Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (15593) Joshua.egan@me.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Attorneys for Defendants

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' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to Article III, Section 2, Clause 1 of the U.S. Constitution, Defendants move this court for a dismissal of the present action, in full, based on the lack of an actual case and controversy. Plaintiff's claims against defendants are not ripe as there has been no judicial determination that the tax treatment taken by purchasers of solar lenses is in any way a fraudulent tax shelter or tax scheme.

INTRODUCTION

Plaintiff's Complaint against defendants in this action is premised on a violation of 26 U.S.C.S. § 6700(a), which provides, in essence, that any person who furnishes a statement with respect to the allowability of any deduction or credit, the excludability of any income or the securing of any tax benefit which the person knows or has reason to know is false or fraudulent as to any material matter, shall pay a penalty.[1] Plaintiff alleges that defendants' statements regarding the ability to claim the solar tax credit of IRC § 48 and depreciation deductions is the "promotion of an abusive tax scheme." See, Complaint, generally.

Yet, despite the IRS auditing and denying deductions to a large number of taxpayers who have purchased solar lenses from RaPower-3, LLC, none of those cases have reached final decision. At present, there are 193 tax court cases relating to an IRS Notice of Deficiency regarding taxpayer claims related to solar energy equipment from RaPower-3, LLC.[2] As of this date, the solar equipment cases being handled by Mr. Jones are still pending in the Tax Court and no trial has been scheduled.[3] Mr. Jones is not aware of any solar equipment case involving RaPower-3, LLC that has been tried on the merits in the Tax Court, U.S. District Court, or the

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[1] IRC 6700(a) provides that any person who (1) a. organizes (or assists in the organization of) a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, or b. participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in a., and (2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)-- a. a statement with respect to the allowability of any deduction or credit, the excludability of any income, 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 the person knows or has reason to know is false or fraudulent as to any material matter, or b. a gross valuation overstatement as to any material matter, shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity.

[2] See Declaration of Paul W. Jones at ¶ 11, attached as Exhibit 1. Mr. Jones is licensed attorney who currently represents the litigants in among the 193 pending cases. *Id.* at ¶ 4.

[3] *Id.* at 19.

U.S. Court of Federal Claims.[4] Furthermore, Plaintiff has failed to identify any cases that have been tried on the merits in any of these courts.

For this reason, the government's claim of an abusive tax scheme is not ripe for decision in this court. Until there is a determination that the taxpayer assertion of energy tax credits and business depreciation is "false or fraudulent" then Plaintiff's claims against defendants is merely speculative and not presently wrongful on any level.

ARGUMENT

Article III of the Constitution limits the jurisdiction of federal courts to actual cases or controversies." A plaintiff bears the burden of proving there is an actual case on controversy. *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) This jurisdictional requirement is known as standing. "To establish standing, plaintiffs bear the burden of demonstrating that they have suffered an injury-in-fact which is concrete and particularized as well as actual or imminent; that the injury was caused by the challenged [laws]; and that the requested relief would likely redress their alleged injuries." *Id.* This three-pronged inquiry seeks to resolve three questions: (1) Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? (2) Is the line of causation between the illegal conduct and injury too attenuated? (3) Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? *See Allen v. Wright*, 468 U.S. 737, 752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984).

I. THERE IS NO CURRENT CASE OR CONTROVERCY.

Plaintiff's Complaint is premises solely on a violation of 28 U.S.C.A. § 6700. Yet, until there is a judicial determination that there exists a violation of the internal revenue laws or an

[4] Id. at ¶ ¶ 19-20.

evasion of the assessment or collection of federal tax liabilities, there can be no section 6700 violation. Plaintiff's action against defendants is premature.

Under the law, ripeness refers to the readiness of a case for litigation; "a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)).

The purpose for the ripeness doctrine is to prevent premature adjudication; if a dispute is insufficiently developed, any potential injury or stake is too speculative to warrant judicial action. *See Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004) ("Our ripeness inquiry focuses not on whether the plaintiff was in fact harmed, but rather whether the harm asserted has matured sufficiently to warrant judicial intervention."). In short, "[r]ipeness doctrine addresses a timing question: when in time is it appropriate for a court to take up the asserted claim." *ACORN v. City of Tulsa*, 835 F.2d 735, 738 (10th Cir. 1987) (quotation omitted). Ripeness issues often arise when a plaintiff seeks anticipatory relief, such as an injunction.

The United States Supreme Court fashioned a two-part test for assessing ripeness challenges to federal regulations. The Court said, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967):

> *Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.*

Abbot Laboratories v. Gardner, 387 U.S. 136, 148-49 (1967).

The government complaint that the solar tax credit and depreciation deductions that defendants have represented are available to qualified individuals who purchase solar lenses from RaPower-3, LLC, is contrary to the clear language of the IRS Code. This is evident based on the fact that none of the taxpayers whose returns have been audited and the deductions disallowed by the IRS have been adjudicated to have violated internal revenue laws or unlawfully evaded the assessment or collection of their federal tax liabilities. In truth, there has never been a judicial determination that the tax benefits related to the technology at issue are not fully and completely appropriate under the tax code.

