- what my
21 impression was. I actually had a case where I had to
22 chase some money to the isle of Vanuatu, which I didn't
23 even know was a real place until I had to go there.
24 MR. ELSWICK: It is.
25 THE WITNESS: It is a real place. It's by

1 Nevis, which I also didn't know was a real place until I
2 had to go there.
3 MR. KLEIN: I thought Vanuatu was --
4 THE WITNESS: It's down by New Zealand.
5 MR. KLEIN: Nevis is in the Caribbean.
6 THE WITNESS: It is. It was a double trip. I
7 ended up going to both of those. To be blunt, nothing is
8 near Vanuatu, but that was how I got those two correlated.
9 Anyway, I had to go chase an individual who had absconded
10 with a substantial amount of investor funds in a case, and
11 we tracked him to those two locations. And ultimately,
12 Nevis is where we were able to locate the funds.
13 And that's what caught my attention is that when
14 I heard him talking about -- in fact, it was XSun. When I
15 heard him talking about XSun, he said the funds are in
16 Nevis, and I knew where that was, which is why it stuck in
17 my head.
18 Q. (By Mr. Castleberry) Okay.
19 A. That's why it wasn't attorney-client privilege
20 because he was talking about the company.
21 MR. CASTLEBERRY: Correct. I have no more
22 questions.
23 MR. ELSWICK: We're not going to ask any
24 additional questions.
25 THE WITNESS: We'll read and sign.

1 MR. ELSWICK: I'd like just a digital mini with
2 exhibits and index.
3 (The proceedings concluded at 1:55 p.m.)
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1 CERTIFICATE OF DEPONENT
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19 --oOo--
20 I, Justin D. Heideman, deponent herein, do
hereby certify and declare under penalty of perjury the
21 within and foregoing transcription to be my deposition in
said action; that I have read, corrected, and do hereby
22 affix my signature to said deposition.
23
24 ______________________________
25 Justin D. Heideman, Deponent

1 REPORTER'S CERTIFICATE
2 STATE OF UTAH)
3 COUNTY OF UTAH)
4
5 I, Daren S. Bloxham, a Certified Shorthand
6 Reporter, Registered Professional Reporter, hereby
7 certify:
8 THAT the foregoing proceedings were taken before
9 me at the time and place set forth in the caption hereof;
10 that the witness was placed under oath to tell the truth,
11 the whole truth, and nothing but the truth; that the
12 proceedings were taken down by me in shorthand and
13 thereafter my notes were transcribed through
14 computer-aided transcription; and the foregoing transcript
15 constitutes a full, true, and accurate record of such
16 testimony adduced and oral proceedings had, and of the
17 whole thereof.
18 I have subscribed my name on this 29th day of
19 February, 2021.
20 ______________________________
21 Daren S. Bloxham
Registered Professional Reporter #335
22
23
24
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EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; R. GREGORY SHEPARD; and NELDON JOHNSON, Defendants.	**MEMORANDUM DECISION AND ORDER ON RECEIVER'S MOTION TO INCLUDE AFFILIATES AND SUBSIDIARIES IN RECEIVERSHIP** Case No. 2:15-cv-00828-DN District Judge David Nuffer

R. Wayne Klein, the court-appointed receiver ("Receiver"),[1] filed a motion (the "Motion")[2] to extend the receivership to thirteen entities affiliated with Defendants RaPower-3 LLC ("RaPower"), International Automated Systems Inc. ("IAS"), LTB1 LLC ("LTB1"), Neldon Johnson, and R. Gregory Shepard (collectively, the "Receivership Defendants"). Specifically, the Motion seeks to extend the receivership to the following (collectively, the "Affiliated Entities"):

1. Solco I, LLC ("Solco");
2. XSun Energy, LLC ("XSun");
3. Cobblestone Centre, LC ("Cobblestone");

[1] *See* Corrected Receivership Order, docket no. 491, filed November 1, 2018.

[2] Receiver's Motion to Include Affiliates and Subsidiaries in the Receivership Estate ("Motion"), docket no. 582, filed March 1, 2019; *see* Non-Parties Solco I, XSun Energy and Glenda Johnson's Notice of Intent to File Opposition to Receiver's Motion to Include Affiliates and Subsidiaries in the Receivership Estate, docket no. 586, filed March 4, 2019; Response to Receiver's Report and Recommendation and Motion to Include Affiliates and Subsidiaries in the Receivership Estate ("Response"), docket no. 596, filed March 15, 2019; Neldon Johnson's Opposition to the Receiver's Report and Motion, docket no. 597, filed March 18, 2019; Receiver's Reply in Support of Its Motion to Include Affiliates and Subsidiaries in the Receivership Estate ("Reply"), docket no. 602, filed March 29, 2019.

4. LTB O&M, LLC;
5. U-Check, Inc.;
6. DCL16BLT, Inc.;
7. DCL-16A, Inc.;
8. N.P. Johnson Family Limited Partnership ("NPJFLP");
9. Solstice Enterprises, Inc. ("Solstice");
10. Black Night Enterprises, Inc. ("Black Night");
11. Starlight Holdings, Inc. ("Starlight");
12. Shepard Energy; and
13. Shepard Global, Inc.

The Motion is based, in large measure, on the Receiver's Report and Recommendation on Inclusion of Affiliates and Subsidiaries in Receivership Estate (the "R&R").[3] The R&R was required by Paragraph 5 of the Corrected Receivership Order. The assets of these entities were frozen by that same paragraph "for the purpose of permitting the Receiver to investigate the assets, property, property rights, and interests of the" Affiliated Entities "to determine whether the assets, property, property rights, or interests of the [Affiliated Entities] derive from the abusive solar energy scheme at issue in this case or from an unrelated business activity."[4] In the R&R, "[t]he Receiver recommends that the 12 affiliated entities identified in the [Corrected Receivership] Order, as well as one additional entity, U-Check, Inc., be included in the Receivership Estate as Entity Receivership Defendants."[5]

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[3] Docket no. 581 ("R&R), filed February 25, 2019.

[4] Corrected Receivership Order, *supra* note 1, ¶ 5.

[5] R&R, *supra* note 3, at 28-29, ep 31-32.

Each of the Affiliated Entities has received timely and sufficient notice of the Motion and been afforded an adequate opportunity to be heard with respect to it.[6] Although Neldon Johnson and nonparties Glenda Johnson, XSun Energy, Solco, and Solstice filed responses opposing the Motion, they have not raised a genuine dispute as to any material fact set forth in support of the Motion.[7] No other response has been filed in opposition to the Motion.

It is generally recognized that district courts have broad powers and wide discretion to determine relief in a receivership.[8] "When a district court creates a receivership, its focus is to safeguard the assets, administer the property as suitable, and to assist the district court in achieving a final, equitable distribution of the assets if necessary."[9] To accomplish the purpose of the receivership, courts frequently include all subsidiaries and affiliates of receivership defendants in the receivership, regardless of where they may be located.[10]

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[6] *See* Reply, *supra* note 1, at 4-6.

[7] *See* Response, *supra* note 2; Opposition, *supra* note 2. No other person, including R. Gregory Shepard, has filed anything in opposition to the Motion, and the time to do so has now expired.

[8] *S.E.C. v. Vescor Capital Corp.*, 599 F.3d 1189, 1194 (10th Cir. 2010).

[9] *Id.* (citation and internal quotation marks omitted).

[10] *See, e.g., SEC v. Nationwide Automated Sys., Inc.*, No. CV-14-07249-SJO, 2014 WL 12599624, *5 (C.D. Cal. Nov. 10, 2014); *Orlowski v. Bates*, No. 2:11-cv-01396-JPM, 2014 WL 12771523, *1 (W.D. Tenn. July 28, 2014); *FTC v. Money Now Funding, LLC*, No. CV-13-01583-PHX, 2014 WL 11515024, *8 (D. Ariz. Apr. 28, 2014); *FTC v. Vacation Commc'ns Group, LLC*, No. 6:13-CV-789-ORL, 2013 WL 2468307, *7 (M.D. Fla. June 6, 2013); *SEC v. Small Bus. Capital Corp.*, No. 5:12-CV-03237-EJD, 2012 WL 12862153, *3 (N.D. Cal. June 26, 2012); *SEC v. Sunwest Mgmt., Inc.*, No. 09-6056-HO, 2009 WL 3245879, *2 (D. Or. Oct. 2, 2009); *FTC v. Direct Connection Consulting, Inc.*, No. 1:08-CV-1739, 2008 WL 11336186, *7 (N.D. Ga. May 14, 2008); *Commodity Futures Trading Comm'n v. Aurifex Commodities Research Co.*, No. 1:06-cv-166, 2007 WL 2481015, *1 (W.D. Mich. 2007); *Commodity Futures Trading Comm'n v. Wall Street Underground, Inc.*, No. Civ.A.03-2193-CM, 2004 WL 957852, *2 (D. Kan. Mar. 18, 2004); *FTC v. Sierra Pac. Mktg.*, No. CV-S-93-134-PMP, 1993 WL 78579, *6 (D. Nev. Feb. 22, 1993).

FACTUAL BASIS

The following facts are based on the evidence presented and existing record, including proof presented in hearings held April 26 and May 3, 2019.

1. For more than ten years, the Receivership Defendants promoted an abusive tax scheme centered on purported solar energy technology featuring "solar lenses" to customers across the United States. But the solar lenses were only the cover story for what the Receivership Defendants were really selling: unlawful tax deductions and credits. Their conduct, which is subject to penalty under the Internal Revenue Code, caused serious harm to the United States Treasury.[11] As a result, they have been enjoined from promoting their abusive solar energy scheme, ordered to disgorge their gross receipts, and required to turn over their assets and business operations to the Receiver.[12]

2. The whole purpose of RaPower, IAS, and LBT1 (collectively, the "Receivership Entities") was to perpetrate a fraud to enable funding for Neldon Johnson. The same is true for other entities Johnson created, controls, and owns (either directly or indirectly), including Solco, XSun, Solstice,[13] Cobblestone, LTB O&M, DCL16BLT, DCL-16A, NPJFLP, U-Check, Black Night, and Starlight. Johnson has commingled funds between these entities, used their accounts to pay personal expenses, and transferred Receivership Property to and through them in an

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[11] Findings of Fact and Conclusions of Law, at 1, electronic page ("ep") 6 ("FFCL"), docket no. 467, filed October 4, 2018.

[12] *See* Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, docket no. 444, filed August 22, 2018.

[13] Solco, XSun, and Solstice have each made an affirmative appearance in this case. *See* Response, *supra* note 2, at 1.

attempt to avoid creditors.[14] (U-Check, which is not specifically named in the Corrected Receivership Order, is in possession of a Cessna twin-engine airplane, which may have significant value, and which Neldon Johnson owned and controls.)[15]

3. Each of the Affiliated Entities is a subsidiary or affiliated entity of Receivership Defendants[16] and has close associations with the Receivership Entities.[17] In many cases, the Affiliated Entities and Receivership Entities have common officers, directors, members, and managers. Their corporate purposes are similar. And there have been numerous and substantial financial transactions between them.[18]

4. The failure of the Receivership Defendants and Affiliated Entities to cooperate or provide records,[19] together with the evidence the Receiver has obtained from financial institutions, show that the Receivership Defendants and Affiliated Entities have engaged in transactions without objective economic justification or compliance with legal formalities, while concealing assets and withholding records from the Receiver.[20]

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[14] FFCL, *supra* note 11, at 128, ep 133; *id.* ¶¶ 17 n.26, 41, 284; R&R, *supra* note 3, §§ B.4-5, B.7, B.10-13, F.4-5, F.7, F.10-13; *id.* at 20, 36-37, ep 23, 39-40. The term "Receivership Property" has the same meaning in this Memorandum Decision and Order as it does in the Corrected Receivership Order.

[15] R&R, *supra* note 3, at 35, ep 38.

[16] *See* Corrected Receivership Order, *supra* note 1, ¶¶ 2, 5.

[17] R&R, *supra* note 3, at 35, ep 38.

[18] *Id.*

[19] *Id.* at 1-3, ep 4-6; *see also* United States' Motion to Show Cause Why Neldon Johnson, R. Gregory Shepard, Glenda Johnson, LaGrand Johnson, and Randale Johnson Should Not Be Held in Civil Contempt of Court for Violating the Corrected Receivership Order, docket no. 559, filed January 29, 2019; Receiver's Accounting, Recommendation on Publicly-Traded Status of International Automated Systems, and Liquidation Plan, docket no. 552, filed December 31, 2018; Receiver's Initial Quarterly Status Report, docket no. 557, filed January 28, 2019; Receiver's Second Quarterly Status Report, docket no. 608, filed April 15, 2019; and transcripts of proceedings April 26 and May 3, 2019.

[20] R&R, *supra* note 3, at 37-48, ep 40-51.

5. In many instances, the Affiliated Entities' only assets are tied to the Receivership Defendants. In each instance, the assets appear to have been transferred to the Affiliated Entities for the purpose of defrauding creditors. To prevent further dissipation of Receivership Property, it is necessary to put the Affiliated Entities under the Receiver's control.[21]

6. Based on the Receiver's investigation of the Affiliated Entities, the Receiver has recommended that the receivership be extended to include each of the Affiliated Entities.[22]

7. To fulfil the purposes of the receivership, safeguard receivership assets, administer receivership property as suitable, and achieve a final and equitable distribution of receivership assets, it is necessary to extend the receivership to include the Affiliated Entities.[23]

8. Although many of the Affiliated Entities are now defunct and without assets, bringing them into the receivership estate is necessary to prevent their use to perpetuate further fraud in contravention of the receivership's purposes.[24]

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

1. This court takes exclusive jurisdiction and possession of all assets, of whatever kind and wherever situated, of each of the Affiliated Entities.

2. The Affiliated Entities are hereby made part of the existing receivership estate, which is being administered by court-appointed receiver Wayne Klein, in accordance with the Corrected Receivership Order.

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[21] *Id.* at 35-36, ep 38-39.

[22] *Id.* at 48-49, ep 51-52.

[23] *See Vescor*, 599 F.3d at 1194.

[24] R&R, *supra* note 3, at 36, ep 39.

3. The "Asset Freeze" set forth in the Corrected Receivership Order shall continue to include and apply to the Affiliated Entities.

