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' OPPOSITION TO UNITED STATES' MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF NELDON JOHNSON** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to Rule 702 of the Federal Rules of Evidence, Defendants submit this Opposition to the Motion In Limine of the United States (the "US") to Exclude the Expert Testimony of Neldon Johnson.

I. Introduction.

The US asserts in the introduction to its Motion that:

(1) Johnson's "expert" opinion will not assist the trier of fact and is merely cumulative of what Johnson will offer as a fact witness in this case, whether in his individual capacity or in his representative capacity of RaPower-3, LLC, International Automated Systems, Inc., and/or LTB, LLC.

(2) Johnson is inherently biased and his expert "opinion" testimony offered under Fed. R. Evid. 702 cannot be separated from his factual testimony and personal interest in this case.

(3) Johnson's "opinions" are also unreliable and rely on flawed methodology and assumptions.

(4) Johnson's "opinions" are merely Johnson's version of the facts as an expert and given the weight accorded to an expert.

Following the foregoing introductory bases stated for the US's Motion, the US presents a "Background" with its sections "A. The claims and defenses in this case." and "B. Neldon Johnson's Report."

In the former part A of the US's Background, the US merely restates the unproven allegations of its Complaint, which have been disputed and denied by the Defendants in their Answer, and so no further response is needed. Unanticipated delays and adjustments in approach, and solutions to technical challenges to development, utilization and commercialization of the Solar technology do not make it a "solar energy scheme," as the US asserts. The fact that LTB O&M, LLC is not presently producing power with lenses leased from the purchasers does not invalidate the plans or extensive development efforts undertaken for LTB O&M, LLC to do so. Similarly, a sale of a lens by one of the Defendants at a price that the

seller proposes and the buyer has the prerogative to accept or refuse, does not constitute a "falsely inflated value." The buyers and the sellers of the lenses have an arm's length business relationship. However, none of the foregoing has any bearing on the question of whether the Mr. Johnson's Expert Report and Testimony should be allowed regarding the claims of the US and the defenses of the Defendants.

In the latter part B of the US's Background, despite the extraordinary accomplishments of Mr. Johnson and his demonstrated in-depth understanding of a wide variety of complex technological areas, the US attempts to minimize his qualifications. The breadth and depth of Mr. Johnson's knowledge and expertise is displayed by his ability to conceive, develop, reduce to practice, and patent, apparatuses and methods in a wide variety of technological areas. Mr. Johnson has 29 issued US patents, and other pending applications, published and unpublished (US 9,812,867 for Capacitor Enhanced Multi-element Photovoltaic Cell was issued on November 7, 2017 subsequent to Defendants' prior disclosures).[1] The US seeks to divert the attention of the Court away from the application of Rule 702 to the question of the whether Mr. Johnson's Expert Report and Testimony should be allowed regarding the claims of the US and the defenses of the Defendants.

II. Argument

A. Rule 702 and Daubert.

Federal Rule of Evidence 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

[1] Exhibit 1, attached hereto.

(b) the testimony is based on sufficient facts or data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

1. Mr. Johnson's Qualifications.

The position of the US seems to be that without a General Electric level staff, budget, and development procedure, it is impossible for IAS technology to be fully developed and commercialized. The US completely ignores the fact that Neldon Johnson, with very minimal technical support, has fully developed and patented (US 7,789,650, US 7,789,651, US 7,789,652 and US 8,900,500) a process for manufacturing plastic Fresnel lens components which cures a multitude of problems experienced by previous Fresnel lens technology, including particularly focus distortion and scatter.[2] Those lens components have been successfully manufactured and have been tested and confirmed to perform as intended. No other manufacturer of plastic Fresnel lenses has been able to accomplish what Neldon Johnson has accomplished.

The US also completely ignores the fact that Neldon Johnson, with very minimal technical support, has conceived, designed, tested and constructed the IAS solar collector arrays. These collector arrays have been designed to position and retain the Fresnel lens components for focusing incident sunlight on solar receivers. Neldon Johnson has designed, constructed and tested mechanical, hydraulic, electrical and computer components of the collector arrays to provide for the positioning and retention of the Fresnel lens components for focusing incident sunlight on solar receivers, for continuous and accurate solar tracking, and for horizontal stowing of the collectors when high wind conditions are experienced.

[2] See Exhibit 1, attached hereto.

