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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 **UNITED STATES' MOTION IN LIMINE TO EXCLUDE "EXPERT" TESTIMONY OF KURT HAWES AND RICHARD JAMESON** Judge David Nuffer Magistrate Judge Brooke C. Wells

Defendants have disclosed attorney Kurt Hawes and enrolled agent Richard Jameson as witnesses who will offer expert opinion testimony under Fed. R. Evid. 702. Johnson, International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC, proffer Hawes to

opine that he would recommend a hypothetical client claim depreciation and tax credits associated with the Defendants' solar lenses. Shepard and Freeborn proffer Jameson to opine that the solar lenses qualify as "energy equipment" under 26 U.S.C. § 48, that anyone who purchases a solar lens can claim the Section 48 energy credit for the tax year the lens is "placed in service," and may also deduct depreciation for their lens.

The Court should exclude Hawes and Jameson as expert witnesses because their proposed testimony fails every element of Rule 702. Neither opinion will assist the trier of fact to understand the evidence or to determine a fact in issue. At base Hawes and Jameson offer inadmissible legal opinions. Hawes and Jameson lack the requisite "knowledge, skill, experience, training, or education" to qualify them as an "expert" under Rule 702. Moreover, neither bases their opinion on sufficient facts or data; their methodologies are unreliable, and their proposed testimony does not reliably apply the principles and methods that apply to their professions.

I. BACKGROUND

A. The claims and defenses in this case.

The United States seeks to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[1] As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy.[2] The technology underlying the solar energy scheme,

[1] ECF Doc. No. 2 and ECF Doc. No. 35 ¶ 1(a).

[2] ECF Doc. No. 2 ¶ 16.

purportedly invented by Neldon Johnson, uses "solar lenses" on "solar towers."[3] This purported technology is, however, only the starting point of Defendants' solar energy scheme.

Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC. But LTB is a company that exists only on paper; it has never done anything.[4] Nonetheless, Defendants tell customers that LTB will operate and maintain the customer's lens for them, as part of a system that will generate electricity. Defendants tell customers that LTB will sell electricity to a third-party power purchaser, and then pay customers "rental income" for use of their lenses.

Defendants assure their customers that, by purchasing lenses, customers may claim a depreciation deduction and a solar energy tax credit. The underpinnings of Defendants' solar energy scheme are their statements assuring their customers that:

- customers who buy and then purportedly lease the lenses to LTB are in a "trade or business" and have bought the lenses for the purpose of making a profit;[5]
- by virtue of their "trade or business," customers may deduct "business" expenses, consisting mostly of depreciation[6] on the lenses, from their ordinary income like wages from their full-time jobs[7]; and
- customers may claim a solar energy tax credit to further reduce their tax liability.[8]

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[3] ECF Doc. No. 2 ¶ 17.

[4] LTB has never done anything; it has never had a bank account, any employees, or any revenue. Pl. Ex. 673, Deposition of LTB1, LLC, July 1, 2017, 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; 69:6-74:21, 90:19-91:8. LTB and LTB 1 are indistinguishable. LTB1 Dep. 11:9-15.

[5] *E.g.*, Pl. Ex. 1 at 2-3.

[6] 26 U.S.C. § 162; Pl. Ex. 25 at 1-2.

[7] 26 U.S.C. § 167; Pl. Ex. 24; Pl. Ex. 40 at 12, Lunn_F&L-00037; Pl. Ex. 214; Pl. Ex. 216; Pl. Ex. 492; Pl. Ex. 674.

[8] 26 U.S.C. § 48; Pl. Ex. 25 at 2.

We allege that Defendants' statements are false or fraudulent as to material matters under the internal revenue laws.[9] Defendants knew or had reason to know that these statements were false or fraudulent when they made the statements while promoting the solar energy scheme.[10]

We also allege that, to increase the tax benefits they promote to their customers, Defendants falsely inflate the value of the lenses to more than 200 percent of the correct value.[11] When Defendants tell customers this falsely inflated purchase price, Defendants make a gross valuation overstatement.[12]

Defendants deny all allegations. They also claim that they relied upon advice of counsel.[13]

The United States will offer evidence showing that Defendants' statements about their solar lenses and the purported tax benefits, were false or fraudulent as to material matters and were gross valuation overstatements. To establish that Defendants knew, or had reason to know that their statements were false or fraudulent, we will offer (among other evidence) testimony and documents from attorneys and accountants who advised Defendants at various times while Defendants were promoting the scheme. We will also offer testimony from Defendants themselves, and an expert witness on solar energy technology. As the factfinder,[14] the Court will

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[9] 26 U.S.C. § 6700(a)(2).

[10] 26 U.S.C. § 6700(a)(2).

[11] § 6700(a)(2)(B), (b)(1); *See* Pl. Ex. 520, PSK000002 (attached) demonstrating that International Automated Systems Inc. purchases each for $52.18. Defendants sell the lenses for $3,500 each.

[12] § 6700(a)(2)(B).

[13] ECF Doc. No. 22 & ECF Doc. No. 23, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Defenses.