4. The directors, officers, managers, employees, trustees, investment advisors, accountants, attorneys, and other agents of the Affiliated Entities are hereby dismissed, and the powers of any general partners, directors, or managers are hereby suspended. Such persons shall have no authority with respect to the Affiliated Entities' operations or assets, except to the extent as may hereafter by expressly granted by the Receiver or the court.

5. No person holding or claiming any position of any sort with any of the Affiliated Entities shall possess any authority to act by or on behalf of any of the Affiliated Entities.

6. The Receiver shall have all powers, authorities, rights, and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers, and general and limited partners of the Affiliated Entities under applicable state and federal law, by the governing charters, bylaws, articles, or agreements in addition to all powers and authority of a receiver at equity.

7. In carrying out his responsibilities as receiver, the Receiver shall have all control over assets, books, records, and accounts of Affiliated Entities and all powers and rights granted to the Receiver in the Corrected Receivership Order.

8. The Receivership Defendants, their subsidiaries, any affiliated entities, any affiliated individuals (including spouses and other family members), and the past and present officers, directors, agents, managers, servants, employees, attorneys, accountants, general and limited partners, trustees, and any person acting for or on behalf of the Affiliated Entities, shall cooperate with and assist the Receiver in the performance of his duties and obligations relating to

the Affiliated Entities to the same extent as required in the Corrected Receivership Order with respect to the Receivership Defendants.

9. All persons having control, custody, or possession of any property or records of Affiliated Entities are hereby ordered to turn such property or records over to the Receiver to the same extent as required by the Corrected Receivership Order with respect to Receivership Defendants.

10. As the holder of all ownership and management interests of the Affiliated Entities, the Receiver is granted power and authority to transfer all assets (including intellectual property and real estate) owned or controlled by foreign-based entities to the United States and to liquidate or abandon all foreign entities created by Receivership Defendants.

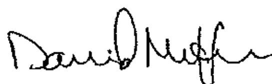
11. The stay of litigation set forth in the Corrected Receivership Order shall apply to the Affiliated Entities to the same extent as it does to the Receivership Entities.

12. All other provisions of the Corrected Receivership Order shall apply to the Affiliated Entities, as they do to the Receivership Entities, to the extent necessary and appropriate to allow the Receiver to accomplish his duties under the Corrected Receivership Order.

13. Any person who may have an objection to this Memorandum Decision and Order, whether in whole or in part, must file such objection in this case within 21 days of receiving actual notice of this Memorandum Decision and Order or else such objection shall be considered waived.

Signed May 3, 2019.

BY THE COURT:



David Nuffer
United States District Judge

EXHIBIT F

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.	**MEMORANDUM DECISION AND ORDER FREEZING ASSETS AND TO APPOINT A RECEIVER** Civil No. 2:15-cv-00828 DN EJF District Judge David Nuffer

This order GRANTS the United States' second motion to freeze Defendants' assets and appoint a receiver, ECF Doc. No. 414, filed June 22, 2018.

On November 23, 2015, the United States filed its complaint against Defendants, seeking to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since on or before 2010.[1] The United States also seeks disgorgement of Defendants' ill-gotten gains from the promotion of their abusive tax scheme. [2]

The United States previously moved for an order freezing the assets of Defendants Neldon Johnson, RaPower-3, and IAS's assets and for an order appointing a receiver on

[1] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

[2] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

November 17, 2017.[3] On March 2, 2018, the United States' motion was denied without prejudice in part because the United States relied upon the facts set forth in its motion for partial summary judgment including the "disputed material facts as to Defendants' knowledge at the time they made certain statements."[4] The Motion for Partial Summary Judgement was also denied in that same order.[5] Trial is now completed. The Court made extensive findings on the record at the end of trial;[6] intends to enter detailed Findings of Fact and Conclusions of Law including a disgorgement order; and has already entered an interim injunction based on summary findings[7] and a preservation order.[8] On the basis of the evidence adduced at trial, as laid out below, the United States' motion is granted.

I. Statement of Facts 3
II. The injunctive relief requested by the United States – in the form of an asset freeze and appointment of a receiver – is necessary or appropriate to enforce the Internal Revenue Laws.. 13
A. The United States has succeeded on the merits. 15
B. The United States will suffer irreparable injury if an order granting the asset freeze and appointing a receiver is not issued. 16
C. The balance of harm to the United States in not issuing the injunctive relief outweighs the harm to be caused to Defendants by issuing the requested relief. 18
D. An injunction will benefit, not disserve, the public interest. 19
E. A receiver is necessary or appropriate to effect the asset freeze. 20
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[3] ECF Doc. No. 252. The United States did not include Shepard in its original motion to freeze defendants' assets.

[4] ECF Doc. No. 318, at 4.

[5] *Id.*

[6] ECF Doc. No. 409, filed June 21, 2018.

[7] Initial Order and Injunction After Trial, ECF Doc. No. 413, filed June 22, 2018.

[8] ECF Doc. No. 419, filed June 27, 2018.

I. Statement of Facts

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower-3, LLC, International Automated Systems, Inc. and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.[9]

2. Johnson claims to have invented certain solar energy technology that involves solar thermal lenses placed in arrays on towers.[10]

3. In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on "the R&D Site" near Delta, Utah, in Millard County.[11]

4. Johnson also directed that IAS install solar lenses in those towers.[12]

5. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.[13]

6. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.[14]

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[9] ECF Doc. No. 22 ¶ 12; Pl. Ex. 579, Deposition Designations for Neldon Johnson, vol. 1 ("Johnson Dep., vol. 1"), 36:1-39:12, 46:3-47:3; 52:20-57:1; 74:1-14; 77:4-87:12.

[10] Johnson Dep., vol. 1, 87:16-91:1; 134:19-135:2; 139:23-144:19; Pl. Ex. 504; Pl. Ex. 509, Video 12_4_38-5_15; Pl. Ex. 509, Video 12_4_00-4-23.

[11] Pl. Ex. 581, Deposition Designations for International Automated Systems, Inc. ("IAS Dep."), 162:1-165:9; 171:10-173:20; Pl. Ex. 532 at 6; Pl. Ex. 531.

[12] IAS Dep. 62:15-64:1.

[13] Pl. Ex. 682, Deposition Designations for RaPower-3, LLC ("RaPower-3 Dep."), Dep. 36:4-39:8.

[14] IAS Dep. 145:21-146:9; Pl. Ex. 463; RaPower-3 Dep. 140:9-143:4; Pl. Ex. 504.

7. Johnson drafted some promotional materials to describe the arrangement, "IAUS Solar Unit Purchase Overview" and IAS "Solar Equipment Purchase."[15]

8. Johnson showed IAS salespeople these descriptive materials about the structure of the transaction, the purported technology, and the federal tax benefits that Johnson said a customer could lawfully claim when he bought a lens from IAS.[16]

9. He told IAS's initial salespeople what he understood the tax laws to mean.[17]

10. R. Gregory Shepard has been an IAS shareholder since the mid-1990s.[18] He became one of IAS's initial salespeople in or around September 2005, and began selling solar lenses.[19]

11. Shepard's information about Johnson's purported solar energy technology came from Johnson or members of Johnson's family, and Shepard's own observations on his site visits over the years.[20]

12. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.[21]

[15] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[16] IAS Dep. 162:1-165:9; 171:10-173:20; Pl. Exs. 531 and 532.

[17] Johnson Dep. vol. 1, 240:18-241:10; 247:11-248:12; RaPower-3 Dep. 117:22-119:11; Pl. Ex. 473.

[18] Pl. Ex. 685, Deposition Designations for R. Gregory Shepard ("Shepard Dep."), 43:19-46:1.

[19] Shepard Dep. 70:14-71:22; Pl. Ex. 463.

[20] Johnson Dep., vol. 1, 209:11-210:3, 211:16-215:23; Shepard Dep. 36:6-40:23, 46:2-57:5, 183:14-187:13; Pl. Ex. 8A; RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

[21] Johnson Dep., vol. 1, 279:19-22; IAS Dep. 162:1-165:9; 194:6-20; Pl. Ex. 531.

13. Johnson created, owns, and controls at least three entities that sell or have sold solar lenses: SOLCO I,[22] XSun Energy,[23] and RaPower-3, LLC.[24] SOLCO I and XSun Energy are not defendants in this action.

14. Johnson created RaPower-3 in 2010. He is it manager and the sole decision-maker for the company.[25]

15. Once formed, RaPower-3, rather than IAS, sold solar lenses to individuals.[26]

16. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.[27]

17. Selling lenses through RaPower-3 gave Johnson "much needed revenue" to continue his operations.[28]

18. Johnson directed RaPower-3 to create a site online (https://rapower3.net) where a customer can access and sign a contract to buy lenses and sign other transaction documents that Johnson provides (described below).[29]

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[22] Johnson Dep., vol. 1, 82:8-83:6; LTB1 Dep. 78:22-79:5; 79:12-80:9; IAS Dep. 38:10-40:6, 45:4-17.

[23] *See generally* Pl. Ex. 355; IAS Dep. 47:2-19; Johnson Dep., vol. 1 79:8-81:7.

[24] RaPower-3 Dep. 32:16-33:14, 44:4-14, 45:9-10.

[25] RaPower-3 Dep. 32:16-33:14.

[26] RaPower-3 Dep. 32:16-33:14; IAS Dep. 23:22-25:22; Pl. Ex. 462; Pl. Exs. 8A, 25, 91-95, 119, 121, 174, 181, 346, 462, 464, 473, 511, 512, 531-533, 555, 587, 613-615, 637-639, 760, 762; Rowbotham Testimony, Trial Tr. 910:24-927:7; Williams Testimony, Trial Tr. 982:3-983:23; 985:4-990:12; 991:6-994:15; Olsen Testimony, Trial Tr. 1060:11-25; 1070:11-1074:7; 1078:20-1081:23; Jameson Testimony, Trial Tr. 1221:15-22; 1224:13-1225:25; 1226:6-1228:10; 1237:8-16.

[27] RaPower-3 Dep. 32:16-33:14; 36:4-39:8.

[28] Pl. Ex. 8A at 9; Pl. Ex. 749.

[29] RaPower-3 Dep. 39:9-41:2; Pl. Ex. 511; Pl. Ex. 673, Deposition Designations for LTB1, LLC ("LTB1 Dep."), 39:6-25; Pl. Ex. 61.

19. Among other things, Shepard created the website www.rapower3.com[30] and moderates an online discussion board called "IAUS & RaPower[-]3 Forum."[31]

20. Shepard gets paid for his work with RaPower-3 through his company, Shepard Global.[32]

21. On the RaPower-3 website, Shepard describes the solar energy technology (including the solar lenses) and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the website with the transaction documents.[33] Shepard also uses the IAUS and RaPower-3 Forum and emails to communicate with RaPower-3 members and prospective members.[34]

22. Shepard also organizes groups of people to visit the R&D Site, the site where component parts of the purported solar technology system are manufactured (the "Manufacturing Facility"), and the site on a large field with a few semi-constructed component parts (the "Construction Site").[35]

[30] Shepard Dep. 25:22-26:8; Pl. Ex. 459; Pl. Exs. 1, 5, 19, 20-21, 24-25, 34, 352, 419, 674, 676, 678-80, 714-724, 796.

[31] Shepard Dep. 286:5-24.

[32] Jameson Testimony, Trial Tr. 1294:15-1301:3; M. Shepard Testimony, Trial Tr. 1412:18-1415:16.

[33] Pl. Ex. 688, Deposition Designations of Roger Freeborn ("Freeborn Dep."), 23:2-24:14; Pl. Ex. 490; Pl. Ex 689, Deposition Designations for Peter Gregg ("Gregg Dep."), 56:20-57:13.

[34] Shepard Dep. 286:5-289:13; Pl. Ex. 481.

[35] *E.g.*, Pl. Exs. 21, 419 at 1; Johnson Dep., vol. 1, 87:23-89:10; Pl. Ex. 509, Video 12_4_00-4_23.

23. Shepard directs customers to use tax return preparers who are part of the solar energy scheme, like John Howell in Wichita Falls, Texas; Kenneth Alexander in Florida; and Richard Jameson in St. George, Utah.[36]

24. From 2009 through 2016, RaPower-3 had received at least $25,874,066 from its role in the solar energy scheme.[37]

25. From 2008 through 2016, IAS has received at least $5,438,089 from its role in the solar energy scheme.[38]

26. From 2011 through 2016, XSun Energy has received at least $1,126,888 from its role in the solar energy scheme.[39]

27. From 2010 through 2016, SOLCO I has received at least $3,434,992 from its role in the solar energy scheme.[40]

28. From 2005 through February 28, 2018, all lens-selling entities have received at least $32,796,196.

29. Testimony at trial showed that the total sales price of lenses which appears to have been paid is at least $50,025,480.[41]

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[36] Pl. Exs. 242-245; Pl. Ex. 597; Gregg Dep. 121:14-25; Pl. Ex. 606; Pl. Ex. 334.

[37] Pl. Ex. 735; Reinken Testimony, Trial Tr. 863:18-866:18; 866:19-868:24; *see also*, Pl. Exs. 742B, 749.

[38] Pl. Ex. 738; Pl. Ex. 852, at 59; Buck Testimony, Trial Tr. 257:7-258:20; 271:9-272:12; 293:1-294:11; 312:5-15; Pl. Ex. 371; Pl. Ex. 507, at 20, 35; Johnson Testimony, Trial Tr. 1812:4-12.

[39] Pl. Ex 741; Johnson Dep., vol. 1, 79:8-81:7; 82:8-10; IAS Dep. 47:2-19; Pl. Exs. 208, 355, 356, 510, 743, at 11.

[40] Pl. Ex. 739; Reinken Testimony, Trial Tr. 863:18-866:18; 870:3-871:7; Johnson Dep., vol. 1, 82:8-85:2; IAS Dep. 38:10-40:6; 45:4-21; LTB1 Dep. 78:22-79:5; 79:12-80:9;81:12-21; Pl. Exs. 38, 325, 495, 545. Reinken Testimony, Trial Tr. 863:18-866:18; 871:10-872:14.

[41] Exhibit 749.

