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

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendant.	**ORDER DENYING THE [90] AND [94] MOTIONS TO BIFURCATE** Case No. 2:15-cv-00828 District Judge David Nuffer

Defendants move to bifurcate this case.[1] The United States responds in opposition.[2] The defendants reply in support of their motion.[3]

Because bifurcating this case will not lead to a more just and expeditious disposition of this case, the Motion is DENIED.

BACKGROUND

Defendants summarize their business model and marketing strategy in the Reply:

> RaPower3 is the owner of proprietary technology involving the use of innovative solar lenses to capture sunlight and create heat, enabling the creation of electricity. In order to capitalize on this technological breakthrough, RaPower3 created a marketing strategy whereby it sells its proprietary solar lenses to businesspeople who in turn lease the lenses to a third party [IAS], thereby generating revenue for the lens owner. As part of its marketing, RaPower3 alerts potential buyers that there are potential tax advantages to owning and operating a

[1] Motion to Bifurcate (Motion), docket no. 90, filed September 16, 2016; Defendants R. Gregory Shepard and Roger Freeborn Motion to Bifurcate, docket no. 94, filed October, 3, 2016. Because defendants R. Gregory Shepard and Roger Freeborn's motion joins the early numbered motion, without adding any analysis, all reference below will be to the Motion to Bifurcate, docket no. 90, and the associated Opposition and Reply.

[2] United States' Brief in Opposition to the Motion to Bifurcate (ECF Doc. 90) (Opposition), docket no. 95, filed October 3, 2016.

[3] Reply Memorandum in Support of Motion to Bifurcate (Reply), docket no. 100, filed October 17, 2016.

solar lens leasing business, including a depreciation credit for purchased lenses and a solar energy tax credit.

The United States seeks injunctive relief against the defendants. Under 26 U.S.C. § 7402 and 26 U.S.C. § 7408 for the following reasons:

- "organizing, promoting, or selling the 'solar energy scheme' . . . that advises or assists customers to attempt to violate the internal revenue laws or unlawfully evade the assessment or collection of their federal tax liabilities";[4]
- "making false statements, in connection with such organizing, promoting, or selling, about the allowability of any federal tax benefit as a result of participating in the plan or arrangement";[5]
- "making or furnishing gross valuation overstatements in connection with such organizing, promotion, or selling";[6]
- "preparing or assisting in the preparation of any federal tax return, or any document that may be filed in support of a tax return or other submission to the IRS, claiming tax benefits resulting from the solar energy scheme";[7]
- "preparing or assisting in the preparation of any federal tax return, or any document that may be filed in support of a tax return or other submission to the IRS, claiming tax benefits for any person or entity other than themselves or an entity in which they own an interest;"[8] and

[4] Complaint at 2, docket no. 2, filed November 23, 2015.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

- "engaging in other conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws."[9]

In this Motion, defendants move to bifurcate this case because "the threshold question" is "the nature and viability of Defendants' purported solar energy technology."[10] In other words, defendants argue that before addressing any other issue, the court must first determine whether their technology is viable: "If in fact RaPower3's solar lens technology is valid, then each of the legal arguments the United States has made regarding the propriety of the depreciation and solar tax credits will, under its own analysis, fail."[11]

The United States responds arguing that "even if this Court were [sic] conduct a trial focused exclusively on the viability of Defendants [sic] purported technology and conclude that it *is* viable today, none of the United States' claims would be resolved."[12]

DISCUSSION

Federal Rule of Civil Procedure 42(b) states

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

"The question of whether to conduct separate trials under Rule 42(b) should be, and is, a matter left to the sound discretion of the trial court on the basis of the circumstances of the litigation before it."[13] "Bifurcation is not an abuse of discretion if such interests favor separation

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[9] *Id.*

[10] Motion at 2.

[11] *Reply* at 3.

[12] Opposition at 3.

[13] 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 2388 (3d ed. 1998).

of issues and the issues are clearly separable."[14] Bifurcation is particularly appropriate when trial on the threshold claim disposes of all remaining claims.[15] Some helpful factors for deciding whether to bifurcate include:

> (1) convenience; (2) prejudice; (3) expedition; (4) economy; (5) whether the issues sought to be tried separately are significantly different; (6) whether they are triable by jury or the court; (7) whether discovery has been directed to a single trial of all issues; (8) whether the evidence required for each issue is substantially different; (9) whether one party would gain some unfair advantage from separate trials; (10) whether a single trial of all issues would create the potential for jury bias or confusion; and (11) whether bifurcation would enhance or reduce the possibility of a pretrial settlement.[16]

"The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation."[17]

After considering these factors, bifurcation is not appropriate.