The US further ignores the fact that Neldon Johnson, with very minimal technical support, has built a manufacturing facility that has been and is efficiently and cost-effectively manufacturing the solar collector array components. To date, the components for two hundred solar collector arrays have been manufactured and erection is well underway.[3]

The US further ignores the fact that Neldon Johnson, with very minimal technical support, has conceived, designed, developed, fabricated and tested several concentrated solar receivers for the IAS system, and that he is currently testing other receivers, including a concentrated sunlight photovoltaic receiver conceived, designed, developed, fabricated and tested by Neldon Johnson with very minimal technical support. Neldon Johnson has obtained three U.S. Patents for concentrated solar receivers, including US 9,812,867 for Capacitor Enhanced Multi-element Photovoltaic Cell which was issued on November 7, 2017 subsequent to Defendants' prior disclosures.[4] Mr. Johnson has also obtained a U.S. Patent for a voltage controller which provides for enhanced efficiency of the concentrated photovoltaic receiver, US Patent No. 7,705,560.[5]

While the IAS system could certainly employ one of many readily available heat exchange systems to interface between the solar receivers and the turbines, the US further ignores the fact that Neldon Johnson, with very minimal technical support, has conceived, designed, developed, fabricated, and tested several heat exchange systems. He has obtained U.S.

[3] See Declaration of Neldon Johnson in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment.
[4] See Exhibit 1, attached hereto.
[5] Id.

Patent No. 9,599,404 for a direct fluid contact heat exchange system, and has other heat exchange technology that is patent pending before the USPTO.[6]

The US further ignores the fact that Neldon Johnson, with very minimal technical support, has conceived, designed, developed, fabricated, tested and patented a pressurized gas bladeless turbine and a pressurized fluid bladeless turbine. He has obtained US Patent No. 6,533,539 for a Pressurized Gas Turbine Engine, US Patent No. 6,783,320 for a Pressurized Gas Turbine Engine With Electrothermodynamic Enhancement, US Patent No. 6,997,674 for a Pressurized Fluid Turbine Engine, and US Patent No. 7,314,347 for a Pressurized Fluid Bladeless Turbine Engine With Opposing Fluid Intake Assemblies.[7] The pressurized fluid bladeless turbine eliminates the need for a boiler system as it provides for flashing of the heated and pressurized water to steam at or near the nozzles of the bladeless turbine. The simplicity and inherent reliability of the turbine is a very important feature of the versions of the IAS system utilizing a turbine and a generator.

The US apparently does not have a clue as to how the phenomenal achievements of Neldon Johnson could be accomplished with the very limited budget that Neldon Johnson has had to work with, and how he could do so without an extensive support staff that could be charged with following extensive protocol procedures regarding experimentation, testing and record keeping. Nevertheless Mr. Johnson has achieved these things.

2. Mr. Johnson's Opinions are Based on Sufficient Facts and Data, are the product of reliable principles and methods, has reliably applied the principles and methods to the facts of the case.

[6] Id.
[7] Id.

The US correctly notes that, in his report Mr. Johnson states that he formed his opinions "based on practical trials, engineering, and research and development," and "based on [his] own personal knowledge," and his "experience [] accumulated over the years as [he has] conceived, designed and engineered devices and methods in various fields of technology that have resulted in over 35 patent applications and 28 issued patents." [8]

The US refers to the following opinions extracted from the Expert Report of Mr. Johnson:

> (a) that the Fresnel lens [a component of the IAS system] that are [sic] sold by RaPower3 are solar energy equipment specifically designed for and capable of generating useful heat that can be used for the generation of electricity and for other useful purposes, and is specifically designed for and capable of producing concentrated sunlight for use with concentrated photovoltaic cells in the production of electricity."[9]
>
> (b) the lenses exist and are in full production – they are manufactured by a U.S. company and we have 34,000 lenses that have been bought at this particular time;
>
> (c) the lenses produce usable heat - this is not debatable and cannot be in dispute;
>
> (d) the lenses are part of a solar array that can be used to produce solar process heat and electric power.[10]

Regarding opinion (a) above, the sole purpose of the years of research, development, design, testing, redesign, and patenting of the Fresnel lens manufacturing methodology (US 7,789,650, US 7,789,651, US 7,789,652 and US 8,900,500) which cures a multitude of problems experienced by previous Fresnel lens technology, including particularly focus distortion and scatter, was to make the IAS solar collector technically feasible. No other manufacturer of plastic Fresnel lenses has been able to accomplish what Neldon Johnson has been able to accomplish. Those lens components have been successfully manufactured and have been

[8] Pl. Ex. 643 at 1.
[9] Id.
[10] Id. at 25-26; Johnson Dep., vol. 2, 23:1-24:6.

confirmed by testing performed under the personal supervision of Mr. Johnson, to perform as intended, i.e. to provide highly concentrated solar radiation, which, is "heat that can be used for the generation of electricity and for other useful purposes" per the opinion of Mr. Johnson. Accordingly, this opinion by Mr. Johnson is based on sufficient facts and data and is the product of reliable principles and methods reliably applied to the facts of the case.