30. From 2008 through 2016, Shepard received $702,001 from his role in the solar energy scheme.[42]

31. While selling the solar lenses, Defendants told customers they could buy "lenses" and claim tax benefits.[43]

32. While they sold solar lenses and organized efforts to sell solar lenses, Defendants told their customers that if they bought a solar lens and signed the transaction documents Defendants provide, their customers were in the "trade or business" of "leasing" solar lenses.[44]

33. According to Defendants, because their customers are in the trade or business of leasing solar lenses, their customers are allowed to claim on their federal income tax returns a business tax deduction for depreciation on the solar lenses and a solar energy tax credit.[45]

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[42] Pl. Exs. 411, 445; G. Shepard Testimony, Trial Tr. 1596:5-1598:21; Jameson Testimony, Trial Tr. 1296:19-1301:3.

[43] Oveson Testimony, Trial Tr. 377:21-378:3; Rowbotham Testimony, Trial Tr. 928:14-929:10; 957:17-19; Williams Testimony; Trial Tr. 1022:4-14; 1099:16-1102:15; Olsen Testimony, Trial Tr. 1089:21-1090:15; RaPower-3 Dep., 155:4-166:18; Shepard Dep. 250:13-251:13; Aulds Dep. 42:11-44:22; 54:15-55:14; 57:17-60:15; Freeborn Dep. 71:2-20; Gregg Dep. 127:19-128:8; 136:4-6, 10-14; 137:3-12; 147:5-148:10; 149:1-7; Lunn Dep. 164:12-171:1; Pl. Exs. 1, 30, 32, 43, 49, 93, 125, 214, 294, 348, 492, 496, 499, 501, 532.

[44] *E.g.*, Pl. Ex. 32. Occasionally, Shepard has claimed that customers have been "in the solar energy business." Shepard Dep. 243:11-244:3; Pl. Ex. 43 at 1 ("AM I REALLY IN THE SOLAR ENERGY BUSINESS? Yes."). But in recent years, Shepard has made it clear that "We should not consider ourselves in an 'energy' business. We are buying lenses and leasing them – THAT is our business – LEASING – NOT producing energy …" Pl. Ex. 32.

[45] Pl. Ex. 1 at 2-3 ("Tax Question" Nos. 45). A collection of Johnson's statements: IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 531 at 3; *see also* Pl. Ex. 532 at 7-10. A collection of Shepard's statements: Pl. Ex. 93 (as a result of purchasing a lens, "the investor gets his $9,000 back in the form of a Tax Credit, plus the depreciation which adds extensive value over a six year period plus the income from power produced by the Solar Pod."); Shepard Dep. 148:21-149:25; *e.g.*, Pl. Ex. 125 (letter from Shepard telling a customer that he is "qualif[ied] … for the Internal Revenue Service solar energy tax credit" because RaPower-3 "put [their lenses] into service").

34. Defendants told customers that IAS, RaPower-3, or LTB "placed in service" or "put into service" their solar lenses in the year that the customers purchased the lenses.[46]

35. Starting in 2010, RaPower-3 sold lenses for a price of $3,500 per lens.[47] Johnson determined the price that RaPower-3 would charge for the lenses.

36. Customers started purchasing lenses via the internet at rapower.net. On that site, a potential customer enters the number of lenses he wishes to purchase, and the website "figures" the amount the customer owes and the amount of the customer's down payment.[48]

37. The site also provides all transaction documents for customers to sign electronically: an Equipment Purchase Agreement, an Operations & Maintenance Agreement ("O&M"), and, at times in the past, a bonus contract.[49]

38. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.[50]

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[46] Pl. Ex. 1 at 3 ("Tax Question" No. 7); Pl. Exs. 44, 57, 104-105, 123-125, 176, 185, 313, 588; *see also,* Pl. Ex. 472.

[47] Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition Designations for Robert Aulds ("Aulds Dep.") 141:3-13; 146:17-147:5.

[48] Aulds Dep. 141:3-13.

[49] RaPower-3 Dep. 39:18-41:2; Aulds Dep. 141:3-13.

[50] RaPower-3 Dep. 39:9-41:2; *e.g.,* Pl. Exs. 119, 181, 511; Aulds Dep. 141:3-13; 146:17-147:5; Gregg Dep. 55:19-56:13; Howell Dep. 39:17-40:4; 95:3-5; 134:14-135:22; Zeleznik Dep. 67:3-12; Pl. Ex. 693, Deposition Designations for Frank Lunn, IV ("Lunn Dep.") 114:11-115:4.

39. Over the years, Defendants told customers about Johnson's purported solar energy technology and the progress being made by Defendants.[51] Defendants emphasized progress being made despite their knowledge that the system was not up and running.[52]

40. From the start, Defendants have told their customers that they can "zero out" their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and solar energy tax credit for the lenses.[53]

41. Defendants knew that when they made statements to customers and prospective customers about the tax benefits and their purported solar lens leasing "trade or business," that the only way a customer has ever "made money" from buying a lens is from the tax benefits; no customer has earned money from rental income or income from a bonus contract.[54]

[51] *E.g.*, Pl. Ex. 185 at 1; Johnson Dep., vol. 1, 173:11-177:16; Pl. Exs. 16 & 17. Johnson gave these white papers to Shepard. Johnson Dep., vol. 1, 185:15-23; Shepard Dep. 126:9-128:5. Shepard made them available to the public on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Exs. 441, 491; RaPower-3 Dep. 140:4-143:17; Pl. Ex. 504; Shepard Dep. 199:10-204:14; Pl. Ex. 471; Shepard Dep. 250:13-252:21; Pl. Ex. 72; Pl. Ex. 109 at 1-3; *see also* Freeborn Dep. 95:3-98:1; Pl. Ex. 425 at 1. Johnson dep., vol. 1, 211:16-215:23; Shepard Dep. 36:6-40:23, 183:14-187:13; Pl. Ex. 8A; Pl. Ex. 676; Gregg Dep. 57:18-59:12; Pl. Exs. 298-299; Pl. Ex. 26; 93; 216, 246, 270, 329, 348.

[52] J. Anderson Testimony, Trial Tr. 617:25-618:9; Pl. Ex. 602; Ruling on Plaintiff's Motions in Limine, Trial Tr. 2107:2-9; Pl. Exs. 6; 292; 411, at 10-11; 412, at 9; 413, at 6; 414, at 10; 415, at 7; 416, at 7; 509, Video 12_4_38-5_15; 509, Video 18_4_09-4_25; 526; 901; Johnson Testimony, Trial Tr. 1990:13-16; Shepard Dep. 204:15-207:8.

[53] Johnson Dep., vol. 1, 247:11-248:12; Pl. Ex. 490 at 9-10; IAS Dep. 162:1-165:9; Pl. Ex. 531. According to Shepard, "the greater one's tax liability, the greater will be the depreciation benefit." Pl. Ex. 24 at 1; *see also*, Pl. Ex. 20 at 2; Lunn Dep. 188:18-189:20; Pl. Ex. 24, 43, 48, 70, 71, 85, 88, 109, 133, 142, 158, 181, 207, 214, 220, 325, 438, 474, 490, 496, 497, 501, 532, 597, 674, 718, 721, 722, 777.

[54] Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commission on solar lens sales is also "functional." Freeborn Dep. 82:16-85:17; Pl. Ex. 246. But the multi-level marketing component of RaPower-3 is not connected to lens ownership. RaPower-3 Dep. 33:8-34:9. A distributor need not buy a lens in order to sell lenses for RaPower-3. *Id*; Johnson Testimony, Trial Tr. 2242:8-2251:18.

42. LTB, which by contract was to operate and maintain the solar energy project and specifically the lenses, has never done anything; it has never had a bank account, any employees, or any revenue.[55]

43. Defendants told customers to expect income from the "lease" of their lenses, but Defendants know that no customer has been paid for the use of his or her lenses.[56]

44. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.[57]

45. Based on the advice and information provided by attorneys or accountants they spoke with about the solar energy scheme, Defendants knew or had reason to know that the purported tax benefits were not permissible under the Internal Revenue Code.[58]

46. Defendants also knew or had reason to know that the purported tax benefits from their solar energy scheme were not permissible under the Internal Revenue Code because others also disagreed with their assertions about tax benefits available from the solar lenses, including:

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[55] LTB Dep. 10:10-11:1; 14:7-16:7; 18:2-9; 42:10-43:5; 69:6-74:21; 90:19-91:8; Pl. Ex. 464; Johnson Testimony, Trial Tr. 2246:7-2247:19

[56] Shepard Dep. 34:18-35:24; 67:1-12; 76:23-82:18; 93:17-94:13; Pl. Ex. 279 at 1; Pl. Ex. 602 at 1-2; Pl. Ex. 465; Johnson Dep., vol. 1. 230:4-11; Pl. Exs. 10, 19, 48, 49, 61, 70A, 142, 151, 159, 217, 246, 283, 341, 465, 724, 796; Rowbotham Testimony, Trial Tr. 933:19-935:15; Williams Testimony, Trial Tr. 1000:9-1001:7; Olsen Testimony, Trial Tr. 1074:8-1078:16; 1086:12-1087:6; Jameson Testimony, Trial Tr. 1238:3-24; 1241:6-11; 1241:17-1245:1; 1280:21-1282:20; 1310:18-1312:9; M. Shepard Testimony, Trial Tr. 1406:12-1407:2; 1574:21-1575:14; G. Shepard Testimony, Trial Tr. 1734:9-1738:23.

[57] *E.g.*, Pl. Ex. 683, Deposition Designations of John Howell ("Howell Dep."), 211:11-213:14 (aware of 150 cases in Tax Court); Shepard Dep. 250:17-251:3.

[58] Pl. Exs. 23, 73, 135, 141, 185, 231, 370, 373, 374, 449, at 2; 450, at 4; 452, at 2; 477, 480, 547, 570, 574, 582; Freeborn Dep. 95:3-13; Dr. Mancini Testimony, Trial Tr. 75:4-15; 85:24-86:12; 90:5-94:7; 96:17-20; 105:9-107:6; Shepard Testimony, Trial Tr. 1692:25-1693:5; 1723:15-22; 1728:4-1729:25; 1730:18-1731:3; Buck Testimony, Trial Tr. 267:24-269:22; 270:3-271:4; Oveson Testimony, 331:11-23; 334:18-336:3; 341:20-342:25; 343:1-2, 6-8; 343:21-344:10; 344:21-346:19; 347:18-348:13; 352:24-355:21; 356:7-357:14; 358:13-361:2; Shepard Dep. 266:2-267:1; J. Anderson Testimony; Trial Tr. 613:12-618:9; 620:1-621:24; 622:19-623:20; 630:20-632:10; 632:17-633:1.

customers' or prospective customers' tax preparers/CPAs, the Internal Revenue Service, the Oregon Department of Revenue, the Oregon Tax Court Magistrate Division, and the Department of Justice.[59]

47. When a customer notifies Shepard that they are under audit, Shepard typically directs the customer to Enrolled Agents John Howell or Richard Jameson to represent the customer before the IRS.[60] Howell and Jameson represent RaPower-3 customers using the same arguments that Defendants make.[61]

48. Shepard has also advocated for customers under audit before the IRS.[62] He has given customers the arguments to make before the IRS and documents to submit while under audit.[63]

49. Johnson is paying the attorneys' fees for all customers whose tax benefits have been disallowed on appeal by the IRS and who have filed petitions in Tax Court.[64]

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[59] *Id.*; *see also*, ECF Doc. No. 2; *Peter C. Gregg v. Department of Revenue*, 2014 WL 5112762 (Or. Tax. Magistrate Div. 2014); *Kevin M. Gregg v. Department of Revenue*, 2017 WL 5900999 (Or. Tax Magistrate Div. 2017); *Matthew D. Orth v. Department of Revenue*, 2017 WL 5904611 (Or. Tax Magistrate Div. 2017).

[60] Gregg Dep. 151:7-25; Pl. Exs. 333-34; Howell Dep. 183:11-184:8; 211:11-212:10; Pl. Ex 348.

[61] *See, e.g.,* Howell Dep. 221:16-223:18; Pl. Exs. 605, 608, 637.

[62] Pl. Ex. 10.

[63] Pl. Ex. 49; Pl. Ex. 697, Deposition Designations for Brian Zeleznik ("Zeleznik Dep."), 184:18-185:17; 211;4-214:4 and *compare, e.g.,* Pl. Ex. 81 (document written by Brian Zeleznik to the IRS in response to his audit) *with* Pl. Ex. 89 (email from Shepard to Zeleznik with a sample document to use with the IRS); *see also*, Pl. Ex. 163 at 1-2; Pl. Ex. 231; Pl. Ex. 340 (*id.* at 2 ("You can hand write notes or even copy the above [arguments] down by hand and read it word for word [to an auditor]. Just don't give [an auditor] this email.")).

[64] Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23; Zeleznik Dep. 142:7-143:1; Jameson Testimony, Trial Tr. 1249:14-1250:1.

50. Defendants have caused serious harm to the United States Treasury as a result of their solar energy scheme.[65] Defendants' customers claimed at least $14,207,517 of improper tax refunds as a result of Defendants' scheme for tax years 2013 through 2016.[66]

51. To date, Johnson, Shepard, IAS and RaPower-3 continue to organize sales of solar lenses, and participate (directly and indirectly) in the sale of solar lenses.[67]

52. They are not deterred from promoting the scheme, not by the IRS' disallowance of their audited customers' depreciation deductions and solar energy tax credits or by the complaint filed in this case or by the announced result in the case.[68]

II. The injunctive relief requested by the United States – in the form of an asset freeze and appointment of a receiver – is necessary or appropriate to enforce the Internal Revenue Laws.

Under 26 U.S.C. § 7402, this Court has the authority to impose an asset freeze and appoint a receiver to take control of Defendants IAS and RaPower-3's assets and business operations..[69] Section 7402(a) encompasses a broad range of powers necessary to compel

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[65] Pl. Ex. 750; Howell Dep. 186:3-190:23; 193:22-194:10; 194:19-200:20; Zeleznik Dep. 152:10-15, 152:22-159:5; Gregg Dep. 102:7-103:25; 104:24-105:4; 105:15-106:2; 112:7-124:9; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14; Olsen Testimony, Trial Tr. 1136:14-1137:18; 1139:8-1145:12; Williams Testimony, Trial Tr. 1022:18-1028:14; Jameson Testimony, Trial Tr. 1282:21-1289:11; 1289:15-1293:18; 1304:4-1306:8; 1307:2-1308:17.