[14] The Court struck Defendants' jury demand. See ECF Doc No. 43.

evaluate all of the relevant evidence, make credibility determinations, and apply the law to decide:

(1) what statements Defendants made or furnished while promoting the solar energy scheme, whether such statements were false or fraudulent as to material matters, and whether Defendants knew or had reason to know such statements were false or fraudulent;[15]

(2) whether Defendants made or furnished gross valuation overstatements as to a material matter;[16] and

(3) if Defendants made either or both such statements the extent of the injunctive and equitable relief that is appropriate.[17]

B. Kurt Hawes' Report and Testimony

Defendants first contacted Kurt Hawes to ask him to be an "expert witness" in this case in late August 2017.[18] Before this engagement, Hawes never met Defendants, and had heard of RaPower-3 only once, in a newspaper article.[19] Hawes never gave legal advice to any Defendant, or to any of Defendants' customers.[20] On September 15, 2017, Johnson, RaPower-3, LLC, LTB1, LLC and International Automated Systems Inc., identified Hawes as an expert witness and provided his written report to the United States.[21]

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[15] 26 U.S.C. § 6700 (a)(2)(A).

[16] 26 U.S.C. § 6700(a)(2)(B).

[17] *See* 26 U.S.C. §§ 6700, 7408.

[18] Pl. Ex. 672, Deposition of Kurt O. Hawes, October 4, 2017, 100:2-9.

[19] Hawes Dep. 75:4-7; 134:8-17.

[20] Hawes Dep. 133:21-134:6.

[21] Pl. Ex. 651.

Hawes is the sole practitioner at the law firm of K. Hawes Associates, PLLC, and his practice includes some federal tax matters.[22] Hawes has been an attorney for approximately 14 years.[23] During that time, Hawes clerked for a federal judge in this District,[24] and then worked at several law firms and an in-house counsel position where his practice included local, state and federal tax issues.[25] In his 14-year career, Hawes can only remember one instance when he gave advice on whether a client was engaged in a trade or business.[26] He has never addressed the issue of whether transactions underlying a purported trade or business have economic substance;[27] whether a trade or business is a non-passive activity, as defined by 26 U.S.C. § 469;[28] whether a taxpayer materially participates in a trade or business, as defined by 26 U.S.C. § 469;[29] and whether a taxpayer may otherwise qualify for a depreciation deduction under 26 U.S.C. § 167.[30] Hawes has handled only one tax case involving energy credits: bio-diesel tax credits, which are not at issue in this case.[31] He has never addressed energy credits for purported solar energy equipment, which *are* at issue in this case.[32] Hawes has never handled a case

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[22] Pl. Ex. 651.0030, Hawes' Curriculum Vitae.

[23] Hawes Dep. 16:25-17:9.

[24] Hawes Dep. 17:10-14. Hawes clerked for the Hon. Dee Benson.

[25] Hawes Dep. 18:13-34:4.

[26] Hawes Dep. 55:19-62:25.

[27] Hawes Dep. 66:23-68:8, 173:25-176:16. He learned about the doctrine in law school. Hawes Dep. 66:23-68:8. Nonetheless, Hawes considers himself an "expert" in economic substance. *Id.*

[28] *E.g.*, Hawes Dep. 54:4-5; 220:11-222:6.

[29] *See* Hawes Dep. 220:11-222:6.

[30] *E.g.*, Hawes Dep. 103:25-105:25, 220:11-222:6.

[31] Hawes Dep. 24:13-17; 30:16-25; 32:14-20; 44:23-45:3.

involving 26 U.S.C. § 6700; the entirety of his knowledge of § 6700 comes from law school and research he has done in conjunction with this case.[33]

Defendants retained Hawes to opine on whether he would recommend to a hypothetical client that the client claim depreciation and tax credits associated with the solar lenses.[34] To form his opinions, Hawes reviewed the contracts that Defendants use to sell their solar lenses to customers, visited Defendants' facilities in Delta, Utah, and reviewed documents he obtained from Defendants' websites.[35] When Hawes reviewed these materials, he simply assumed their veracity.[36] Hawes did not review Defendants' deposition transcripts,[37] nor did he review documents and other materials in which Defendants promote the purported tax benefits of their lenses.[38] He did not ask Defendants for any additional materials beyond what they had selected for him to review.[39] For example, Hawes assumed that LTB1, LLC, which is indistinguishable from LTB, LLC,[40] the company that purportedly operates and maintains customers' solar lenses

(…continued)

[32] *E.g.*, Hawes Dep. 49:13-16, 54:24-55:4, 103:25-105:25, 220:11-222:6.

[33] Hawes Dep. 49:21-51:3; 55:11-18. Nonetheless, Hawes considers himself an expert on § 6700. Hawes Dep. 66:9-12. As discussed below, much of Hawes' research is derived from other attorneys associated with the defendants.

[34] Deposition of Kurt Hawes, October 4, 2017, 81:19-82:6.

[35] Pl. Ex. 651.003; Hawes Dep. 79:23-81:18.

[36] Hawes Dep. 96:13-15; 114:8-18; 138:16-139:1.

[37] Hawes Dep. 117:7-14.

[38] Hawes Dep. 151:9-160:19, considering Pl. Ex. 518; Hawes Dep. 160:20-170:6, considering Pl. Exs. 20, 112, 244; Hawes Dep. 173:25-183:14, considering Pl. Ex. 282.

[39] Hawes Dep. 136:12-18.