It should further be noted that the sole purpose of the years of research, development, design, testing, redesign, under the personal direction of Mr. Johnson, of the solar arrays, including the lens attachment components, and the solar tracking and wind protection mechanical, electrical and control components, was to enable the Fresnel lens components to provide highly concentrated solar radiation, which, is "heat that can be used for the generation of electricity and for other useful purposes" per the opinion of Mr. Johnson. Also, by definition, concentrated photovoltaic cells are designed to produce electricity from the concentrated radiation produced by the Fresnel lens components.

Regarding opinion (b) that *the lenses exist and are in full production – they are manufactured by a U.S. company and we have 34,000 lenses that have been bought at this particular time*, is obviously based upon Mr. Johnson's personal knowledge. He personally directed the acquisition and production of the lenses and the quantity of the lenses produced. Accordingly, this opinion by Mr. Johnson is based on sufficient facts and data and is the product of reliable principles and methods reliably applied to the facts of the case.[11]

Regarding opinion (c) that *the lenses produce usable heat - this is not debatable and cannot be in dispute*, it should be noted that the US and its expert witness, do not dispute that the Fresnel lens components, as mounted in the solar arrays, will produce concentrated solar

[11] See Rule 702(d).

radiation.[12] Further, the US's expert agrees that the concentrated solar radiation will be capable of producing steam that can be used to power a turbine. Id. at ¶ 20. It is also indisputable that the concentrated solar radiation can be used by a concentrated photovoltaic cell.[13] Accordingly this opinion by Mr. Johnson is based on sufficient facts and data and is the product of reliable principles and methods reliably applied to the facts of the case.

Finally, regarding opinion (d) that *the lenses are part of a solar array that can be used to produce solar process heat and electric power*, based on the discussion presented above, this opinion by Mr. Johnson is based on sufficient facts and data and is the product of reliable principles and methods reliably applied to the facts of the case. As stated above, the sole purpose of the years of research, development, design, testing, redesign, under the personal direction of Mr. Johnson, of the solar arrays, including the lens attachment components, and the solar tracking and wind protection mechanical, electrical and control components, was to enable the Fresnel lens components to provide highly concentrated solar radiation, which, is "heat that can be used for the generation of electricity and for other useful purposes" per the opinion of Mr. Johnson. By definition, concentrated photovoltaic cells are designed to produce electricity from the concentrated radiation produced by the Fresnel lens components. Further, as stated above, the US's expert agrees that the concentrated solar radiation will be capable of producing steam that can be used to power a turbine. Heated water also may be used for many other purposes as *solar process heat*. See Mancini Deposition at pg. 156:6-12. Accordingly, this opinion by Mr. Johnson is based on sufficient facts and data and is the product of reliable principles and methods reliably applied to the facts of the case.

[12] Mancini Report at ¶ ¶ 15, 19, 23.
[13] Id. at ¶ 14.

The US takes the position that because Mr. Johnson has failed to maintain detailed records of his mathematical analyses and his testing of the solar system components, his opinions are not reliable. The US cites as an example, Mr. Johnson's opinion that one of the optional solar receivers "is approximately 95 percent heat absorbent."[67] The US faults Mr. Johnson's analysis because he purportedly did not complete the test in a manner that would be required for scientific publication and scientific peer review. Interestingly if this were to disqualify Mr. Johnson, it would likewise disqualify the US expert, who took no measurements, conducted no testing, and did no mathematical modeling.

This Court has already ruled that the viability of technology would not determine any of the counts and is at best a "tertiary concern."[14] Hence, any opinion by Mr. Johnson, or any expert retained by the US, regarding the rate of heat absorption by any of the optional solar receivers, is only marginally relevant in the present case dealing with tax deductions. Accordingly, this example asserted by the US is not probative on the question of the admissibility of Mr. Johnson's Expert Opinions and Testimony.

3. Mr. Johnson's opinions will help the trier of fact to understand the evidence and to determine facts in issue.

Based upon the US's introduction to its Motion, it appears that the US is primarily asserting that Mr. Johnson's opinions will not be helpful to the trier of fact because they are merely restatements of his version of the facts rather than opinions, and because he is biased due to his relationship with the other Defendants and his interest in the outcome of the case.

As the US has pointed out, Mr. Johnson is not a professional expert witness. He has never served as an expert witness before, and is not being compensated as a witness in this case.

[14] See ECF 158 at pg. 5.

Mr. Johnson may classify an opinion, which he does not believe to be reasonably debatable, as a statement of fact. That does not change the nature of the statement or statements in question. It is still an admissible opinion.