[66] Pl. Ex. 750; Perez Testimony, Trial Tr. 828:5-829:7, 834:11-836:14.

[67] Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Exs. 424, 426, 539, 679, 731-33.

[68] Shepard Dep., 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25; Jameson Testimony, Trial Tr. 1229:11-14; M. Shepard Testimony, Trial Tr. 1526:19-21

[69] Under 26 U.S.C. § 7402(a), the district courts "shall have jurisdiction to make and issue in civil actions, writs and orders of injunction, [ ] orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

compliance with the tax laws.[70] Courts have exercised this broad authority under § 7402(a) in a variety of contexts, including ordering disgorgement of ill-gotten gains against a tax return preparer engaged in fraudulent return preparation,[71] appointing receivers to assist in collection of federal tax liabilities or otherwise ensure compliance with the internal revenue laws,[72] and freezing a defendant's assets.[73] The statute alone provides sufficient authority to issue an injunctive order freezing Defendants' assets.

Examination of the typical factors in imposing equitable relief before final adjudication is not necessary but demonstrates the propriety – and necessity – of this action. In the Tenth Circuit, a party seeking a preliminary injunction must show 1) that there exists a substantial likelihood that the movant will prevail on the merits; 2) that the movant will suffer irreparable injury unless the injunction issues; 3) that the threatened injury to the movant outweighs

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[70] *See Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957) ("It would be difficult to find language more clearly manifesting a congressional intention to provide the district courts with a full arsenal of powers to compel compliance with the internal revenue laws."); *United States v. Kaun*, 633 F. Supp. 406, 409 (E.D. Wisc. 1986) ("By its very terms, this statutory provision authorizes the federal district courts to fashion appropriate, remedial relief designed to ensure compliance with both the spirit and the letter of the Internal Revenue laws – all without enumerating the many, particular methods by which these laws may be violated or their intent thwarted."), *aff'd on other grounds*, 827 F.2d 1144 (7th Cir. 1987); *see also United States v. ITS Financial, LLC*, 592 Fed. Appx. 387, 397 n.6 (6th Cir. 2014).

[71] *United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla., March 6, 2017).

[72] *See, e.g., United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014) (receiver appointed under broad authority of section 7402(a) to oversee company's finances, prevent company from pyramiding employment taxes, and ensuring that company timely filed tax returns); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005) (district court did not abuse its discretion in appointing a receiver when defendant owed more than $1 million in delinquent taxes and engaged in a series of transactions to move assets and commingle funds in an attempt to thwart the government's collection efforts); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960) ("'Though the precise limits of judicial discretion to appoint a receiver under Sections 7402(a) and 7403 of the 1954 [Internal Revenue] Code are not defined, where the record shows that a substantial tax liability probably exists, and that the Government's collection of the tax may be jeopardized if a receiver is not appointed, the appointment will be made.'") (quoting Mertens, Law of Federal Income Taxation, Vol. 9, § 49.222, 1960 Cum. Supp. p. 41).

[73] *United States v. First National City Bank*, 379 U.S. 378 (1965).

whatever damage the proposed injunction may cause the opposing party; and 4) that the injunction would not be adverse to the public interest.[74] The Court finds that while 26 U.S.C. § 7402(a) provides explicit authority for the relief requested, the United States, as the moving party, also meets its burden under the preliminary injunction standard for the relief requested.[75]

A. The United States has succeeded on the merits.

For injunctive relief to be warranted under § 7408, the United States must prove by a preponderance of the evidence that (1) Defendants organized an entity, plan, or arrangement; (2) Defendants made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan or arrangement; (3) Defendants knew or had reason to know those 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. Alternatively, for injunctive relief to be warranted under § 7402, the United States must prove that an injunction is necessary ***or*** appropriate to enforce the internal revenue laws.[76] As the Court has found, the United States has proven that it is entitled to an injunction under 26 U.S.C. §§ 7402 and/or 7408. The evidence adduced at trial shows that Defendants organized the solar energy scheme;[77] that

[74] *In re Qwest Communications Intern., Inc. Securities Litigation*, 243 F.Supp.2d 1179, 1185 (D. Colo. 2003) (citing *Lundgrin v. Claytor*, 619 F.2d 61, 63 (10th Cir. 1980)); *see also*, Fed. R. Civ. P. 65.

[75] *Lundegrin*, 619 F.2d at 63.

[76] 26 U.S.C. § 7402(a) (emphasis added).

[77] *E.g.*, Pl. Ex. 2, Pl. Ex. 511; Pl. Ex. 579,Johnson Dep., vol. 1, 228:10-234:17; Pl. Ex. 682, RaPower-3 Dep., 39:9-41:2; *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000) *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n. 1 (7th Cir. 2013); *see also United States v. Stover*, 650 F.3d 1099, 1107 (8th Cir. 2011) (The organizing, promoting, or selling element of § 6700 "should be defined broadly, and is satisfied simply by selling an illegal method by which to avoid paying taxes." (quotations omitted).); *United States v. Benson*, 561 F.3d 718, 722 (7th Cir. 2009); *United States v. Alexander*, 2010 U.S. Dist. LEXIS 40108, at *13-14 (D.S.C. 2010) *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

Defendants made false or fraudulent statements about the tax benefits to be obtained from purchasing a solar lens; [78] and that Defendants knew or had reason to know that their statements were false or fraudulent pertaining to a material matter,[79] namely the tax benefits of depreciation and solar energy tax credits. Further, Defendants have testified that they have no intention of ceasing their activity related to and sales of solar lenses. An injunction is necessary to prevent recurrence of Defendants' conduct.

Disgorgement is also necessary or appropriate to enforce the internal revenue laws. Defendants profited from their scheme in the millions of dollars through money from the United States Treasury that was funneled through their customers. Defendants should not be permitted to retain their ill-gotten gains. The United States has shown that a reasonable approximation of their proceeds is at least $50,025,480. This Court has found that an injunction will issue and that disgorgement will be ordered. Thus, the United States has already succeeded on the merits.

B. The United States will suffer irreparable injury if an order granting the asset freeze and appointing a receiver is not issued.

The United States Treasury has already been greatly harmed by Defendants' scheme. Defendants continue to sell lenses to this day, and Defendants' customers continue to claim the tax benefits related to those lenses. If the injunctive relief requested is not granted, Defendants

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[78] *E.g.*, Pl. Ex. 24, Pl. Ex. 32, Pl. Ex. 93, Pl. Ex. 125, Pl. Ex. 214, Pl. Ex. 294, Pl. Ex. 492, Pl. Ex. 496, Pl. Ex. 531, Pl. Ex. 532; *see United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, *9.

[79] *E.g.*, Pl. Ex. 40 at 8, Pl. Ex. 279, Pl. Ex. 246, Pl. Ex. 531, Pl. Ex. 532 at 6; *Stover*, 650 F.3d at 1108-09; *United Energy Corp.*, 1987 WL 4787, *9; *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985); *Campbell*, 897 F.2d at 1320-22 (statements about material matters include those that directly address the tax benefits purportedly available to a participant in a tax scheme and those that concern factual matters that are relevant to the availability of tax benefits.); *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

will have full unfettered access to the funds illicitly obtained to the detriment of the United States.[80] Defendants' entire scheme was geared to "zero-out" a customer's tax liability. Defendants requested customers make a down payment for their solar lenses of $1,050 per lens. The customers paid this with a $105 "upfront fee" and were asked to pay the remaining amount *after* they received their tax refunds.[81] Defendants funded their entire scheme through funds that were "redirected" or diverted from the United States Treasury to their pockets though the money first went through the hands of their customers. The United States will not be able to recover all of the improper refunds paid to Defendants' customers. Defendants have been dissipating assets since they learned of the criminal investigation by the Internal Revenue Service no later than June of 2012[82] and throughout the course of this litigation.[83] Defendants have moved assets into

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[80] *See United States v. Stinson*, 239 F. Supp. 3d 1299, 1326 (M.D. Fla., March 6, 2017); *Manor Nursing Centers*, 458 F.2d at 1104 ("The effective enforcement of the federal securities law requires that the SEC be able to make violations unprofitable. The deterrent effect of a Commission enforcement action would be greatly undermined if securities law violators were not required to disgorge illicit profits.").

[81] Pl. Ex. 511; Shepard Dep. 150:17-153:21, 154:9-156:17; Pl. Exs. 119, 147, 265, 267.

[82] RaPower-3 Dep., vol. 197:13-199:6.

[83] Pl. Ex. 684, true and correct copies of bank statements of defendants Neldon Johnson, RaPower-3 and IAS showing some of the activity and transfers that have occurred during the pendency of this litigation; *see also*, Pl. Ex. 646, Pl. Ex. 647, Pl. Ex. 648, Pl. Ex. 649, Pl. Ex. 650; Johnson Dep., vol. 2, 202:17-220:16.

foreign jurisdictions[84] and both Johnson[85] and Shepard[86] have taken steps to frustrate the collection of a potential disgorgement award. Without the relief requested, Defendants will continue in their attempt to frustrate the collection of any disgorgement this Court may award and thus irreparably injure the United States.

C. The balance of harm to the United States in not issuing the injunctive relief outweighs the harm to be caused to Defendants by issuing the requested relief.

In evaluating this factor, courts look to whether the freeze itself will cause such disruption of defendants' *legitimate* business affairs that the assets would be destroyed. [87] Here, Defendants have no legitimate business. Defendants' solar energy scheme is an abusive tax scheme and not a legitimate business. Defendants do not operate the solar energy scheme – or

[84] Johnson Dep., vol. 2, 37:22 – 38:5; Neldon Johnson assigned the rights to six patents to Black Night Enterprises, Inc., #6 Solomon's Arcade, Main Street, Charleston, Saint Kitts and Nevis (see USPTO Patent Assignment Search, search by assignee name: "Black Night"). The assignments were executed between April 2013 and June 2015 and recorded on June 16, 2015. See USPTO assignment search for Neldon Johnson, https://assignment.uspto.gov/patent/index.html#/patent/search/result?id=neldon%20johnson&type=patAssignorName.

[85] For example, Neldon Johnson has transferred patents to Nevis and has ownership interests in multiple foreign entities, *supra*. Further, Neldon Johnson testified that if a "government agency caus[ed] problems," then certain assets would revert back to the foreign company. Trial Tr. 2175:4-16. Johnson has structured his affairs in a convoluted manner and in such a way as to obstruct the United States' discovery of ownership interests and assets. *E.g.*, ECF Doc. No. 53, ECF Doc. No. 55, ECF Doc. No. 56, ECF Doc. No. 57, ECF Doc. No. 58, ECF Doc. No. 59, ECF Doc. No. 138, ECF Doc. No. 140, ECF Doc. No. 143, ECF Doc. No. 160, ECF Doc. No. 161, ECF Doc. No. 203, ECF Doc. No. 206, ECF Doc. No. 209, ECF Doc. No. 210, ECF Doc. No. 212, ECF Doc. No. 213, ECF Doc. No. 218, ECF Doc. No. 219. Permitting Defendants more time to engage in their solar energy scheme and moving assets while the case has been submitted and decision and judgment is forthcoming will only cause further injury to the United States.

[86] In March 2017, during this litigation, R. Gregory Shepard transferred his property right in his personal residence to a trust in the name of his wife. Pl. Ex. 914, 915, 916 (attached); *see also*, U.C.A. § 78B-5-503(7); U.C.A. § 78B-5-512. Pl. Ex. 914, 915, and 916 are certified copies of documents filed with the Salt Lake County Recorder and are self-authenticating. Fed. R. Evid. 902(4).

[87] *SEC v. Prater*, 289 F. Supp. 2d 39, 54 (D. Conn. 2003) (citing *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972)) (emphasis added).

any of the entities involved in the solar energy scheme – in a businesslike manner. Defendants do not have any revenue or income aside from the sale of solar lenses. There is no harm to Defendants in prohibiting them from using ill-gotten gains to fund their technology experimentation and their personal expenses, including offshore arrangements that will be difficult to collect against. The United States however, and the taxpaying public, will continue to be harmed by the probable dissipation of Defendants' assets. The United States has a compelling interest in enforcing the tax laws and ensuring that persons promoting abusive tax schemes do not profit from their unlawful behavior.[88] As such, the balance of harms weighs in favor of the United States and for relief to be granted.[89]

D. An injunction will benefit, not disserve, the public interest.

The public interest is served by issuing the injunctive relief requested by the United States. The public has an interest in enforcement of the tax laws.[90] Taxpayers have an interest in being protected from suffering the results of other taxpayers improper tax benefits. Defendants' activities do a disservice to the taxpaying public, undermining confidence in the fair administration of the internal revenue laws, and have cost the United States' Treasury over $14

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[88] *See Bull v. United States*, 295 U.S. 247, 259 (1935) (Taxes are the life-blood of government and their prompt and certain availability an imperious need.).

[89] *See United States v. Buddhu*, 2009 WL 1346607, at *5 (D. Conn. 2009) ("While the [defendants] will be denied the right to earn a livelihood preparing income tax returns, the harm to them is substantially outweighed by the harm to which their clients are subjected by having fraudulent tax returns prepared in their names.")

[90] *United States v. Anderson*, 2010 WL 1988100, at *3 (D.S.C. 2010); *accord HedgeLender*, 2011 WL 2686279, at *10 (E.D. Va. 2011) (Promoting an abusive tax shelter that caused millions of lost tax revenue "is a significant harm to society because it promotes noncompliance with federal tax laws and is a great cost to the public."); As the Senate Report regarding the enactment of § 6700 observed, "[t]he widespread marketing and use of tax shelters undermines public confidence in the fairness of the tax system and in the effectiveness of existing enforcement provisions." S. Rep. No. 97- 494, Vol I at 266.

million. Defendants should not be permitted to profit from their illicit activities. The public interest is also served in ensuring that Defendants do not dissipate assets that can be used to satisfy any disgorgement award this Court may order or otherwise compensate those harmed by Defendants' abusive tax scheme.[91]

E. A receiver is necessary or appropriate to effect the asset freeze.

This Court has explicit statutory authority to appoint a receiver pursuant to 26 U.S.C. § 7402(a) as may be necessary or appropriate for the enforcement of the internal revenue laws.[92] Second, the appointment of a receiver is authorized by the inherent equitable power of a federal court.[93] The Court finds that the appointment of a receiver is necessary and appropriate in this case. Defendants' solar energy tax scheme involves false or fraudulent statements and the possible dissipation of assets.[94] Given Defendants' reluctance to cooperate in discovery regarding assets and ownership structure[95], a receiver is necessary to enforce the internal revenue

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[91] When the public interest is involved, "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *United States v. First National City Bank*, 379 U.S. 378, 383 (1965) (quoting *Virginia R. Co. v. System Federation*, 300 U.S. 515, 552 (1937)).