[40] See LTB1 Dep. 11:9-15.

and makes lease payments to the customers (the "rental income"), is a valid going concern.[41] Defendants did not tell Hawes that LTB exists in name only and has never done anything.[42] LTB1 and LTB are currently dissolved.[43] Similarly, Hawes did not speak to a single actual RaPower-3 customer because his opinion was based on "what the tax code said, not what their experience was, necessarily."[44]

Not only did Hawes accept the facts Defendants or their representatives gave him, he used their flawed legal analysis to direct his own. According to Hawes, an attorney named Jenni Davenport performed a "fair amount" of the legal research that appears in his report.[45] Jenni Davenport is an associate at the law firm of Hale and Wood.[46] Hale and Wood is attorney Paul Jones' law firm.[47] Paul Jones regularly uses Ms. Davenport for his own research and writing needs.[48] Paul Jones and Hale and Wood also represent numerous RaPower-3 customers in the

[41] Hawes Dep. 201:14-17; Pl. Ex. 651.0004-0005, 651.0015.

[42] LTB1 Dep. 6:24-13:6; 75:25-77:14; Hawes Dep. 199:16-207:14.

[43] LTB1 Dep. 12:21-13:6.

[44] Hawes Dep. 106:22-107:7. In other words, Hawes reviewed the *form* of Defendants' transaction and not the *substance*. Nonetheless, he considers himself an expert on the economic substance doctrine. Hawes Dep. 68:5-10.

[45] Hawes Dep. 145:10-14; see also Hawes Dep. 103:1-15. See also Hawes Dep. 147:6-11 ("Q: [] So [Jenni Davenport] just gave you some authorities that she found, gave them to you and you used them in your report? A. Yep.").

[46] Hawes Dep. 142:21-143:2.

[47] Hawes Dep. 143:13-19. See also Pl. Ex. 670 (attached), available at https://www.halewoodlaw.com/pwjones (last accessed November 2, 2017.)

[48] Hawes Dep. 105:13-20.

United States Tax Court, at Neldon Johnson's expense.[49] Paul Jones is also the attorney that first solicited Hawes to serve as Defendants' "expert" in this case.[50]

Hawes' report contains four opinions, all premised on the legal advice he would give to a purportedly hypothetical client:[51]

- Hawes would recommend to his hypothetical clients that Solar Lenses purchased from RaPower and subsequently leased for use in an Alternative Energy System qualify as "energy property" as defined in Section 48 of the Internal Revenue Code ("IRC") and entitled any purchaser to the energy tax credit under Section 48.[52]

- Hawes would recommend to his hypothetical clients that credits taken for Solar Lenses purchased be taken in the year that they are leased as the Solar Lenses are placed in service in the year the Solar Lenses are held out for lease, which for most purchasers is the same year the Solar Lenses are purchased.[53]

- Depending on the client's situation, Hawes would recommend that his hypothetical clients consider themselves materially participating in a leasing business if they leased the Solar Lenses purchased from RaPower to LTB, or any other lessee.[54]

- Because of his third opinion, above, Hawes would recommend that his hypothetical clients claim depreciation on their income tax returns for lenses used in their leasing business.[55]

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[49] Pl. Ex. 78 (December 26, 2015 email from Greg Shepard to Paul Jones directing Mr. Jones to file a petition in the United States Tax Court on behalf of Brian Zeleznik); see also Pl. 671 (United States Tax Court Docket Sheet for *Zeleznik v. Comm'r*, Docket No. 7022-16, listing Paul Jones as counsel for Brian and Amy Zeleznik).

[50] Hawes Dep. 75:15-77:9.

[51] Pl. Ex. 651.0002-0003.

[52] Pl. Ex. 651.0002.

[53] Pl. Ex. 651.0002.

[54] Pl. Ex. 651.0003.

[55] Pl. Ex. 651.0003.

In forming these opinions, Hawes did not consider – and was not aware of – legal precedent that bears on the issues in this case such as the codified economic substance doctrine at 26 U.S.C. § 7701(o)[56] or *Nickeson v. Commissioner*, 962 F.2d 973 (10th Cir. 1992).[57] *Nickeson* offers various tests for evaluating whether a certain transaction, plan, or arrangement, is a legitimate "trade or business" or an illegitimate tax shelter. When faced with facts showing that Defendants' customers are not in a trade or business, and are actually participating in a tax shelter, as defined in *Nickeson,* (such as the emphasis of tax benefits in Defendants' promotional materials;[58] the fact that the lenses have not generated revenue although Defendants have been selling them for more than 10 years;[59] the fact that customers can get their lens purchase money back when the IRS audits their tax returns or if there are changes to the Internal Revenue Code that reduce the tax benefits associated with their lenses;[60] and the lack of evidence that the lenses are actually worth $3,500[61]) Hawes was unable to explain why this authority does not apply.[62]

In sum, based on the facts and legal authority that defendants gave him, Hawes would advise an imaginary client to claim the same tax benefits that Defendants have falsely promoted to their customers.

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[56] Hawes Dep. 173:25-175:8. Hawes testified that he is an expert on the economic substance doctrine. Hawes Dep. 68:5-10.

[57] Hawes Dep. 140:6-8; 147:6-11.

[58] Hawes Dep. 160:20-170:6, considering Pl. Ex. 20, 112, 244.

[59] Hawes Dep. 185:14-186:18.

[60] Hawes Dep. 173:25-183:14, considering Pl. Ex. 282.

[61] Hawes Dep. 151:9-160:19, considering Pl. Ex. 518.

[62] Hawes Dep. 140:7-212:11.