Rule 702 of the Federal Rules of Evidence imposes a gatekeeping function on district courts to ensure expert testimony is admitted if it is relevant and reliable.[15] The language "help the trier of fact" in Rule 702 is a relevance test for expert testimony.[16]. In addition to being scientifically valid, it must "fit"—it must relate to a disputed issue in the case.[17]

The reliability determination calls for a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[18] These two steps are codified in Rules 702(c) and 702(d). Although many factors may bear on whether expert testimony is based on sound methods and principles, the *Daubert* Court offered five non-exclusive considerations: whether the theory or technique has (1) been or can be tested, (2) been peer-reviewed, (3) a known or potential error rate, (4) standards controlling the technique's operation, and (5) been generally accepted by the scientific community.[19]

"The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate."[20] "The plaintiff need not prove that the expert is indisputably correct . . . . Instead, the plaintiff must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently

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[15] *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).
[16] *See Daubert*, 509 U.S. at 591.
[17] *Id.* at 591-92.
[18] *Daubert*, 509 U.S. at 592-93.
[19] *See Daubert*, 509 U.S. at 593-94.
[20] *Id.* at 595.

satisfy Rule 702's reliability requirements."[21] Neither Rule 702 nor Daubert "requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered."[22]

Neither the express language of Rule 702, nor any of the related case law calls for the exclusion of the opinions of an expert because the expert is not independent of the parties or because the expert has an interest in the outcome of the case.[23] The trier of fact, of course, is free to take into consideration, in its evaluation of an admitted expert opinion and its determination of the weight to be afforded to that opinion, any potential basis for challenging the credibility of the expert or the reliability of the expert's opinion. Such a conflict of interest goes to the weight of the evidence, not its admissibility.[24]

The US also asserts that "Johnson's report also expands outside of his area of expertise and infringes upon the province of the fact-finder, offering pure speculation on the ultimate issues of this case when he has no qualifications or expertise in such areas." In support of this assertion, the US refers to Johnson's report:

> "Therefore, the only component that ought to be at issue in this litigation is whether the Fresnel lenses sold to customers qualifies as solar energy equipment, not the actual workings of the turbine, heat exchangers or other components"; at 24, "there would be no DOJ action against Rapower3 if its power generation system had not already been successfully commercialized"; at 25, "The only part of our project that can be regulated by the federal government is what is being sold for which tax payers [sic] are claiming a tax credit or a depreciation deduction. This means that the only items that the government

[21] *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (citation omitted).
[22] *See GE v. Joiner*, 522 U.S. 136, 146 (1997).
[23] *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 (7th Cir. 1988) ("[N]othing in [Rule 702's] language suggests that a party cannot qualify as an expert"); *see also Braun v. Lorillard Inc.*, 84 F.3d 230, 237-38 (7th Cir. 1996) ("A litigant, or a litigant's CEO, or sole stockholder, or mother, or daughter is not, by reason of his or her or its relation to the litigant, disqualified as an expert witness.").
[24] *See Cole v. Reader's Digest Sales & Servs.*, Inc., 139 F. App'x 707, 708 (6th Cir. 2005) (citing *Tagatz*, 861 F.2d at 1042.)

> can challenge are the lenses and the only question is whether the solar Fresnel lens are [sic] solar equipment that produce solar process heat or electric power."[25]

An opinion by Mr. Johnson that the position in the solar energy system where "useful heat" is available for use in the generation of electricity or the production of process heat, or where concentrated solar radiation is available for use by a concentrated photovoltaic cell for the generation of electricity, does not expand outside of his area of expertise, does not amount to speculation on the ultimate issues of this case, and does not infringe upon the province of the fact-finder. Mr. Johnson's expertise, in particular his technical knowledge relating the IAS solar system, makes him qualified to offer the opinion being challenged by the US. As stated by Mr. Johnson in the portion of his report cited by the US discussed previously, "the Fresnel lens [a component of the IAS system] that are [sic] sold by RaPower3 are solar energy equipment specifically designed for and capable of generating useful heat that can be used for the generation of electricity and for other useful purposes, and is specifically designed for and capable of producing concentrated sunlight for use with concentrated photovoltaic cells in the production of electricity."[26] The opinion of Mr. Johnson that the US asserts "infringes upon the province of the fact-finder, offering pure speculation on the ultimate issues of this case" is a mere extension of the foregoing opinion and within the expertise of Mr. Johnson. There is no more qualified expert on the technology involved in this dispute than that possessed by the inventor. There is no other expert whose credentials can substitute for Mr. Johnson's.

[25] EFC Doc. 250 at pg. 8, n.42.
[26] EFC Doc. 250 at pg. 7.

Conclusion

Based on the foregoing, Defendants respectfully request that the US's Motion In Limine to Exclude the Expert Report and Testimony of Neldon Johnson be denied.

Dated this 17th day of December, 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' OPPOSITION TO UNITED STATES' MOTION IN LIMINE TO EXCLUDE THE EXPERT TESTIMONY OF NELDON JOHNSON** 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