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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828-DN-EJF **DEFENDANTS' 12(f) MOTION TO STRIKE IMMATERIAL, IMPERTINENT, OR SCANDALOUS ALLEGATIONS IN PLEADINGS** Judge David Nuffer Magistrate Judge Evelyn J. Furse

I. Precise Relief Sought and Grounds in Support.

Defendants Rapower-3, LLC, International Automated Systems, Inc., and Neldon Johnson, (hereinafter "Defendants") pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, move to strike from Plaintiff's Complaint any and all reference to the viability of the solar technology in light of this Court's order denying bifurcation (Doc. 158) entered on April 21, 2017. Based on this Court finding that "the viability of the technology would not determine any counts" it forces the conclusion that the viability question is immaterial, impertinent, or

scandalous, therefore subject to a motion to strike.[1] Accordingly, Defendants move to strike paragraphs 16 through 22, 29, 41 through 42, 45 through 51, 53 through 56, 68, 72, subparagraph b and e of paragraph 76, 88, 95, 97, 104, 110, 113, 117 through 118, 121 through 122, 128, 134, 140, 146, 159, 163 through 164, subparagraph a and b of paragraph 169, subparagraph b of paragraph 177, 178, subparagraph a and b of paragraph 185, 186, subparagraphs a and b of paragraph 193, and 194 of the Complaint. Additionally, Defendants move to strike subparagraphs b, e, f, g, i(ii), and k of Plaintiff's prayer for relief. Striking these parts of the Complaint will reduce or remove any need for a later Motion in Limine to exclude proof relating to the viability of the technology.

I. Relevant Facts.

1. Plaintiff's Complaint is replete with unsupported, unproven, and disparaging references to the solar energy technology.[2] Plaintiff has pejoratively defined the term "solar energy scheme" because "Defendants' scheme centers on purported solar energy technology."[3]

2. On April 21, 2017, this Court entered an order denying Defendants' [90] and [94] Motions to Bifurcate. (Doc. 158).

3. In the ruling, this Court, at the government's urging, stated:

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[1] *See* Fed R. Civ. P 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.")

[2] See Complaint at paragraphs 16 through 22, 29, 41 through 42, 45 through 51, 53 through 56, 68, 72, subparagraph b and e of paragraph 76, 88, 95, 97, 104, 110, 113, 117 through 118, 121 through 122, 128, 134, 140, 146, 159, 163 through 164, subparagraph a and b of paragraph 169, subparagraph b of paragraph 177, 178, subparagraph a and b of paragraph 185, 186, subparagraphs a and b of paragraph 193, and 194

[3] *Id*. at ¶ 41.

> "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. **But the viability of the technology would not determine any of the counts…** Though the United States' Complaint focuses to some degree on the viability of the technology, much more of the Complaint focuses on defendants' business structure and marketing approach. **Thus the question of the technology's performance is of tertiary concern**."[4]

II. Argument and Supporting Authority.

References to the Viability of Defendants' Technology is Immaterial, Impertinent and Scandalous.

Under Rule 12(f), the Court may strike from a pleading any redundant, immaterial, or impertinent, or scandalous manner. The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious side issues by dispensing with those prior to trial.[5] Immaterial matter is that which has no essential or important relationship to the claim for relief or the defenses being plead.[6] Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question.[7] Allegations may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice.[8]

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[4] See Order (Doc. 158) at page 5 (emphasis added).

[5] *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010); *accord Developers Sur. & Indem. Co. v. Network Elec., Inc.*, No. 2:12-cv-00289, 2013 U.S. Dist. LEXIS 84606, at *9 n.4 (D. Utah June 14, 2013)

[6] *Whittlestone*, 618 F.3d at 974 (9th Cir. 2010) (quoting 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1382, at 706-07 (1990) (quotation marks omitted)).

[7] *Id.*

[8] *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664 (7th Cir. 1992).

In this case, pursuant to the government's argument and this Court's order, the viability of the technology is at best a "tertiary issue" that "would not determine any of the counts." Under this ruling, the viability of the technology cannot have an "essential or important relationship to the claim for relief or defenses being plead" or be necessary to any of the issues in question. Accordingly, all allegations referring to the viability of the technology should be stricken to better define and confine the scope of the issues to be litigated in this case.

Additionally, if the technology has no material or pertinent purpose in either the prosecution or defense of any claim, then the only purpose it serves is to publish scandalous material in the public record which has or will needlessly prejudice Defendants' reputation.[9] Indeed, plaintiff disparagingly characterized the solar technology as a "scheme" labeling it as "abusive solar energy scheme" no less than 40 times throughout its Complaint. Characterizing Defendants' solar development efforts as an "abusive solar energy scheme" is an unambiguous and unnecessary insult to Defendants suggesting they are promoting fraudulent technology.[10] This allegation is improper as immaterial, impertinent and scandalous.

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[9] *Gitto v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1, 12 (1st Cir. 2005) ("The Court offered several examples of such 'improper purposes, 'including gratifying public spite, promoting public scandal, and using court files as 'reservoirs of libelous statements for press consumption.'")

[10] *See Computerized Thermal Imaging v. Bloomberg*, L.P., No. 1:00 cv 98 K, 2001 U.S. Dist. LEXIS 24905, at *5 (D. Utah Mar. 26, 2001) (Libel per se consists of describing "conduct that is incompatible with the exercise of a lawful business, trade, [or] profession...") (*citing Baum v. Gillman*, 667 P.2d 41, 43 (Utah 1983)).

III. Conclusion

For the foregoing reasons, Defendants respectfully request that paragraphs 16 through 22, 29, 41 through 42, 45 through 51, 53 through 56, 68, 72, subparagraph b and e of paragraph 76, 88, 95, 97, 104, 110, 113, 117 through 118, 121 through 122, 128, 134, 140, 146, 159, 163 through 164, subparagraph a and b of paragraph 169, subparagraph b of paragraph 177, 178, subparagraph a and b of paragraph 185, 186, subparagraphs a and b of paragraph 193, and 194 of the Complaint. Additionally, Defendants move to strike subparagraphs b, e, f, g, i(ii), and k of Plaintiff's prayer for relief.

DATED this 26th day of May, 2017.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/Denver C. Snuffer, Jr.
Attorneys for Defendants RAPower-3, LLC, International Automated Systems, Inc., LTB1, and Neldon Johnson

CERTIFICATE OF SERVICE

On this 26th day of May, 2016, I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' 12(f) MOTION TO STRIKE IMMATERIAL, IMPERTINENT, OR SCANDALOUS ALLEGATIONS IN PLEADINGS** was served on the following by the method identified:

Party/Attorney	Method
Donald S. Reay Reay Law PLLC 43 W. 9000 S., Ste. B Sandy, Utah 84070 Tel. (801) 999-8529	_____ Hand Delivery _____ U.S. Mail _____ Overnight Mail __X__ Email: donald@reaylaw.com _____ Electronic Filing Notice
John K. Mangum US Attorney's Office (UT) Tel. (801) 325-3216	_____ Hand Delivery _____ U.S. Mail _____ Overnight Mail __X__ Email: john.mangum@usdoj.gov _____ Electronic Filing Notice
Erin Healy Gallagher Christopher R. Moran US Department of Justice (TAX) P.O. Box 7238 Washington, DC 20044 Tel. (202) 353-2452	_____ Hand Delivery _____ U.S. Mail _____ Overnight Mail __X__ Email: erin.healygallagher@usdoj.gov christopher.r.moran@usdoj.gov _____ Electronic Filing Notice
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/s/Denver C. Snuffer, Jr.
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