C. Richard Jameson's Report and Testimony, To Date

Richard Jameson has been a tax return preparer since 1987 and an Enrolled Agent since 1990.[63] He owned and operated H&R Block franchises.[64] Jameson has a "M.S. in Taxation" from William Howard Taft University.[65] He has other professional designations in the field of tax preparation and representation of customers before the IRS.[66] Since November 2013, Jameson has operated North Star Tax Services, LLC, through which he continues to prepare tax returns and assist customers with audits and administrative appeals at the IRS.[67]

Since 2012, Richard Jameson has prepared tax returns for RaPower-3 solar lens customers.[68] Since at least 2014, he has represented such customers before the IRS during audit and administrative appeal.[69] Jameson is hardly independent. Indeed, Shepard promoted Jameson's services for tax return preparation and audits and appeals before the IRS to RaPower-3 customers.[70]

Jameson gets information about his clients, RaPower-3, and other matters in this case from his clients and from Johnson and Shepard.[71] Jameson accepts this information

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[63] Pl. Ex. 659 at 24-25.

[64] Pl. Ex. 659 at 25.

[65] Pl. Ex. 659 at 24; Pl. Ex. 666, Deposition of Richard Jameson, Sept. 20, 2017, 22:12-24:13.

[66] Pl. Ex. 659 at 24.

[67] Pl. Ex. 659 at 25.

[68] Jameson Dep. 67:10-21, 74:22-76:6, 96:13-97:12.

[69] Jameson Dep. 67:10-21, 74:22-76:6, 96:13-97:12.

[70] Pl. Exs. 625, 631, 640, 641.

[71] *See* Jameson Dep. 105:1-106:1.

uncritically.[72] He relies heavily on the transaction documents that his clients receive from Defendants to support the tax returns and advocacy materials that he prepares for RaPower-3 customers.[73]

Jameson testified, for example, that when he prepares a tax return, it is "not [his] responsibility to audit the taxpayer and to ask them what work they do" in their purported "trade or business" related to the solar lenses they buy from RaPower-3.[74] He simply asks "them if they do the work. And they say yes."[75] Similarly, Jameson has never asked questions of Johnson or Shepard like who is going to pay for any purported electricity generated by his customers' solar lenses or asked why it is taking so long to start rental payments.[76] This is because, according to Jameson, "It is not [his] responsibility to audit the tax return. It is [his] responsibility . . . to prove that [his customers] have the documentation to claim the deduction on their tax return."[77] Jameson knows that if a person is not going to have a tax liability to offset, there is no need for him to buy lenses.[78]

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[72] *See* Jameson Dep. 203:8-209:1; Pl. Ex. 637.

[73] *E.g.*, Pl. Ex. 659 at 9-13; Jameson Dep. 86:687:17, 125:7-126:25 (Jameson testified that, although he checks a box on RaPower-3 customers' tax returns stating that the full amount of money claimed as related to RaPower-3 is "at risk," he does not know whether their money is at risk. He assumes it is based on the text of the transaction documents.), 209:2-210:11 *and* Pl. Ex. 637 at 10.

[74] Jameson Dep. 153:22-155:5.

[75] Jameson Dep. 153:22-155:5, Jameson Dep. 173:9-25.

[76] Jameson Dep. 89:30-93:1; *see also* Jameson Dep. 175:11-176:4.

[77] Jameson Dep. 90:15-24; *see also* Jameson Dep. 125:7-126:25 (Jameson testified that, although he checks a box on RaPower-3 customers' tax returns stating that the full amount of money claimed as related to RaPower-3 is "at risk," he does not know whether their money is at risk. He assumes it is based on the text of the transaction documents.); *id.* at 176:5-17 (Jameson does not know how the price of each lens is set or whether a customer has challenged the price); *id.* at 215:6-220:24.

[78] Jameson Dep. 183:10-184:15; Pl. Ex. 632.

Jameson reviews legal authority in the course of his work for RaPower-3 customers and frequently cites this legal authority to the IRS on behalf of his customers with broad declarations supporting RaPower-3 customers.[79] Jameson regurgitates that same authority in his expert report.[80] Jameson believes that the legal authorities he cites supports the statements that defendants make promoting their tax scheme.[81] Jameson's analysis is nonsensical. For example, Jameson contends that the lenses are "Section 1231 property," which means (to him) that when a customer "leases out" the solar lenses, the purported leasing activity is non-passive.[82] But 26 U.S.C. § 1231, on its face, has nothing to do with the issues of this case. Section 1231, entitled "Property Used in the Trade or Business and Involuntary Conversions" provides the preferential long-term capital gain rate for sales or exchanges of "property used in the trade or business" under certain circumstances.[83] Section 1231 assumes that a taxpayer is engaged in a trade or business, and only comes into play when assets are disposed of, and the gain needs to be characterized. Section 1231 has no bearing on whether a taxpayer's participation in a purported business is active or passive; rather, this is determined by 26 U.S.C. § 469. Jameson's logic is

[79] *See* Jameson Dep. 150:11-151:3; 214:6-23; Pl. Exs. 163, 638, 639.

[80] *See* Jameson Dep. 150:11-151:3; 214:6-23; Pl. Exs. 163, 638, 639; Pl. Ex. 659, at 2-23.