[92] 26 U.S.C. § 7402(a); *see also, United States v. Latney's Funeral Home*, 41 F.Supp.3d 24, 27 (D.D.C. 2014); *United States v. Bartle*, 159 Fed. Appx. 723, 724-25 (7th Cir. 2005); *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

[93] *See SEC v. Vescor Capital Corp.*, 599 F3d. 1189, 1193-94 (10th Cir. 2010) (the district court has broad powers and wide discretion to determine relief and supervise receiverships); *United States v. Bartle*, 159 F. App'x 723, 725 (7th Cir. 2005); *Consolidated Rail Corp. v. Fore River Railway Co.*, 861 F.2d 322, 326-27 (1st Cir. 1988) (court may exercise discretion to appoint receiver upon considering fraudulent conduct, relative risks of harm, inadequacy of legal remedies, chance of success on merits, likelihood of irreparable injury, etc.); *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994) (federal court has inherent power to appoint receiver to manager defendant's assets pending litigation); *National Partnership Investment Corp., v. National Housing Development Corp.*, 153 F.3d 1289, 1291 (11th Cir. 1998) (appointment of receiver in equity is an ancillary remedy); *see also* Fed. R. Civ. P. 66.

[94] *Matter of McGaughey*, 24 F.3d 904, 907 (7th Cir. 1994).

[95] ECF Doc. No. 218.

laws and determine and corral the assets Defendants have, regardless of their location. This is appropriate to ensure that any disgorgement that may awarded will not be rendered meaningless.

The United States shall provide, within 30 days, the names of three possible receivers as well as a proposed order detailing the powers and responsibilities that the United States proposes the Court vest within the receiver. The Court may appoint from that list or otherwise. The proposed order should include all powers conferred upon a receiver under the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and any additional equitable powers that the United States requests.

Unless otherwise ordered by the Court,[96] the proposed order shall provide:

1. The Receiver shall have all powers, authorities, rights and privileges heretofore possessed by the owners, members, shareholders, officers, directors, managers and general and limited partners of IAS under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1692, Fed. R. Civ. P. 66 and this Court.

2. The Receiver shall have the following general powers and duties:

    a) To use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Defendants, including, but not limited to, monies, accounts, trusts, funds, securities, credits, stocks, bonds, effects, goods, chattels, intangible property, real property, lands, premises, leases, claims, rights

[96] The parties may move for modification of these terms.

and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Defendants own, possess, have a beneficial interest in, or control directly or indirectly (""Receivership Property");

b) To take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto;

c) To manage, control, operate and maintain the Receivership Property and hold in his/her possession, custody and control all Receivership Property, pending further Order of this Court;

d) To use Receivership Property for the benefit of the Receivership, making payments and disbursements and incurring expenses as may be necessary or advisable in the ordinary course of business in discharging his/her duties as Receiver;

e) To take any action which, prior to the entry of this Order, could have been taken by the officers, directors, partners, managers, members, shareholders, trustees and agents of the Receivership Defendants;

f) To engage and employ persons in his/her discretion to assist him in carrying out his/her duties and responsibilities hereunder, including, but not limited to, accountants, attorneys, or forensic experts;

g) To take such action as necessary and appropriate for the preservation of Receivership Property or to prevent the dissipation or concealment of Receivership Property;

h) The Receiver is authorized to issue subpoenas for documents and testimony consistent with the Federal Rules of Civil Procedure;

i) To bring such legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver;

j) To pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates; and,

k) To take such other action as may be approved by this Court.

3. The Receivership Defendants are directed to preserve and turn over to the Receiver forthwith all paper and electronic information of, and/or relating to, the Receivership Property; such information shall include but not be limited to books, records, documents, accounts and all other instruments and papers.

4. The Receivership Defendants and all persons receiving notice of this Order by personal service, facsimile or otherwise, are hereby restrained and enjoined from directly or indirectly taking any action or causing any action to be taken, without the express written agreement of the Receiver which would interfere with or prevent the Receiver from performing his/her duties.

5. The Receivership Defendants shall cooperate with and assist the Receiver in the performance of his/her duties.

6. The Receiver shall promptly notify the Court and counsel for the United States of any failure or apparent failure of any person or entity to comply in any way with the terms of this Order.

7. Until further Order of this Court, the Receiver shall not be required to post bond or give an undertaking of any type in connection with his/her fiduciary obligations in this matter.

8. The Receiver and his/her agents, acting within the scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court and shall not be liable to anyone for their own good faith compliance with any order, rule, law, judgment, or decree. In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel nor shall the Receiver or Retained Personnel be liable to anyone for actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

9. This Court shall retain jurisdiction over any action filed against the Receiver or Retained Personnel based upon acts or omissions committed in their representative capacities.

10. Within 60 days from the entry of the order appointing the Receiver, the Receiver shall file and serve an accounting of the Receivership Estate, reflecting (to the best of the Receiver's knowledge) the existence, value, and location of all Receivership Property, and of the extent of liabilities, both those claimed to exist by others and those the Receiver believes to be legal obligations of the Receivership Estates. The Receiver shall also detail his/her efforts in

locating Receivership Property and what, if any, additional efforts need to be undertaken to provide a full accounting of each Receivership Estate to this Court.

11. The Receiver's fees shall be paid by the Receivership Defendants or from the Receivership Estates upon approval of the Court, with prior notice and opportunity for the United States to respond to any fee application.

12. The Receiver shall distribute the estate to:

a. First Priority: The Internal Revenue Service, up to $14,207,517. This payment shall be paid in full before any distributions to the Second Priority claims.

b. Second Priority: The taxpayers who file claims with the Receiver with sufficient evidence of:

i. Their investment and all amounts received by payment or credit from Defendants including rental payments, bonus payments, salaries, distributions, and commissions and overrides or similar payments due to multilevel marketing; and

ii. The resolution of all the taxpayer's issues with the Internal Revenue Service.

Payments to claimants shall be made on a pro rata basis of the amount paid by the claimant to Defendants less all amounts received by the claimant from Defendants.

III. Order

IT IS HEREBY ORDERED that the United States' second motion[97] to freeze the assets of Defendants RaPower-3, LLC, Neldon Johnson, International Automated Systems, Inc. and R. Gregory Shepard and to appoint a receiver is GRANTED and IT IS HEREBY ORDERED THAT:

1. This Court hereby takes exclusive jurisdiction and possession of the assets, of whatever kind and wherever situated, of the following Defendants: RaPower-3, LLC, Neldon Johnson, International Automated Systems, Inc. and R. Gregory Shepard (collectively, the "Receivership Defendants").

2. The United States shall provide within 30 days, the names of three possible receivers, with information regarding their qualifications, along with a proposed order of the specific powers and responsibilities that the Court should grant to the receiver in this case.

3. Except as otherwise provided herein, all assets of the Receivership Defendants are frozen until further order of this Court ("Receivership Property"). Accordingly, all persons and entities with direct or indirect control over any Receivership Property, other than the Receiver, are hereby restrained and enjoined from directly or indirectly transferring, setting off, receiving, changing, selling, pledging, assigning, liquidating, or otherwise disposing of or withdrawing such Receivership Property. This freeze shall include, but not be limited to Receivership Property that is on deposit with financial institutions such as banks, brokerage firms and mutual funds, shares of stock, and any patents or other intangible property.

[97] ECF Doc. No. 414, filed June 22, 2018.

4. The Receivership Defendants, their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile service, or otherwise, and each of them, shall hold and retain within their control, and otherwise prevent any withdrawal, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal of any assets, funds, or other properties (including money, real or personal property, securities, choses in action or property of any kind whatsoever) of the Receivership Defendants. This applies to assets held by Receivership Defendants or under their control, at any time after inception of this action, whether such assets were or are held in the name of any Receivership Defendant or for their direct or indirect beneficial interest wherever situated. The Receivership Defendants shall direct each of the financial or brokerage institutions, debtors, and bailees, or any other person or entity holding such assets, funds, or other properties of any Receivership Defendant to hold or retain within their control and prohibit the withdrawal, removal, transfer, or other disposal of any such assets, funds, or other properties.

5. The trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Defendants are restrained except as they may act in the ordinary course of business and shall not exercise their powers or take action inconsistent with this order. They are notified that upon appointment of the Receiver they shall likely be dismissed, and have no authority with respect to the Receivership Defendants' operations or assets, except to the extent as may hereafter be expressly granted by the Receiver.

6. The Receivership Defendants are directed to preserve all paper and electronic information of, and/or relating to, the Receivership Property.

The assets of Receivership Defendants Neldon Johnson and R. Gregory Shepard shall be frozen but each Defendant shall be allowed to withdraw on a monthly basis, monies for basic living expenses based on the IRS national standards. Defendants must account for these funds on or before the 15th of each month following the expenditure in the form required by the Receiver. The sums which may be withdrawn are:

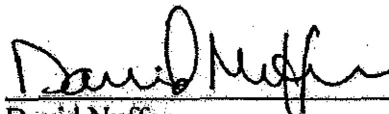
IRS National Standards	Neldon Johnson	R. Gregory Shepard
Housing & Utilities (Based on location)	$1,347.00	$1,806.00
Food, Clothing & Other Expenses	$1,202.00	$1,202.00
Out of pocket health costs	$114.00	$114.00
Transportation (National Standard)	$497.00	$497.00
Monthly Total	**$3,160.00**	**$3,619.00**

7. To the extent that any Receivership Defendant requests the use of Receivership Property, such application shall be made to the Court. After the appointment of a Receiver, requests for the use of funds shall be made to the Receiver and any party may dispute the Receiver's decision by filing a motion with this Court.

8. The appointment of a Receiver shall not, without further order, deprive any Defendant of the right to appeal orders in this case or otherwise defend this action through counsel (paid from sources other than Receivership Property) of Defendants' own choice.

Signed August 22, 2018.

BY THE COURT



David Nuffer
United States District Judge

EXHIBIT G

EXHIBIT 2
WIT: Heideman
DATE: 2/18/21
JD Legal Support

HEIDEMAN

& ASSOCIATES

—Attorneys at Law—

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Internal Case No: ______
Date: 4/5/16

CLIENT INFORMATION

Client Name: RaPower3

Social Security #: ____-____-____

Address: 4035 South 4000 West
Street
Deseret UT 84624
City State Zip

Mailing Address (if different than above): —

Telephone: (801) 369-5951 (Home) — (Work) (801) 372-4838 (Mobile) Neldon Cell

E-mail: glendagjohnson@hotmail.com

Fax: ( )

Additional Contact: ______ (Name) ( ) (Phone)

How did you hear about our Firm? (please check all that apply)

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3. Are you currently retaining any other law firm or attorney? YES ☐ NO ☐

4. If "Yes," please provide the name and address of the firm/attorney: ______

FEE AGREEMENT

BY SIGNING THIS AGREEMENT BELOW, CLIENT ACKNOWLEDGES AN AGREEMENT OF EMPLOYMENT OF HEIDEMAN & ASSOCIATES (HEREAFTER "ATTORNEYS"), AND ANY OTHER ATTORNEYS WITH WHOM ATTORNEYS MAY ASSOCIATE FOR CLIENT'S BENEFIT. LEGAL REPRESENTATION BY ATTORNEYS WILL NOT COMMENCE UNTIL THE CLIENT HAS DATED AND SIGNED PAGE SIX (6) OF THIS AGREEMENT, AND UNTIL THE INITIAL RETAINER AMOUNT AND/OR ASSESSED INITIAL COSTS HAVE BEEN RECEIVED BY ATTORNEYS AND PAYMENT OF SUCH HAS "CLEARED" THE BANK.

Employment: Client employs Attorneys to represent Client in connection with:

(Check relevant area)

o Bankruptcy	o Criminal Defense	o Probate
o Business Formation	o Domestic	o Securities
o Civil Rights	o Entertainment	o Trust/Will/Estate
o Commercial	o Landlord/Tenant	o Real Property
o Construction	● Municipal	o Other (specify)
o Contract	o Personal Injury	

New Action including Pro HAC Vice Admission in the State of OREGON Regarding Administrative Actions Commenced Against client.

Opposing party/parties:

OREGON.

Name Address Attorney

Name Address Attorney

Name Address Attorney

(see pg 4)

Initial Fees: Client agrees to pay Attorneys an advanced fee of $ 15,000.00 which shall be considered an initial fee for: opening a case file, all preliminary legal research and preliminary interviews, strategy and tactical consideration, and case management. Client understands that Attorneys will not commence to render services until said retainer is paid. Client agrees to replenish the total fee amount listed above on a bi-monthly basis, if requested by Attorneys, in order to maintain an ongoing average balance of at least one-half of the original retainer amount. Attorneys retain the right to make any adjustment of any outstanding bill. Attorneys agree that, any unexpended amount after adjustment shall be returned to Client upon conclusion of this matter and/or termination of services.

Client Initial___ **Initial Costs:** Client agrees to advance any cost that are incurred, initial cost payment is $_______, payable in a separate check, for initial costs. Client further understands that all costs incurred during the course of their legal matter, which extend beyond the initial cost amount, must be prepaid. Heideman & Associates will not cover any costs associated with this matter **unless specified herein**. Costs include, but are not limited to: travel expenses, including mileage, meals, lodging, etc., process serving fees, filing fees, any and all court costs, recording costs, costs associated with discovery, copies, mailings, and any and all other ancillary costs associated with Client's case. Attorneys shall charge an automatic one-time fee of $25.00 for the electronic filing (and any subsequent filing) of any document(s) in Utah state court. If Attorneys' representation of Client is based upon a contingency fee agreement as indicated above, such costs and expenses advanced by Attorneys shall be paid first from the proceeds from any settlement award or judgment. Otherwise, such amounts shall be payable by client within ten (10) days after each billing.