Bifurcating the issues will not expedite the final disposition of this litigation. The first six counts center on how all the defendants allegedly

> made, and continue[] to make, false or fraudulent statements regarding the law and facts applicable to material matters under the internal revenue laws; facilitated, and continue[] to facilitate, customers' claims for tax benefits to which they were not entitled; and collected, and continue[] to collect, income from the abusive solar energy scheme.[18]

And the remaining counts center on how all the defendants but LTB1 allegedly

> a. . . . made or furnished, or caused another to make or furnish, statements regarding a customer's ability to claim false federal tax benefits, including deductions and credits. [The defendants] knew or had reason to know these statements were false or fraudulent as to material matters because the facts and law applicable to the tax benefits it promoted – as [the defendants] knew or had

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[14] *Angelo v. Armstrong World Industries, Inc.*, 11 F.3d 957, 965 (10th Cir. 1993).

[15] *Easton v. City of Boulder, Colo.*, 776 F.2d 1441, 1447 (10th Cir. 1985).

[16] *K.W. Muth co., Inc. v. Bing-Lear mfg. Group, L.L.C.*, No. 01-cv-71925, 2002 WL 1879943 at *3 (E.D. Mich. July 16, 2002).

[17] FED. PRAC. AND PROC. *supra* note 13.

[18] Complaint ¶¶ 122, 128, 134, 140, 146, and 152. There is some variation among these, but the section quoted includes the general allegations the United States makes against each defendant in the Complaint.

> reason to know them – were contrary to [the defendants'] statements in furtherance of its solar energy scheme; and
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> b. [defendants] made or furnished, or caused another to make or furnish, gross valuation overstatements as to material matters.

The resolution of these counts may, as defendants argue, be helped if there were a determination on the technology's viability. For instance, the technology's viability might be a "material matter" about which the defendants made certain representations.[19] But the viability of the technology would not determine any of the counts.

As the United States correctly summarizes, even if the technology were found viable, significant discovery and likely trial on many other issues would still be necessary:

> such as [defendants'] statements about the financial structure of the transaction through which their customers purportedly purchased the solar thermal lenses; whether, and to what extent, their customers conducted any kind of "business activities" with respect to the solar lenses; and what Defendants knew or had reason to know about the falsity of their statements to customers about securing tax benefits.[20]

Though the United States' Complaint focuses to some degree on the viability of the technology,[21] much more of the Complaint focuses on defendants' business structure[22] and marketing approach.[23] Thus the question of the technology's performance is of tertiary concern.[24]

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[19] *Id.* ¶

[20] Opposition at 18.

[21] Complaint ¶¶ 45–55.

[22] *Id.* ¶¶ 23–40, 56–69, 76, 116.

[23] *Id.* ¶¶ 14–22, 34, 42–43, 70–75, 104, 107.

[24] *See id.* ¶ 95 ("Defendants' abusive solar energy scheme is designed to generate money for their customers from tax savings alone, regardless of the actual performance of the lenses.").

Even if the viability of defendants' technology were established, many, many questions would still have to be resolved before final disposition of this litigation.[25] Two separate phases of discovery; two separate sets of dispositive motions; two periods of trial preparation for both the litigants and the court; and two trials completely outweigh whatever degree of paring down bifurcation might achieve. Indeed, bifurcating this litigation could have adverse, prejudicial effects prolonging instead of expediting this suit.

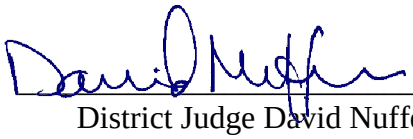
Therefore, it is not appropriate to bifurcate this case. It would not be more convenient.[26] It would not avoid prejudice.[27] It would not resolve the issues more expeditiously.[28] And it would not economize judicial or litigant resources.[29]

ORDER

IT IS HEREBY ORDERED that the Motions to Bifurcate[30] are DENIED.

Signed April 21, 2017.

BY THE COURT



District Judge David Nuffer

[25] *See id.* ¶ 76. Listing some of the potential issues that would still need to be resolved.

[26] Federal Rule of Civil Procedure 42(b).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Docket no. 90, filed September 16, 2016; Defendants R. Gregory Shepard and Roger Freeborn Motion to Bifurcate, docket no. 94, filed October 3, 2016.