[81] *See* Jameson Dep. 150:11-151:3; 214:6-23; Pl. Exs. 163, 638, 639; *but see id.* 59:6-66:6 (Jameson testified that he has heard of, or dealt with, the economic substance doctrine, but has never had a customer's tax return challenged based on the doctrine).

[82] Jameson Dep. 142:8-17; 147:10-21; Pl. Ex. 659, at 12.

[83] *Cottle v. Comm'r*, 89 T.C. 467, 485 (1987); See also Rev. Rul 72-85.

circular and he ignores a key provision of § 469, which makes clear that rental activities involving personal property, like the solar lenses at issue here, are *per se* passive.[84]

On September 20, 2017, the United States deposed Jameson as a fact witness in this case. On September 28, 2017, R. Gregory Shepard and Roger Freeborn disclosed Richard Jameson as an expert witness and provided his written report to the United States.[85]

Jameson's report does not identify or cite specific facts that he considered in forming his opinions.[86] It appears that he relies simply on the generalized facts that he has learned from Defendants and from clients. Based on these generalizations, Jameson opines that:

- the solar lenses "qualify under section 48 of the Internal Revenue Code as 'energy equipment'";
- purchasers of solar lenses can "claim the energy credit for the year their lens(es) are placed in service"; and
- purchasers of solar lenses "qualify to deduct depreciation on their federal tax returns."[87]

Much of the text of Jameson's report is identical, or substantially similar, to text that he has written to the IRS as an advocate for RaPower-3 customers who are being audited or are in the appeals process.[88]

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[84] 26 U.S.C. 469(c)(2). With very limited exceptions, any activity involving the rental of personal property is *per se* passive.

[85] ECF Doc. No. 225; Pl. Ex. 659. Because his "report" had not been disclosed before his deposition, this Court has allowed the United States an additional four hours to depose Jameson about his "report," on or before January 31, 2018. ECF Doc. No. 236. Notably, at Jameson's deposition, the Defendants' attorney explicitly argued that Jameson is *not* an expert. See Jameson Dep. 60:18; 116:9-12; 150:1-9.

[86] *See generally* Pl. Ex. 659.

[87] Pl. Ex. 659 at 1.

[88] *See* Jameson Dep. 150:11-151:3; 214:6-23; *compare* Pl. Exs. 163, 638, *and* 639 *with* Pl. Ex. 659. In particular, Jameson's report states that "[t]he taxpayer has attached proof of the lease in the Operation & Maintenance

(continued...)

II. ARGUMENT

Federal Rule of Evidence 702 allows a witness "who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" *only if*: the witness's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; the witness's "testimony is based on sufficient facts or data"; the witness's "testimony is the product of reliable principles and methods"; and the witness "has reliably applied the principles and methods to the facts of the case."[89]

A. Neither Hawes' nor Jameson's proffered expert testimony will "help" this Court understand the evidence or to determine a fact in issue.

Fed. R. Evid. 702 permits expert opinion testimony when the witness' expertise will "help" the trier of fact understand evidence or determine a fact. But legal opinion testimony is generally unhelpful and inadmissible because the presiding judge is presumed to have adequate expertise. Further, even if legal opinion testimony were helpful in this case, which it is not, Hawes and Jameson lack the required expertise to provide it.

(…continued)

Agreement" and "The taxpayer has attached proof of payment (see Invoices) for the Solar Lenses." Pl. Ex. 659 at 12-13. While this might be a statement he would make in a letter to the IRS when advocating for a specific RaPower-3 customer, Jameson does not attach an agreement or invoices to his report.

[89] Fed. R. Evid. 702; *Cinema Pub, L.L.C. v. Petilos*, 2017 WL 1066628, at *3 (D. Utah 2017) (Nuffer, J.).

1. Legal opinions are unhelpful and inadmissible.

"Experts are supposed to interpret and analyze *factual* evidence. They do not testify about the law because the judge's special legal knowledge is presumed to be sufficient."[90] Indeed, it is black letter law in every circuit of this country that expert testimony about domestic law is generally inadmissible.[91] The reason that courts do not permit experts to opine on legal matters is simple: all courtrooms come "equipped with a 'legal expert,' called a judge."[92] Legal opinions are also inadmissible because allowing them would undermine an "a priori assumption that there is one, but only one, legal answer for every cognizable dispute … [which] … requires only one spokesman of the law, who of course is the judge."[93] Similarly, testimony that consists of legal conclusions – the application of law to facts – is generally inadmissible because it does not assist the trier of fact, but, instead, impermissibly invades the role of the Court.[94]

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[90] *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986) (emphasis added).

[91] *See, e.g.*, *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997); *Marx & Co., Inc. v. Diners' Club*, 550 F.2d 505, 509-10 (2d Cir. 1977); *United States v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991); *Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 365-68 (4th Cir. 1986); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983); *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986); *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 751-52 (8th Cir. 2003); *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266, 1270 (9th Cir. 1980); *United States v. Vreeken*, 803 F.2d 1085, 1091 (10th Cir. 1986); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997); *In re Initial Pub. Offering Sec. Litig.*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) ("Every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law.")

[92] *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C. Cir. 1997); see also *iFreedom Direct Corp. v. First Tennessee Bank Nat. Ass'n*, 2012 WL 3067597, at *2 (D. Utah 2012) (Nuffer, J.).

[93] *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) (citing Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution*, 41 Den. L. Cent. J. 226, 237 (1964).)