Returned Check Fee: Client understands that returned checks will be subject to a $25.00 fee. Client further understands that all subsequent payments will be received on a cash basis only.

<u>Attorney Fees</u>:

1. Any appellate work requires a separate and new client agreement based on terms agreeable to Client and Attorney.
2. Costs are exclusive of any attorney's fees amount described hereinafter and are subject to the same terms and conditions as stated in the "Initial Costs" section of this agreement
3. In the event Client engages in negotiations outside of Attorneys' presence or without consulting and obtaining the prior agreement of Attorneys, or if Client settles or compromises the case without the concurrence of the Attorneys on the terms of settlement, Client shall be obligated to pay Attorneys the percentage agreed upon in this agreement on the *entire amount prayed for by Attorneys in the complaint.* Client understands that this is not a punitive or liquidated damage measure but rather recognition of the time, effort and risk involved in pursuing a contingent fee case. Client agrees to this provision in order to safeguard Attorneys from any imprudent settlement on Client's part which could result in a financial loss for Attorneys.
4. *For full "hourly" fee arrangements*: Time will be charged in 1/10 hour increments (i.e. every 6 minutes) However no entry will be for <u>less than 15 minutes</u> (i.e. 2.5 increments) even where the actual time worked is less than 15 minutes.
5. *For "fixed amount" arrangements*: Defense work is ***<u>NOT</u>*** subject to a fixed amount agreement, with the exception of preliminary assessments, specific research, or specific pleadings agreed to by the Client and Attorney.
6. *For full or partial "contingency" agreements*:
   a. The firm's contingency fee will be calculated based on the gross recovery received. Gross recovery means that total amount of any settlement without deduction of any costs, expenses or medical liens.
   b. In case of recovery received by means of execution of judgment, gross recovery means the total amount recovered by the execution less any amounts recovered in the execution attributable to costs of suit.
   c. "Costs" shall be paid by the Client out of the Client's share of any recovery, after the attorney's contingency fees have been calculated and paid to the firm. Client further understands that the costs are not contingent on the success of the claim, but remain the responsibility of the Client in the event of an unsuccessful settlement or adverse verdict. Further, in the event of a loss, the Client may be liable for the opposing party's attorney's fees, and could be liable for the opposing party's costs as required by law
7. *For all fee arrangements involving a full or partial contingency*:
   a. In the event of a "structured settlement" the fee provided for shall be computed on the basis of the "present value" of that "structured settlement" at the time of settlement, in accordance with such methods of determining "present value" as are generally recognized, accepted, and/or employed by expert economists or actuaries. The entire attorney's fee is payable at the time of settlement which will be based upon the "present value"; attorney's fees under a "structured settlement" will be paid from settlement funds.
   b. If Client settles the matter without Attorneys' consent, Client agrees to pay Attorneys the specified contingency fee percentage of the settlement amount as indicated. If by the terms of such settlement the opposing party agrees to pay for Client's attorney's fees, then the percentage due to Attorneys shall be computed on the amount of the money paid to Client plus the amount to be paid to Attorneys. Attorneys shall have in addition thereto their taxable costs and disbursements. If the cause of action is settled by Client without the consent of Attorneys after a verdict is rendered, then the compensation of Attorneys shall be computed in accordance with the provisions of this Agreement as if the verdict had been collected in full.

Client/ Attorney Initials	Type	Description
[initials]	Straight Hourly Fees	Straight hourly rate of $ 325.00 per hour.
	Fixed Amount	Fixed amount of $__________.
	Fixed Full Contingency	Full contingency of ______ %.
	Mixed Reduced Hourly/Contingent	Reduced Hourly of $ ______ per hour PLUS contingency of %.
	Mixed Flat Fee/Contingent	Flat Fee of $ ______ PLUS contingency of ____ %.
[initials]	Other Fee Arrangement	Beginning with this Agreement All Future matters & Billings will be utilizing A Single Retainer system. This matter initiates that system As the Prior Retainer Paid is solely for the litigation Associated there with.

Client/ Attorney Initials	Fixed Amount and Flat Fee matters: Scope of work to be performed

Defense Work: When a Client who files a claim is countersued by the Defendant, the Client's hourly defense fee will be equal to the firm's regular hourly rates.

Services by Clerks, Legal Secretaries, Independent Contractors, Secretaries: Client agrees to pay $110.00 per hour for work done by unlicensed clerks, legal secretaries, independent contractors, or secretaries. Client further agrees to pay $125.00 per hour for work completed by paralegals and bar-licensed clerks.

Payment: All sums due to Attorneys which are not covered by Client's retainer and/or additions to such retainer shall be paid by Client within ten (10) days after presentation of a statement therefore. Client hereby gives and grants to Attorneys a lien on all proceeds, judgments, causes of action, files, monies, or property of Client, and Client hereby assigns to Attorneys any proceeds of any judgment relative to said cause of action or legal matter to the extent of said attorney's fees. Client further grants to Attorneys the right to endorse any check, draft or other instrument for the payment of money in the name of or on behalf of Client, and to retain the proceeds thereof for payment of attorney's fees, costs, and expenses.

Cross-Application of Trust Funds: Where Attorneys represent Client on more than one matter (i.e. Client has more than one trust account), Client *expressly authorizes* Attorney to cross-apply any positive balance from one account to pay for a deficit in any other account. This includes occasions where the positive balance is a result of a judgment in favor of Client, settlement, settlement on a contingency fee, or in any other case where positive funds are obtained in any given matter. In such situations, Client agrees that any positive balance in one matter may be automatically transferred to pay any negative balance due on any other Client matter.

Payment of Service Charges: Client agrees that any/all service charges associated with a credit card payment to the Attorney will be paid by Client of up to 3%.

Payment of Settlement or Judgment: Any and all sums of money that may be received by either party on account of any settlement or compromise of the claim, demand, or chose in action, or of any judgment thereafter rendered thereon, shall be received and held by the party recovering the same as the agent or bailee of the other party and subject to all the duties and liabilities attaching to such relation, until each party hereto shall have received his proper share of such money according to the terms of this Agreement.

Joint Payment: In the event there is more than one Client, each Client understands and agrees that it is liable for the full amount of the attorney's fees and disbursements incurred and advanced on behalf of all Clients. Acceptance of payment from any combination of Clients shall not be deemed a waiver of the right of Attorneys to receive payment from any other Client.

Attorney's Lien: Client hereby grants an attorney's lien to Attorneys for any and all fees and costs not paid by Client.

Interest: Any balance not paid within twenty (20) days of billing will accrue interest at the rate of two per cent (2%) per month (24% per annum) until paid.

Termination of Representation:

(a) In the event that payment is not made upon presentment of Attorneys' statement and/or request therefore Attorneys may, upon notification to Client, withdraw from the matter or discontinue work on the case until payment is received.

(b) In the event that Client makes a material factual misrepresentation or fails to disclose a material fact pertaining to the representation, Attorneys may at once and without further notice, terminate representation. In such an event, Attorney may be entitled to keep any fees incurred to that point. In the case of a contingent based agreement, Attorneys will be entitled to an attorneys' lien based on the percentage agreed to under the terms of this agreement or, at the Attorneys' sole option, to the hourly value of all attorney, staff, and independent work performed to the point of termination.

(c) In the event that Client terminates Attorneys' employment before the conclusion of the case, Client agrees to pay Attorneys for work performed on Client's behalf. At Attorneys' sole option, Attorneys may elect to be paid (i) a fee based on the number of hours expended by Attorneys, at Attorneys' usual hourly billing rate as indicated above; (ii) a percentage of the amount actually received by Client through settlement of judgment, with such percentage being not less than one-half (2) of the amount to which Attorneys are entitled pursuant to this Agreement; or (iii) if any amount has been offered to Client by the opposing party as settlement of this matter, Attorneys may elect payment of one-third (1/3) of the amount offered.

Retention of File: Attorneys shall return Client's file upon conclusion of representation for any reason. Client further authorizes Attorneys to dispose of Client's file, including records of any kind, five (5) years after disposition of the matter. If the file has been placed in closed storage and Client requests any information from the file, Attorneys may charge Client a fee not to exceed thirty dollars ($30.00) for retrieval of such information.

Attorney's Fees and Collection Costs/Adjustment of Bill: In the event collection of any sum owing Attorneys hereunder is necessary, Client agrees to pay costs of collection, including a reasonable attorney's fee, regardless of whether suit for collection is filed. Attorneys retain the sole right to modify/adjust the bill of Client as deemed appropriate by Attorneys.

Results: Client acknowledges that Attorneys have **made no guarantees** regarding the results of this case and have discussed with Client the facts relating thereto.

Retroactivity of Agreement: This Agreement shall become binding upon execution of this Agreement and payment of any requested advance retainer; however, its effective date will be retroactive to the date Attorneys

first provided services on Client's behalf. Even if this Agreement does not take effect, Client shall be obligated to pay Attorneys the reasonable value of any services performed on Client's behalf.

Encrypted information; Unless expressly requested by Client, correspondence, email or other electronic communications by and between Client and Heideman & Associates will *not* be encrypted.

Execution; Facsimile: This Agreement may be executed and delivered by facsimile transmission, and a facsimile signature shall have the same binding legal effect as the original thereof.

Jurisdiction/Choice of Law/Venue: Client and Attorneys agree that Utah law will govern any lawsuit, mediation and/or arbitration arising out of this Agreement. Furthermore, any lawsuit, mediation and/or arbitration shall take place in any venue deemed appropriate **solely by Attorneys** irrespective of any applicable Utah choice of law provisions.

Requested Documentation: Attorney requests that Client hereafter provide the following documentation or evidence: ____________________

☐ Client will provide Attorney with a written statement of facts. Client Initial____

Time Deadlines: The following Deadlines are known to be of importance at the time of this documents execution: ____________________

Automatic Payment: Client hereby expressly authorizes Attorney's to charge Client's credit card (card information below) no less than $200.00 per month and up to the current past-due amount owing including any late fee interest at any time Client's trust account moves into a negative balance. Firm will provide a written notice of such charge(s) to Client.

Card Information:

Type of Card: __________
Name on Card: __________
Card Number: __________
Security Number: __________
Expiration Date: __________
Address of Cardholder: __________

This Agreement signed and dated this 5th day of April, 2016.

Client(s): NELDON JOHNSON [signature]
Print Name / Signature

__________ Print Name / __________ Signature

__________ Print Name / __________ Signature

__________ Print Name / __________ Signature

Attorney: Justin D. Heideman [signature]
Print Name / Signature

EXHIBIT H

JUSTIN D. HEIDEMAN (USB #8897)
CHRISTIAN D. AUSTIN (USB #9121)
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Attorneys for Defendant

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

R. WAYNE KLEIN, as Receiver, Plaintiff, vs. JUSTIN D. HEIDEMAN, LLC, DBA HEIDEMAN & ASSOCIATES, a Utah Limited Liability Company, Defendant.	**DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF DISCOVERY REQUESTS** Case No. 2:19-CV-00854-DN Judge: David Nuffer

COMES NOW Defendant, Justin D. Heideman, dba Heideman & Associates ("Defendant" or "H&A"), by and through counsel undersigned and pursuant to Fed. R. Civ. P. 33, 34, and 36 submits the following *Responses to Receiver's First Set of Discovery Requests*.

PRELIMINARY STATEMENT

These responses reflect H&A's current understanding, belief, and analysis with, regard to the discovery requests. These responses are given without prejudice to H&A producing evidence of any subsequently discovered facts. H&A also expressly reserves the right to assert any additional factual allegations or legal contentions as additional facts are discovered and analyzed.

To the extent that H&A has not objected to a given request, H&A has made a reasonable and good faith effort to respond to all requests made in these requests. H&A answers consist of H&A's current understanding and interpretation of the Receiver's requests. If H&A subsequently asserts an interpretation of any of the requests propounded herein, H&A reserves the right, without obligating himself to do so, to supplement these responses and/or objections.

GENERAL OBJECTIONS

1. Defendant objects to Plaintiff's requests to the extent that they violate the attorney-client privilege, the protections afforded by the work product doctrine or any other privilege cognizable under applicable law.

2. Defendant objects to Plaintiff's requests to the extent that Plaintiff's requests require a legal conclusion. Defendant's responses to these requests in no way should be construed as waiving any legal arguments that may exist.

3. Defendant objects to Plaintiff's requests to the extent that the discovery requests seek information that is not relevant or not reasonable calculated to lead to the discovery of admissible evidence per Fed. R. Civ. P. 26(b).

4. Defendant objects to Plaintiff's requests to the extent that the discovery requests are vague/ambiguous.

5. Defendant objects to Plaintiff's requests to the extent that they are overly broad, unduly burdensome, and/or unreasonably cumulative or duplicative in nature.

6. Defendant objects to Plaintiff's requests to the extent that that such information is already in Plaintiff's possession, is more readily available to Plaintiff or that is obtainable from

another source that is more convenient, less burdensome, or less expensive.

7. These General Objections are expressly incorporated by reference into each of the individual answers and response below. A partial or full response to any request does not act as a waiver to any objections that Defendant might have.

8. Defendant objects to Definition No. 12 of the Responses to Receiver's First Set of Discovery Requests regarding "document" or "documents" to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Defendant further objects to Definition No. 12 to the extent that it calls for documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege.

REQUESTS FOR ADMISSION

REQUEST NO. 1: *Admit that at least $128,798.36 in funds transferred to Heideman between 2016 and 2017 originated with and can be traced to RaPower for legal services performed on behalf of Oregon lens purchasers.*

RESPONSE: Objection: (1) Relevance, (2) Calls for a legal conclusion, (3) Vague as to "traced", (4) Lacks foundation, (5) Vague as to "on behalf of." Notwithstanding the stated objections and without waiving the same, Defendant responds and Denies for lack of knowledge as to the origination and tracing of funds to RaPower. Defendant has no duty to "source" funds, and has never done so. No ethical rule requires the "sourcing" of funds, nor do any banking regulations. Deny that $128,798.36 was "transferred" to Heideman & Associates (H&A). Deny that services were rendered **solely** for the benefit of any Oregon Lens Purchaser (OLP.)