Defendants have offered the opinion testimony that the IAS solar energy lenses qualify as energy property and purchases are therefore eligible for an energy credit under IRC section 48. See, Expert Witness Report of Kurt O. Hawes, JD, MBA, pp 6-14.[5]

In his report, Mr. Hawes states that, based on his review of transaction documents, online materials and other information related to the sale of solar lenses from RaPower-3, LLC to customers and the subsequent lease of the solar lenses by purchasers to LTB1, LLC or any other leasee, combined with his personal inspection of the premises and the structures of the solar towers and lenses, and the relevant statutes, regulations and other legal authorities, "I would recommend to my 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

[5] A copy of Mr. Haws report is attached as Pl. Ex. 651 (Part 1), Kurt Hawes' Expert Report, to Plaintiff's, Memorandum in Support to Exclude "Expert" Testimony of Kurt Hawes and Richard Jameson filed by Plaintiff USA, as attachment 24.

the Internal Revenue Code ("IRC")[6] and entitle any purchaser to the energy tax credit under Section 48."[7]

To address the IRS concerns raised in the audit cases and other objections, Mr. Haws has also rendered an opinion in this case that the IAS solar lenses are placed in service when they are purchased by the taxpayer.[8] Mr. Haws expresses the opinion that "I would recommend to my 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."[9]

Furthermore, Mr. Haws, based on his review and analysis, would recommend that taxpayer would consider themselves "materially participating in a leasing business" if they leased the Solar Lenses purchased from RaPower to LTB1, or any other lessee,[10] and that as a consequence of Opinion #3, he would recommend that taxpayers claim depreciation on their income tax returns for lenses used in their leasing businesses.[11]

The bases for Mr. Haws' opinions are defended and set forth in his report, Exhibit 1 hereto. Those opinions have been uncontroverted by Plaintiff.

The ONLY expert opinions submitted in this case support that the tax treatment suggested by RaPower-3, LLC is justified. RaPower-3, LLC has taken careful steps to ensure that each taxpayer/purchaser of solar lenses is obligated to decide for himself/herself whether

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[6] All statutory references are to the Internal Revenue Code 26 U.S.C., unless otherwise noted.

[7] Pl. Ex. 651 , page 2 (Opinion #1).

[8] Id. at p. 14-15.

[9] Id. at page 2 (Opinion #2).

[10] Id. (Opinion #3).

[11] Id. (Opinion #4).

they qualify for the tax treatment. Until the government can show that those taxpayers do not qualify for the tax treatment they have sought, then there can be no action against these defendants for advocating an illegal tax scheme.

To cement the position that taxpayers who purchase RaPower-3, LLC lenses are entitled to claim certain tax treatments, IRS "enrolled agent" Richard Jameson has also provided his opinion and analysis to support his conclusions that solar lenses purchased by individual or business entities from RaPoer-3, LLC qualify under section 48 of the Internal Revenue Code as "energy equipment" and for tax reporting purposes, those people can claim the energy credit for the year their lens(es) are placed in service.[12]

Moreover, for those taxpayers that assert a solar energy business as part of their purchase of solar lenses from RaPower-3, LLC, qualify to deduct depreciation for the use of their solar lenses in a solar energy business on their federal tax returns.[13]

Given the expert opinions in favor of the allowability of tax credits and deductions, it appears that defendants and taxpayers who buy solar lenses from RaPower-3, LLC are entitled to rely on those analyses and the advice of their individual tax preparers to claim legal tax treatment on their individual tax returns.

II. LACK OF A RIPE CASE OR CONTROVERSY IS GROUND FOR IMMEDIATE DISMISSAL.

The seriousness of the failure of Plaintiff's Complaint is most clearly demonstrated in the potentiality that defendants are found liable under Plaintiff's allegations in this matter, then this court's decision being used as a judicial determination of a fraudulent tax scheme. It does not

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[12] See Expert Report from Richard Jameson, Pl. Exhibit 659, attachment 26 to Plaintiff's, Memorandum in Support to Exclude "Expert" Testimony of Kurt Hawes and Richard Jameson.

[13] Pl. Exhibit 659, at pg. 2.

seem to be this court's place to rule on the correctness of an individual taxpayer treatment (who is not a party to this case) on his/her individual tax return (that is not in evidence in this case). So it would be an abuse to allow the government to use this court to obtain a ruling on the existence of a fraudulent tax shelter claim against taxpayers that are presently in a dispute with the IRS over their individual tax treatment in a different forum.

The government is trying to sidestep the legal process involving the individual taxpayers and back-door a ruling from this court based on matters outside the tax code and instead in a large part based on the personalities of the parties.

It should be noted expressly, if not clear by now, none of the taxpayers who have claimed a solar tax credit or a business depreciation expense have had their claims adjudicated. Therefore, they have done nothing wrong. There is no fraudulent tax scheme or illegal tax treatment for which defendants "knows or has reason to know is false or fraudulent as to any material matter." IRC 6700(a)(2)(a). None of the taxpayers who have claimed solar tax credits and/or business depreciation on their income tax returns have had a court rule against them. None of the taxpayers have been ordered by a judge to withdraw their assertion of particular tax treatment relating to the purchase of solar lenses or operation of a solar energy business.

Until a tax court has declared an unlawful tax shelter, this court should not rule on whether defendants have knowingly made any false statements in an attempt to entice others into violating federal tax law. Until that decision is made (which may never happen) this court has no other choice but to dismiss for lack of subject matter jurisdiction.

CONCLUSION

For the reasons stated herein, this case should be dismissed for lack of subject matter jurisdiction.

Dated this 17th day of November, 2017.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul .
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
__X__ Electronic Service via Utah Court's e-filing program

/s/ Steven R. Paul .
Attorneys for Defendants