[94] *Specht v. Johnson,* 853 F.2d 805, 810 (10th Cir. 1988). ("when the purpose of testimony is to direct the [factfinder's] understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed"); *see also Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983) ("allowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant."); *U.S. ex rel. Maxwell v. Kerr-McGee Chem. Worldwide, LLC*, 2006 WL 2053534, at *3 (D. Colo. 2006)

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In cases involving specialized industries and highly complex, technical legal issues, courts sometimes permit expert testimony *only if* such testimony would be helpful to the factfinder.[95] In these rare cases the role of the legal expert is limited to "explaining the law in a manner that could inform or assist the finder of fact," not "applying the law to the facts."[96] But this is the exception that proves the general rule. In non-complex cases like this one, there is no need for legal experts because the judge obviously has the requisite expertise. The Defendants' scheme boils down to basic fraud. For example, they tell their customers that customers are in the trade or business of leasing solar lenses and that customers' solar lenses were placed in service and generate electricity, or will soon. The Defendants tell their customers that their solar lenses qualify for an energy credit and may be depreciated on the customer's tax return. The United States contends that these statements are false or fraudulent, and that Defendants knew, or had reason to know, that these statements were false or fraudulent. The Court will decide who is correct. Courts and juries perform this basic factual analysis all the time, with no help from legal

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("an expert may provide an opinion to help a judge or jury understand a particular fact, [but] he may not give testimony stating ultimate legal conclusions based on those facts." (internal citations omitted)).

[95] See *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011). In the rare instance where courts have permitted experts to opine on the law, their credentials are far superior to Hawes and Jameson. *See, e.g.*, *SCO Grp., Inc. v. Novell, Inc.*, No. 2:04–CV–139 TS, 2010 WL 725573 (D. Utah Mar. 2, 2010). In a "close question" the Court admitted expert testimony in a software copyright case from an attorney who had practiced for 40 years in the area of technology and intellectual property. He spent approximately 90% of his time representing major computer software and hardware companies in the field. The expert wrote one of the first books on software protection and licensing, which won several awards for excellence, as well as 100 or more articles for law journals and legal publications. He was also an adjunct professor at two law schools. Based on this "extensive experience," the court concluded that the witness could "testify on the narrow issue as to whether, in his experience, ownership of the UNIX copyrights was necessary for SCO to operate its business," but cautioned that the witness could *not* "testify as to what law is applicable in this case. That is the province of the Court. Further, Mr. Davis may not opine on the ultimate issue of who ultimately owns the copyrights at issue. Such testimony would impinge on the role of the jury." *Id.* at *5.

[96] *Stobie Creek Investments, LLC v. United States*, 81 Fed. Cl. 358, 364 (2008).

opinion testimony.[97] Since the Court "serves as an expert on the law, it can very well conduct the legal analysis" that will resolve this case.[98]

Hawes attempts to wedge his opinions into the "factual analysis" category by couching them as advice that he would give to an imaginary client. But at base, he has impermissibly applied cherry-picked facts to cherry-picked law, and provided legal opinions. Jameson does not even pretend to analyze the generalized, and biased, facts contained in his report; his opinions are purely legal. "Opinions that are "phrased in terms of inadequately explored legal criteria" or that "merely tell the [factfinder] what result to reach" are not deemed helpful to the [factfinder]" and are inadmissible under Rule 702.[99] This is especially true here, because, as discussed below, neither Hawes nor Jameson bring any specialized legal expertise or experience that will be helpful to this Court in analyzing the facts of this case.

Neither Hawes nor Jameson's incomplete, hypothetical, and partisan analysis will help this Court "to understand the evidence or to determine a fact in issue."[100] In its case-in-chief, the United States will present the Court with a complete set of facts relevant to the issues to be decided, including (among other things) the actual Defendants testifying under oath; the actual writings they made contemporaneously with the statements they made to customers and prospective customers; the actual attorneys and CPAs who advised the Defendants; the actual

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[97] *E.g.*, *United States v. Stover*, 731 F. Supp. 2d 887, 911 (W.D. Mo. 2010); *United States v. United Energy Corp.*, 1987 WL 4787 (N.D. Cal. 1987); *see also Nickeson v. Comm'r*, 962 F.2d 973, 976-77 (10th Cir. 1992).

[98] *Claston, LLC by & through Sunset Holdings, LLC v. United States*, 2012 WL 12957108, at *5 (D. N. Mar. I. 2012), citing *Stobie Creek*, 81 Fed. Cl. 358, 359–60.

[99] *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993).

[100] *See* Fed. R. Evid. 702(a); *c.f.* Hawes Dep. 129:8-133:11 (testifying to his belief that this Court is "completely equipped to decide this case and apply the law to the facts of this case"); *see also* Jameson Dep. 138:19-140:21 ("The only person not wrong in this whole thing will be a judge.").

state of Defendants' purported solar energy technology throughout the years; the actual customers who participated in the actual transactions at issue; and the actual impact of Defendants' conduct on those customers and the actual United States Treasury. The Defendants will have an opportunity to present whatever admissible factual evidence deem appropriate.