REQUEST NO. 2: *Admit that if solar lenses were not placed in service, RaPower was obligated to refund lens purchasers the purchase price of any lenses purchased.*

RESPONSE: Objection: (1) Relevance, (2) Improper hypothetical, (3) Lacks foundation, (4) Vague, (5) Calls for a legal conclusion. Notwithstanding the foregoing objections, and without waiving the same, Defendant responds and Denies the allegation that Solar Lenses were not placed in service as defined by the internal revenue code. Additionally, Defendant Denies that any refund to the lens purchasers is owed. Furthermore, and plainly, it is clear that this lawsuit is not intended to refund money to lens purchasers as they have been identified as persons subject to the Plaintiff's ill-conceived and inappropriate collections efforts. Moreover, Defendant denies the assertion that refunds are owed on the basis that multiple Internal Revenue Service audits have occurred on Lens Purchaser tax returns, which audits have approved the tax credit. To the extent the tax credit was approved, it would be entirely inappropriate to refund money that was the subject of an approved tax purchase. Notwithstanding the fact that Plaintiff is entirely aware of the audits that were conducted and approved. Plaintiff refuses to acknowledge the fact that Plaintiff elected to proceed with the inappropriate effort to collect the tax credit for the benefit of the United States Government. Plaintiff is not acting on behalf of the company and certainly not on behalf of persons who purchased lenses.

REQUEST NO. 3**:** *Admit that RaPower never placed any solar lenses in service.*

RESPONSE: Objection: (1) Calls for a legal conclusion, (2) Relevance, (3) Improper hypothetical, (4) Lacks foundation, (5) Vague, (6) Calls for a legal conclusion. Notwithstanding the foregoing objections, and without waiving the same, Defendant

responds and assumes that Request No. 3 refers to the legal term of art “placed in service” as defined by 26 USC §48 Energy Credit. However, because the specific definition for this term of art is not offered, Defendant can only assume that was the intention of the interrogatory. As such, assuming this definition is the controlling term of art for this Interrogatory, Defendant Denies the allegation that Solar Lenses were not “placed in service.” Specifically, Defendant’s representatives were personally present during an in-person examination of the solar tower facility. Defendant saw the solar lenses in operation, and videotaped the lens’ production of solar heat sufficient to start a wooden 2x4 on fire. Moreover, Defendant is aware of recent motions filed by the RaPower Defendants wherein the Plaintiff in that case – the United States Government – has elicited testimony from expert witnesses confirming that the solar lenses were placed in service. Furthermore, all parties to this litigation are aware of the fact that multiple Internal Revenue Service (IRS) audits were conducted, wherein the IRS auditing agent confirmed the appropriate nature of the deduction taken by the Tax Payer, which deduction can only be appropriate if the lenses at issue meet the definition of the term of art “placed in service.”

INTERROGATORIES

INTERROGATORY NO. 1: *Identify all transfers made by any Receivership Entity to you between January 2016 and December 2017, including but not limited to all transfers listed in the Receiver’s Complaint.*

RESPONSE: **Objection: (1) Vague as to the term “transfer,” (2) Calls for a legal conclusion as to the term “transfer.”** Notwithstanding the foregoing objections, and without waiving the same, Defendant responds as follows: See Exhibit 1.

INTERROGATORY NO. 2: *Identify the basis or purpose for all transfers identified in response to Interrogatory No. 1, including but not limited to the service or consideration you claim to have provided in exchange for the transfer, and all person(s) or entities to whom the service or consideration was provided.*

RESPONSE: **Objection: (1) Vague as to the term "transfer," (2) Calls for a legal conclusion as to the term "transfer," (3) Relevance regarding Plaintiff's Complaint paragraph 23(a) – (q). Specifically, Plaintiff asserts these amounts and then indicates and admits that nothing more than $128,798.36 could be attributed to the representation associated with the Oregon matters. Given this admission it is unnecessary for Plaintiff to address any amounts in excess of this amount as such would be irrelevant.** Notwithstanding the foregoing objections, and without waiving the same, Defendant responds as follows: Plaintiff's Complaint paragraph 23(a) – (q) asserts amounts were paid to H&A. Given that Plaintiff has these amounts and presumably the basis for the amounts, Plaintiff is in equal position to address the evidence supporting them and so no further information is presented as to those amounts.

Additionally, Exhibit #1 to this response offers a line item categorization of all funds received by H&A that have been identified as pertaining to the Oregon legal matters, and third party costs received by Defendant H&A that were issued to third parties for payment associated with services rendered. All of the costs identified were used in preparation for the Oregon matters generally, if not specifically, as the issues in the underlying federal action are identical to those in the Oregon cases.

Defendant asserts that the total amount received by H&A for legal services associated with the Oregon cases is not more than $109,632.50. This amount is reduced by the third-

party expenses which were delivered to H&A, but which H&A did not receive. Specifically, H&A issued those funds to the appropriate third party for the expenses incurred. The amount of third-party expense payments issued is not less than $41,702.28. Additionally, this amount is reduced by expenses that were incurred and billed against the underlying federal case, but which were incurred for the mutual benefit of the Oregon matters as well. The costs incurred in this fashion amount to not less than $23,096.26. Thus, the total amount at issue in this matter cannot exceed $44,833.96.

Furthermore, the following color codes are offered regarding Exhibit 1 to these responses:

- Orange represents line items that were incurred in the Oregon matter for the specific purpose of benefitting the underlying federal litigation.
- Green represents actions taken that directly impacted tax rulings, tax evidence, or tax analysis. These issues were exactly the same as those being addressed in the underlying federal litigation, which efforts were taken for the specific purpose of avoiding a preclusive or persuasive negative impact on the underlying federal litigation.
- Yellow matters represent billings that were of identical benefit to both the federal and Oregon litigation, and were undertaken for the specific purpose of benefiting the RaPower Defendants in the federal case.
- Pink matters represent actions taken at the express instruction of the RaPower Defendants for the purpose of securing the interests of the RaPower Defendants in the federal litigation inasmuch as those interests were at issue in the Oregon case.

These were necessary expenses that RaPower Defendants mandated Defendant H&A incur to preserve RaPower Defendants' legal interests and positions in the underlying federal litigation.

- Blue matters represent fees incurred to address specific issues in the Oregon litigation. The total of these payments to Defendant H&A represents not more than $28,721.00.
- Purple identifies expenses incurred.

Exhibit #1 to this response offers a detailed description next to all line item entries. That description speaks for itself. In all instances where the term or word "client" is used in reference to communications between Defendant H&A and "client" the term client is defined to mean a RaPower Defendant; and more particularly Neldon and/or Glenda Johnson.

<u>INTERROGATORY NO. 3</u>: *For every transfer identified in Interrogatory No. 1 in exchange for which you claim to have provided service or consideration for any person other than the person or entity making the transfer, identify every benefit you claim the person or entity who made the transfer received for your services.*

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above. (1) Vague as to the term "transfer, (2) Calls for a legal conclusion as to the term "transfer," (3) Relevance. Plaintiff has admitted that only those payments made to H&A which are identified as being relevant to the representation of matters in Oregon is relevant to this litigation. To the extent this admission is made, Plaintiff declines to respond to this interrogatory to the extent that it asks for information that is admittedly for the purpose of representation in the underlying federal litigation. Proportionality dictates that there is no benefit, or likely benefit to such**

response, and unless a need is show it would be unduly burdensome to Defendant to be forced to respond to each and every line item entry associated with the underlying – and uncontested – billing amounts. Notwithstanding the foregoing objections and without waiving the same, Defendant responds as follows:

Each transfer identified in Interrogatory No. 1 generated a direct or indirect benefit to the Receivership Defendants. Specifically, all actions undertaken by H&A were done with an eye toward preventing any compromising verdict or finding by any judicial or administrative body that could be then used as either a controlling or persuasive authority. Specifically, the Receivership Defendants (RDs) were concerned that any finding in the Oregon tax courts indicating the discounts taken by lens purchasers were illegitimate would be severely damaging to the RDs' case. This concern was generated by two specific facts. First, there had been multiple audits conducted on lens purchaser's tax returns. Those audits substantiated the deductions taken. This stood as strong evidence that the Internal Revenue Service had reviewed and determined on multiple occasions that the actions of the lens purchasers, and by extension the RDs were engaged in appropriate conduct. It was anticipated that following discovery Defendant H&A would prepare and file a motion for summary judgment based on the IRS Audit findings. Such motion would be of stunning significance if Defendant H&A were to prevail in the Oregon Tax court such that the Oregon Tax Court confirmed the audit conclusions.

To that end, the Oregon litigation was undertaken because the first case that was initiated in Oregon occurred without the taxpayer possessing the benefit of legal representation. In that *pro se* action the court ruled against that taxpayer. Fortunately, this

ruling was able to be distinguished on this basis, and the Oregon court elected to address the other cases on their merits given the inept representation of the issues offered by the *pro se* litigant. Accordingly, counsel was able to litigate the issues fully and fairly on behalf of the lens purchasers from that point forward.

INTERROGATORY NO. 4: *To the extent you believe any transfer identified in response to Interrogatory No. 1 pertaining to your representation of Oregon lens purchasers was made in good faith and/or for reasonably equivalent value to the provider of the funds, identify the basis on which you believe such transfers were made in good faith, the reasonably equivalent value provided, and the person(s) to whom you claim to have provided such value.*

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above. (1) Vague as to the term "transfer," (2) Calls for a legal conclusion as to the term "transfer."** Defendant responds that all payments received by H&A were issued to H&A because H&A performed legal services that benefitted the RD's. Moreover, H&A affirms that the RDs gave all indications of complete fiscal solvency and security. Furthermore, H&A visited the facility and saw the lenses in operation; saw the towers tracking; saw the heat sinks, and engines in various stages of construction; saw linkages where the system has been connected to the power grid; and saw the home that was equipped to operate off of the power generated by the lenses. H&A representatives also saw the massive number of lenses in production and in inventory. Prior to all steps of litigation in all of the myriad jurisdictions and forums/venues in which RDs were engaged at the time, RDs and Defendant H&A would meet to discuss the impact of the matters and specifically the impact that those ancillary matters would have on RDs position in the federal litigation. During these discussions it was plain that if the matter

was not of benefit to the RDs federal position the litigation was to be resolved, settled, or even dismissed if appropriate.

Specifically, the RDs were very fiscally responsible and were consistently aware of the progress of all litigation issues. Neldon Johnson was particularly vigilant in his desire to evaluate the parties' legal positions in the various cases, and demanded regular, often daily, updates as to different positions, tactics, and legal strategies. Mr. Johnson was also very engaged in the manner in which the Oregon cases progressed as the billing represent multiple "meetings" with the client. No referenced in those billings are myriad numbers of cell phone calls taken by counsel in the course of the representation.

Hence, Defendant directly responds to this interrogatory and states that in all instances the work performed was primary for the benefit of the RDs, and that while others may have received a direct or indirect benefit, the primary purpose of the representation was to protect and directly bolster the RDs' legal position in the underlying federal litigation.

INTERROGATORY NO. 5: *Identify all factual or other bases for your denial of ¶ 21 of the Complaint*.

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above. (1) Calls for a legal conclusion. (2) This Request has, in substance, been previously propounded. (3) This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.** Defendant H&A denies the allegation in paragraph 21 of the Complaint on the basis that

the allegation is false. As indicated in Responses to Interrogatories 1 - 4, Defendant was engaged for the express purpose of protecting the RDs' legal interests in all litigation venues were the RDs or any of the RDs' investors were engaged. Of particular interest and benefit to the RDs was legal representation that sought to affirm the IRS audit determinations, or, which sought to defend any verdict or decision that would indicate the system (of which the lenses were a part) would not appropriately qualify for the available tax credits. Plaintiff in the instant case only alleges that H&A's representation in the Oregon tax courts is inappropriate. This allegation by itself answers the interrogatory posed. Specifically, the state of Oregon sought to invalidate the tax credits taken by RDs' investors in an action in the tax courts of Oregon. H&A's representation in those actions served to challenge any such judicial determination, as such a determination could be used as a bar by the Plaintiff in the underlying federal proceeding to damage RDs' legal position. Importantly the converse was also true, and was the primary reason why the RDs hired H&A to represent investors in the Oregon cases. Specifically, a victory in the Oregon tax courts, coupled with the IRS's independent audits that confirmed the validity of the tax credits would be powerful, and highly persuasive, legal determinations. RDs and H&A believed that placed together before the Federal Court in a motion for summary judgment, RDs would prevail in the Federal case and avoid a protracted trial and all of the attendant expense, time, etc., associated therewith. As such, the benefits to RDs are obvious and in complete alignment with the interests of the investors in the Oregon litigation.

INTERROGATORY NO. 6: *Identify all factual or other bases for your allegation in response to ¶ 22 of the Complaint that "H&A precluded findings adverse to the case in chief by presenting evidence of RaPower's solar panels working to Oregon Tax Courts."*

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above. (1) Vague. Specifically, Defendant H&A is unclear as to the question presented.** Notwithstanding this objection, and without waiving the same Defendant responds and states that Plaintiffs' allegation in Paragraph 22 demonstrates by itself the importance of H&A's representation of the RDs in the Oregon case. Specifically, Plaintiff asserts that H&A's representation "sustained and prolonged the Receivership Defendants…" Such allegation demonstrates that even Plaintiff acknowledges the enormous importance that the Oregon Tax Court's decision portended for the underlying federal action. Plaintiff asserts that H&A's actions allowed RDs to continue to engage in a fraudulent tax scheme. Defendant H&A rejects this characterization and asserts that all parties are entitled to legal representation. H&A had a *legal, ethical, and moral imperative* to provide the best possible representation to its clients. The fact that H&A was successful in its efforts, and that this success causes to Plaintiff to now assert that such success allowed the RDs to move forward is a direct admission of the enormous benefit the RDs received from H&A's legal efforts.

INTERROGATORY NO. 7: *Identify all factual or other bases for your allegation and affirmative defense that the Receiver's claims "are barred, in whole or in part, by the provisions of Utah Code Ann. §§ 25-6-10, 78B-2-307, 78B-2-305 and/or such other statute of limitations as may be applicable."*

RESPONSE: The citation to *Utah Code Ann. §§ 25-6-10* should have been to Utah Code Ann. §25-6-101 *et seq*.