After the parties present their factual evidence, the parties' attorneys will have the opportunity make their closing arguments as to how the law should apply to the complete set of facts before the Court. This Court's verdict should be based on evidence solicited from witnesses with percipient knowledge[101] of what *actually* happened while the Defendants promoted their scheme. Partisan "legal experts" like Hawes and Jameson who do nothing more than regurgitate the Defendants' legal arguments serve no purpose beyond the role already played by Defendants' attorneys.[102] "Expert testimony that is simply . . . an attempt to make a 'closing argument' via an 'expert' should be excluded."[103]

Once this Court has heard all admissible evidence and closing argument, it will apply the law, objectively, to the facts it finds and decide whether Defendants engaged in penalty conduct and should be enjoined. This Court is eminently qualified to undertake this process in tax cases; district courts do it all the time.[104] Allowing either or both of Hawes' and Jameson's partisan

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[101] Fed. R. Evid. 602.

[102] When an expert "seeks to supplant the role of counsel in making argument at trial, and the role of the jury interpreting the evidence" their testimony is inadmissible. *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 529 (S.D.N.Y.) (abrogated on other grounds). See also *Cacciola v. Selco Balers, Inc.*, 127 F. Supp. 2d 175, 184 (E.D.N.Y. 2001). See also *Cacciola v. Selco Balers, Inc.*, 127 F. Supp. 2d 175, 184 (E.D.N.Y. 2001) ("[w]hen expert witnesses become partisans, objectivity is sacrificed to the need to win.")

[103] *iFreedom Direct Corp. v. First Tennessee Bank Nat. Ass'n, No.*, 2012 WL 3067597, at *3 (D. Utah 2012)

[104] See ECF Doc. No. 158 (denying defendants' bifurcation motion) (Nuffer, J.); see also *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012) (Nuffer, J.); *Hansen v. United States*, 2016 WL 1634761, at *1 (D. Utah

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and irrelevant legal opinion testimony would only usurp the Court's role as factfinder and arbiter of the law[105] and waste this Court's time.[106]

2. This Court requires no "help" deciding legal issues in this case, particularly from an attorney or a tax return preparer with no specialized experience in those issues.

For expert testimony to be admissible, the expert must be qualified "by knowledge, skill, experience, training, or education."[107] Hawes is a lawyer with little to no specialized tax experience, particularly in the topics at issue in this case. Hawes admitted that he does not bring any particularly specialized experience to this case beyond the general experience of a tax attorney who has been practicing for 12 or 13 years.[108] As discussed above, Hawes has never handled an I.R.C. § 6700 case, his only experience with energy credits involved the bio-diesel credit, and only once has he assisted a client in determining whether an activity constituted a trade or business. Jameson has experience preparing tax returns, generally, and representing customers before the IRS. But merely being a lawyer or a tax return preparer does not give one

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2016), report and recommendation adopted,, 2016 WL 1629271 (D. Utah 2016) (Nuffer, J.); *Blue Mountain Energy, Inc. v. United States*, 2016 WL 4179366, at *11 (D. Utah 2016) (Nuffer, J.)

[105] *United States v. Vreeken*, 803 F.2d 1085, 1091 (10th Cir. 1986) ("As a general rule, questions of law are [ ] not the subject of expert testimony").

[106] Fed. R. Evid. 403. See *United States v. Vreeken*, 803 F.2d 1085, 1091 (10th Cir. 1986) ("Moreover, the trial court could properly determine under Fed.R.Evid. 403 that the probity of such testimony was substantially outweighed by the danger of confusion or undue delay.").

[107] *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (citing Fed. R. Evid. 702).

[108] Hawes Dep. 74:4-75:3; *see also Christison v. Biogen Idec Inc.*, 2016 WL 6902706, at *2-5 (D. Utah 2016).

expertise for purposes of Fed. R. Evid. 702 concerning just any legal or tax matter.[109] Even if this were a sufficiently complex case that needed expert opinion testimony to explain the law, which it is not, the expert would need to have specialized knowledge"[110] about some aspect of the case, which Hawes and Jameson simply lack.

B. Hawes' and Jameson's proffered opinion testimony is unreliable.

An expert's testimony must be reliable.[111] For purposes of Fed. R. Evid. 702, that means that the testimony must be based on sufficient facts or data; that the testimony is the product of reliable principles and methods; and that the expert has reliably applied the principles and methods to the facts of the case.[112] An expert's testimony must be based grounded "in the methods and procedures of science" and based on actual knowledge, not "subjective belief or unsupported speculation.[113] The purpose of the *Daubert* inquiry is always to make certain that an expert's opinion "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[114]

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[109] *Christison v. Biogen Idec Inc*., 2016 WL 6902706, at *2 (D. Utah 2016) (Nuffer, J.) ("[M]erely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue." (quoting *Ralston v. Smith & Nephew Richards, Inc*., 275 F.3d 965, 970 (10th Cir. 2001)).)

[110] Fed. R. Evid. 702(a).

[111] *Daubert*, 509 U.S. 579, at 592; *iFreedom Direct Corp. v. First Tennessee Bank Nat. Ass'n*, No. 2:09-CV-205-DN, 2012 WL 3067597, at *1 (D. Utah July 27, 2012)

[112] Fed. R. Evid. 702(b)-(d).

[113] *Dodge v. Cotter Corp.,* 328 F.3d 1212, 1222 (10th Cir. 2003) (citing *Daubert*); *see also Mitchell v. Gencorp Inc*., 165 F.3d 778, 783 (10th Cir. 1999) (citing *Daubert*, 509 U.S. 579, at 589-93.