Objection: Defendant reiterates and restates each Objection from above. This Request has, in substance, been previously propounded. This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.

While the scope of discovery is broad, it is, however, limited by the legitimate interests of an opposing party and requires a balancing of the probative value of the information sought with the burden placed upon the Defendant. Defendant hereby objects to the Plaintiff's Discovery on the grounds that said Discovery is facially overbroad, vague, confusing, compound, ambiguous, unduly burdensome, requests irrelevant, immaterial or inadmissible information or information protected by privilege, and/or contains multipart questions in violation of law, rule or regulation.

This Request is so broad and not limited as to time, context, relevance, and scope as to be an unwarranted annoyance, embarrassment, and is oppressive. To comply with the request would be an undue burden and expense on the Defendant. The request is calculated to annoy and harass the Defendant.

This Request, as phrased, is argumentative. It requires the adoption of an assumption, which is improper.

The response to this Request can be derived or ascertained from the business records of Receivership entities in this case or from an examination or inspection of

such records, the burden of deriving or ascertaining the answer to this discovery request is substantially the same for the propounding party as it is for the Defendant.

This Request seeks discovery that is equally available to the propounding party. Defendant objects to the relevance of this request. Defendant objects to this request as it calls for legal conclusions. Defendant objects in that the request is vague. Defendant objects, lacks foundation. Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts. Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds to Interrogatory number 7 as follows:

The statutes speak for themselves. The statute of limitations and other alleged defenses that have time barred deadlines, have passed for some of the relevant time periods in question. Once the Defendants can ascertain what actionable causes of action the Plaintiff could possibly be pursuing, Defendants can more fully formulate a defense; but thus far in the litigation, Plaintiffs have failed to proffer any evidence or facts that necessitate an articulated defense.

INTERROGATORY NO. 8: *Identify all actions you took to investigate the nature of the business of Receivership Entities during the time in which you performed legal services on behalf of Oregon lens purchasers.*

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above. Plaintiff's interrogatory calls for information that is protected by (1)**

attorney/client privilege and (2) work product privilege. Plaintiff acknowledges that the Receiver now stands in the place of many of the RDs. Plaintiff is therefore aware that the attorney/client privilege has been waived as to the corporate entities. However, Plaintiff is not Neldon Johnson nor Glenda Johnson. As such, these persons continue to possess their privilege. Moreover, and far more applicable to this interrogatory, Plaintiff seeks to force a response from Defendant H&A as to Defendant H&A's work product. This privilege belongs to H&A not the RDs, and as such, cannot be waived by the Receiver. Accordingly, Defendant H&A respectfully, but firmly, declines to respond to this inappropriate interrogatory.

INTERROGATORY NO. 9: *Explain what knowledge you had in 2016 and 2017 of the solvency or insolvency or RaPower, including what inquiries you conducted.*

RESPONSE: **Objection. Defendant reiterates and restates each Objection from above. Plaintiff's interrogatory calls for information that is protected by (a) attorney/client privilege and (b) work product privilege.** Plaintiff acknowledges that the Receiver now stands in the place of many of the RDs. Plaintiff is therefore aware that the attorney/client privilege has been waived as to the corporate entities. However, Plaintiff is not Neldon Johnson nor Glenda Johnson. As such these persons continue to possess their privilege. Moreover, and far more applicable to this interrogatory, Plaintiff seeks to force a response from Defendant H&A as to Defendant H&A's work product. This privilege belongs to H&A not the RDs, and as such cannot be waived by the Receiver. Accordingly, Defendant H&A respectfully, but firmly, declines to respond to this inappropriate interrogatory.

INTERROGATORY NO. 10: *For every transfer identified in response to Interrogatory No. 1 that pertains to your representation of Oregon lens purchasers, identify all invoices for legal services or expenses that you believe were not paid by RaPower or any other Receivership Entity, if any.*

RESPONSE: **Objection: Defendant reiterates and restates each Objection from above.** Defendant H&A responds and affirms that all invoices pertaining to the Oregon representation was paid.

INTERROGATORY NO. 11: *For every transfer identified in response to Interrogatory No. 1 that pertains to your representation of Oregon lens purchasers, identify all funds paid by RaPower or any other Receivership Entity for such services or expenses that were paid to or retained by any person or entity other than Heideman, including local counsel in Oregon.*

RESPONSE: Defendant H&A has provided a color-coded line item accounting. This accounting is outlined in response to Interrogatory No. 2 and is responsive to this question. Please refer to all blue highlighted items. The total offered of such payments is not less than $28,721.00.

INTERROGATORY NO. 12: *Identify any documents concerning your retention as counsel or concerning any possible conflict of interest that mention or refer to RaPower.*

RESPONSE: See documents previously provided in response to Initial Disclosures or attached hereto as Exhibit 1.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: *Produce all documents and communications identified in response to the foregoing Interrogatories, and all documents and communications referred to or relied upon in answering the foregoing Interrogatories.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. See Exhibit 1 attached hereto.

REQUEST NO. 2: *Produce all documents and communications concerning any transfer or other interaction between you and any Receivership Entity from the date of the first transfer identified in response to Interrogatory No. 1 to the present.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. (1) Relevance. Plaintiff has already identified that only those actions associated with the Oregon representation are at issue. As such, other correspondence and communications that are outside of such representation are irrelevant by admission. Accordingly, Defendant respectfully declines to expend the effort and expense to conduct the required search and produce such documents. All correspondence relevant to the Oregon representation is offered as Exhibit 2 attached hereto.

REQUEST NO. 3: *Produce all documents and communications concerning or supporting your denial of ¶ 21 of the Complaint.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. Further, objection to the extent the request seeks work product privileged documentation. Notwithstanding this objection, and without waiving the same, Defendant says see all documents attached hereto.

REQUEST NO. 4: *Produce all documents and communications concerning or supporting any of the denials or defenses stated in your Answer, including but not limited to all documents you may introduce or attempt to introduce at trial.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. Further, objection the extent the request seeks information protected by work product privilege. Notwithstanding this objection and without waiving the same Defendant responds and states: See all produced or previously produced documents. Moreover, Defendant reserves the right to supplement this production of documentation

and evidence as it become available or necessary.

REQUEST NO. 5: *Produce all documents and communications concerning the use to which you put any funds received from any Receivership Entity related to your representation of Oregon lens purchasers.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. See attached Exhibit 1. Additional requested documents requested are available for inspection upon request.

REQUEST NO. 6: *Produce all documents and communications concerning your allegation in response to ¶ 22 of the Complaint that "H&A precluded findings adverse to the case in chief by presenting evidence of RaPower's solar panels working to Oregon Tax Courts."*

RESPONSE: **Objection**: **Defendant reiterates and restates each Objection from above. This Request has, in substance, been previously propounded.**

This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.

While the scope of discovery is broad, it is, however, limited by the legitimate interests of an opposing party and requires a balancing of the probative value of the information sought with the burden placed upon the Defendant. Defendant hereby objects to the Plaintiff's Discovery on the grounds that said Discovery is facially overbroad, vague, confusing, compound, ambiguous, unduly burdensome, requests irrelevant, immaterial or inadmissible information or information protected by privilege, and/or contains multipart questions in violation of law, rule or regulation.

This Request is so broad and not limited as to time, context, relevance, and scope as to be an unwarranted annoyance, embarrassment, and is oppressive. To comply with the request would be an undue burden and expense on the Defendant. The request is calculated to annoy and harass the Defendant.

This Request, as phrased, is argumentative. It requires the adoption of an assumption, which is improper.

The response to this Request can be derived or ascertained from the business records of RaPower in this case or from an examination or inspection of such records, the burden of deriving or ascertaining the answer to this discovery request is substantially the same for the propounding party as it is for the Defendant.

This Request seeks discovery that is equally available to the propounding party.

Defendant objects to the relevance of this request.

Defendant objects to this request as it calls for legal conclusions.

Defendant objects in that the request is vague.

Defendant objects, lacks foundation.

Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts.

Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds as follows:

All documents have been previously provided to the Plaintiff in disclosures. See also all pleadings of RaPower Defendants in Case No. 2:15-cv-00828 during the time Defendants were involved as counsel in the case and the pleadings in the various tax court cases in Oregon for which the Defendants were counsel of record.

REQUEST NO. 7: *Produce all documents and communications concerning the benefits or value any Receivership Entity received, if any, for any transfer identified in response to Interrogatory No. 1 that pertains to your representation of Oregon lens purchasers.*

RESPONSE: **Objection**: **Defendant reiterates and restates each Objection from above. This Request has, in substance, been previously propounded.**

This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.

While the scope of discovery is broad, it is, however, limited by the legitimate interests of an opposing party and requires a balancing of the probative value of the information sought with the burden placed upon the Defendant. Defendant hereby objects to the Plaintiff's Discovery on the grounds that said Discovery is facially overbroad, vague, confusing, compound, ambiguous, unduly burdensome, requests irrelevant, immaterial or inadmissible information or information protected by privilege, and/or contains multipart questions in violation of law, rule or regulation.

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This Request, as phrased, is argumentative. It requires the adoption of an assumption, which is improper.

The response to this Request can be derived or ascertained from the business records of RaPower in this case or from an examination or inspection of such records, the burden of deriving or ascertaining the answer to this discovery request is substantially the same for the propounding party as it is for the Defendant.

This Request seeks discovery that is equally available to the propounding party.

Defendant objects to the relevance of this request.

Defendant objects to this request as it calls for legal conclusions.

Defendant objects in that the request is vague as to "*benefits or value.*"

Defendant objects, lacks foundation.

Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts.

Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds as follows:

All documents have been previously provided to the Plaintiff in disclosures. See also all pleadings of RaPower Defendants in Case No. 2:15-cv-00828 during the time Defendants were involved as counsel in the case and the pleadings in the various tax court cases in Oregon for which the Defendants were counsel of record.

REQUEST NO. 8: *Produce all documents and communications concerning or reflecting Heideman's knowledge regarding any Receivership Entity's financial condition or solvency between 2016 and 2017, including but not limited to RaPower.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above. This Request, as phrased, is argumentative. It requires the adoption of an assumption, which is improper.

The response to this Request can be derived or ascertained from the business records of RaPower in this case or from an examination or inspection of such records, the burden of deriving or ascertaining the answer to this discovery request is substantially the same for the propounding party as it is for the Defendant.

This Request seeks discovery that is equally available to the propounding party.

Defendant objects to the relevance of this request.

Defendant objects to this request as it calls for legal conclusions.

Defendant objects in that the request is vague as to "*benefits or value.*"

Defendant objects, lacks foundation.

Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts.

Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds as follows: Defendant has provided the payments received. The payments were made promptly upon invoice and without request for discount or apparent challenge. Defendant has attached all relevant documents hereto.

REQUEST NO. 9: *To the extent not provided in response to previous requests, produce all communications between you and Neldon Johnson, Glenda Johnson, Randale Johnson, LaGrand Johnson, or NSDP relating to any legal work you provided for or on behalf of Oregon lens purchasers.*

RESPONSE: Objection: **Defendant reiterates and restates each Objection from above.**

This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed, and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.

While the scope of discovery is broad, it is, however, limited by the legitimate interests of an opposing party and requires a balancing of the probative value of the information sought with the burden placed upon the Defendant. Defendant hereby objects to the Plaintiff's Discovery on the grounds that said Discovery is facially overbroad, vague, confusing, compound, ambiguous, unduly burdensome, requests irrelevant, immaterial or inadmissible information or information protected by privilege, and/or contains multipart questions in violation of law, rule or regulation.

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Defendant objects to this request as it calls for legal conclusions.

Defendant objects in that the request is vague.

Defendant objects, lacks foundation.

Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts.

Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds as follows:

Defendant responds and says see all documents attached hereto.

REQUEST NO. 10: *Produce all documents and communications concerning any invoices for legal services or expenses pertaining to your representation of Oregon lens purchasers that RaPower or other Receivership Entities did not pay, if any, as identified in response to Interrogatory No. 10.*

RESPONSE: No responsive documents exist.

REQUEST NO. 11: *Produce all documents and communications concerning transfers identified in response to Interrogatory No. 1 pertaining to the Oregon lens purchasers that were paid to or retained by any person or entity other than Heideman, including local counsel in Oregon, as identified in response to Interrogatory No. 11.*

RESPONSE: Objection: Defendant reiterates and restates each Objection from above.

This Request has, in substance, been previously propounded.

This Request seeks information subject to the attorney-client privilege. The attorney-client privilege is broadly construed, and extends to "factual information" and "legal advice." Defendants further object to this request as an improper attempt to elicit the mental impressions of Defendants' attorneys.

While the scope of discovery is broad, it is, however, limited by the legitimate interests of an opposing party and requires a balancing of the probative value of the information sought with the burden placed upon the Defendant. Defendant hereby objects to the Plaintiff's Discovery on the grounds that said Discovery is facially overbroad, vague, confusing, compound, ambiguous, unduly burdensome, requests

irrelevant, immaterial or inadmissible information or information protected by privilege, and/or contains multipart questions in violation of law, rule or regulation.

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Defendant objects, lacks foundation.

Defendant objects to this request because Plaintiff exceeds the number of Requests allowed by rule, including all discrete subparts.

Defendant reserves the right to supplement this (and every other) Response.

Without waiving any of the foregoing objections, Defendant responds as follows: See Exhibit 1. Additional requested documents requested are available for inspection upon request.

REQUEST NO. 12: *Produce any documents concerning your retention as counsel or concerning any possible conflict of interest that mention or refer to RaPower.*

RESPONSE: See attached.

DATED AND SIGNED August 28, 2020.

HEIDEMAN & ASSOCIATES
/s/ Justin D. Heideman
JUSTIN D. HEIDEMAN
Attorney for Defendant

VERIFICATION OF INTERROGATORY ANSWERS

I, Justin D. Heideman, believe, based on reasonable inquiry, that the foregoing interrogatory answers are true and correct to the best of my knowledge, information and belief. I verify under penalty of perjury that the foregoing is true and correct.

EXECUTED: August 28, 2020.

/s/ Justin D. Heideman
JUSTIN D. HEIDEMAN