[114] *Dodge,* 328 F.3d at 1222-23 (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

1. Hawes' opinion testimony is unreliable.

Hawes' opinions about the hypothetical legal advice he would give an imaginary client[115] fail to meet standards of the legal profession. A lawyer is required to exercise "independent professional judgment and render candid advice," even if the advice is unpleasant.[116] In order for an attorney's advice to be competent, the advice must be based on *inquiry and analysis* into the factual and legal elements at issue.[117]

Hawes' factual inquiry, which took place over approximately two weeks, was limited to accepting only facts that Defendants fed him and *assuming* that those facts were true. He did not ask Defendants about additional materials beyond what they had selected for him to review. Unsurprisingly, the Defendants did not give Hawes information that would demonstrate that the Defendants' statements are demonstrably false. Hawes' legal analysis also reflects the bias of Defendants and their attorneys rather than independent analysis. He was fed legal research by members of Defendants' legal team.[118] Hawes did not consider – and was not aware of – legal precedent that bears on the issues in this case such as the codified economic substance doctrine at 26 U.S.C. § 7701(o) or *Nickeson v. Commissioner*, 962 F.2d 973 (10th Cir. 1992).

Instead of considering *all* facts and *all* law that apply to the issues, as any competent lawyer would do when giving independent advice to an *actual* client, Hawes chose to rely on the

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[115] Pl. Ex. 651.0002-0003; Hawes Dep. 81:19-24. Hawes has never actually given advice to a RaPower-3 customer. Hawes Dep. 133:21-134:6.

[116] *See* Utah Rules of Professional Conduct 2.1, note 2, available at: http://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch13/2_1.htm (last accessed November 16, 2017).

[117] Utah Rules of Professional Conduct 1.1, note 5 (emphasis added), available at: http://www.utcourts.gov/resources/rules/ucja/view.html?rule=ch13/1_1.htm (last accessed November 16, 2017).

[118] Hawes Dep. 96:13-15; 114:8-18; 138:16-139:1.

facts and law that Defendants provided to determine his advice to an *imaginary* client. In this way, Hawes has failed to use the "same level of intellectual rigor that characterizes the practice" of law.[119]

2. Jameson's opinion testimony is unreliable.

An Enrolled Agent like Jameson is not subject to the same standards as an attorney, but is nonetheless required to exercise "due diligence" in preparing and filing documents with the IRS and in determining the correctness of oral and written representations to the IRS[120] and must establish " the facts, determin[e] which facts are relevant, evaluat[e] the reasonableness of any assumptions or representations, relat[e] the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriv[e] at a conclusion supported by the law and the facts."[121] An Enrolled Agent may "rely in good faith without verification upon information furnished by the client . . . [but may not] ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete."[122]

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[119] *See Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999).

[120] *See* Jameson Dep. 43:4-20, 46:8-47:8; 31 C.F.R. § 10.3(c) (allowing Enrolled Agents to practice before the IRS), § 10.22.

[121] *See* 31 C.F.R. § 10.33(a)(2).

[122] 31 C.F.R. § 10.34(d).

Jameson has not evaluated all of the facts that are relevant to any issue to be decided here. Jameson's report does not contain cited facts.[123] Instead, he provides generalized facts which, presumably, are the same or similar facts he testified to having learned from Defendants and their customers while he prepared Defendants' customers tax returns and advocacy pieces for them to the IRS. There is no indication that Jameson asked Defendants about additional materials beyond this limited information, such as Defendants' deposition transcripts or information about what they knew when they made statements about, for example, the purported solar energy technology at issue here.

Because the United States has not yet deposed Jameson specifically about his report, it has not fully tested Jameson's legal research and its sources. But Jameson is a long-time advocate for Defendants' positions. He has been taking those very same positions on RaPower-3 customers' tax returns for years. He has been representing Defendants' customers before the IRS for years. Jameson's legal research offers only those citations which (he believes) support Defendants' positions rather than an objective analysis of the legal authority (including judicial doctrines) at issue. Jameson's legal opinions draw solely on facts provided by Defendants and legal authority that he claims supports their positions – contrary to the standards required of an Enrolled Agent.

[123] For this reason alone, Jameson's testimony should be barred because his report fails to meet the minimum standard for disclosure of a witness who is proffered as an expert for trial. Fed. R. Civ. P. 26(a)(2)(B)(i) and (ii) (disclosure of an expert witness who will testify at trial must "be accompanied by a written report--prepared and signed by the witness-- . . . [which] report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; [and] (ii) the facts or data considered by the witness in forming them.").

III. CONCLUSION

For the foregoing reasons, this Court should exclude Kurt Hawes' and Richard Jameson's proposed opinion testimony under Fed. R. Evid. 702. Their opinions will not "help" this Court to understand the evidence or to determine a fact in issue in this case. They offer inadmissible legal opinions, for which both lack specialized "knowledge, skill, experience, training, or education." By offering these legal opinions, Hawes and Jameson seek to usurp this Court's role to decide how the law applies to the facts in this case. By using facts and law provided by Defendants themselves (or which has already been used to advocate Defendants' positions), Hawes and Jameson fail to base their opinions on sufficient facts or data, fail to use a reliable methodology to generate his legal opinions, and fail to reliably apply the principles and methods of legal practice or practice before the IRS.

Dated: November 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017 the foregoing document was filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Christopher R. Moran
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