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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' REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE "EXPERT" TESTIMONY OF NELDON JOHNSON** Judge David Nuffer Magistrate Judge Evelyn J. Furse

The United States moved to exclude the "expert" testimony of Neldon Johnson under Fed. R. Evid. 702 because Johnson's "expert" opinions are: unreliable, unhelpful to the trier of fact, and cumulative of testimony Johnson will offer as a fact witness (whether in his individual

capacity or as a representative of RaPower-3, LLC, International Automated Systems, Inc., and/or LTB, LLC).[1] Johnson's opinions rely upon insufficient facts and data, upon flawed methodology and assumptions, and do not reasonably apply the methodology to the facts here.

Defendants' opposition only serves to further demonstrate how unreliable and unhelpful Johnson's "expert" testimony is.[2] Defendants' opposition is rife with conclusory and unsupported statements about Johnson's methodology and the facts and data upon which he relies – which is a mere continuation of the conclusory and unsupported statements made by Johnson in his report and earlier testimony.[3] Neither Johnson nor Defendants have articulated the facts and data on which he relies or the methodology he used in formulating his opinions. Defendants have failed to meet their burden of establishing the reliability of Johnson's "expert" testimony[4] and as such, it should be excluded.

I. Johnson's "expert" testimony is unreliable because it is does not rely on sufficient facts and data, is not the product of reliable principles and methods does not reliably apply the principles and methods to the facts of the case.

Expert testimony must be reliable for it to be admissible.[5] When expert testimony is challenged under *Daubert*,[6] the burden of proof regarding admissibility rests with the party

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[1] United States' Motion, ECF Doc. No. 250.

[2] Defendants' Opposition, ECF Doc. No. 269.

[3] ECF Doc. No. 250-11, Pl. Ex. 643; ECF Doc. No. 250-10, Pl. Ex. 579; ECF Doc. No. 250-19, Pl. Ex. 681; ECF Doc. No. 269.

[4] *Truck Ins. Exch. V. Magnetek, Inc.*, 360 F.3d 1206, 1210 (10th Cir. 2004); *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001).

[5] Fed. R. Evid. 702.

[6] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

seeking to present the testimony.[7] Here, defendants, as the party proffering Johnson's "expert" testimony, need not prove that Johnson is indisputably correct or that his theory is "generally accepted" in the scientific community; rather, defendants 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 satisfy Rule 702's reliability requirements.[8] Here, defendants have failed to meet this minimal burden with respect to Johnson's "expert" testimony.

In determining whether an expert's testimony is reliable, the Court must look at whether the expert relied on sufficient facts and data, whether the testimony is the product of reliable principles and methods and whether the expert reliably applied the principles and methods to the facts of the case.[9] Johnson's report and proffered expert testimony relates to the Fresnel lenses sold by RaPower-3 and other components of Johnson's solar system. Specifically, Johnson opined that the Fresnel lenses (1) exist; (2) produce usable heat, and; (3) are part of a solar array that can be used to produce solar process heat and electric power.[10] To support these opinions, Johnson provides nothing more than conclusory and unsupported statements, completely failing to state the facts and data on which he relies or the methodology used in formulating these

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[7] *Truck Ins. Exch. V. Magnetek, Inc.*, 360 F.3d 1206, 1210 (10th Cir. 2004); *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009); *Ralston v. Smith & Nephew Richards, Inc.*, 275 F.3d 965, 970 n.4 (10th Cir. 2001).

[8] *Mitchell v. Gencorp, Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (citation omitted).

[9] Fed. R. Evid. 702; *see also*, United States' motion for a more detailed discussion, ECF Doc. No. 250, at 8-16.

[10] ECF Doc. No. 250-11, Pl. Ex. 643 at 1, 25. Notably, Johnson's opinion that the solar array *could* be used to produce solar process heat and electric power is starkly contradicted by the lack of any solar process heat or electric power produced from any solar array in the more than 10 years since Johnson started promoting his scheme and funding it from the U.S. Treasury.

opinions.[11] This failure alone renders Johnson's opinions unreliable and irrelevant.[12] Notably absent from Johnson's proffered report and testimony, and from Defendants' opposition brief,[13] is a description of the facts and data on which he relies and a description of the methodology he uses in forming his opinions.[14] Instead of detailing the facts, data, and methodology, Defendants offer sweeping statements that Johnson's opinions are reliable and are based on sufficient facts and data, are the product of reliable principles and methods, and reliably apply the principles and methods to the facts of the case.[15]

Defendants appear to imply that Johnson's personal knowledge and experience are sufficient for his "expert" opinion in this case. By utilizing this categorization, Defendants avoid offering details about the principles and methods upon which Johnson relies, including any scientific or engineering principles that are implicated by his proffered testimony. The Court cannot make 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

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[11] ECF Doc. No. 250-11, Pl. Ex. 643; ECF Doc. No. 250-10, Pl. Ex. 579; ECF Doc. No. 250-19, Pl. Ex. 681; ECF Doc. No. 269.

[12] *See, e.g., Nash v. Wal-Mart Stores, Inc.*, 2017 WL 5188339, at *7 (D. Colo. 2017) (Expert did not rely on sufficient facts or data when expert did not specify the facts and data he relied upon, including his calculations or the application of engineering principles that supported his theory, and also failed to apply industry standards to his analysis); *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 47 (1st Cir. 2005) (not an abuse of discretion to exclude expert's testimony that "failed to articulate any underlying methodology" for determining the expert's opinion).

[13] ECF Doc. No. 269, ECF Doc. No. 269-1. Defendants do not even attempt to have Johnson further demonstrate why his opinions are reliable through an affidavit; the only affidavit Defendants filed by Johnson was attached to their opposition to the United States' motion for partial summary judgment. ECF Doc. No. 266. Johnson's Declaration does not shed any further light on the facts and data he relied on in forming his "expert testimony" or his methodology in arriving at his opinions.

[14] ECF Doc. No. 250-11, Pl. Ex. 643; ECF Doc. No. 250-10, Pl. Ex. 579; ECF Doc. No. 250-19, Pl. Ex. 681; ECF Doc. No. 269.

[15] *Id.*

applied to the facts in issue"[16] if Johnson does not identify the methodology (and any scientific and engineering foundations) upon which his opinions rest. [17] Johnson failed not only to articulate his methodology, but to the extent that his "personal experience" substitutes for a detailed methodology, Johnson has failed to articulate how his experience is sufficient to lead to his opinions based on the facts of the case. [18] These failures render Johnson's "expert" testimony unreliable and irrelevant.[19] This lack of detail and explanation is particularly troublesome in light

[16] *Smith v. Terumo Cardiovascular Systems, Corp.*, 2017 WL 2985749, at *6, (citing *Daubert*, 509 U.S. 592-93); *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1221 (10th Cir. 2003); *Koken v. Black & Veatch Constr., Inc.*, 426 F.3d 39, 47 (1st Cir. 2005) (not an abuse of discretion to exclude expert's testimony that "failed to articulate any underlying methodology" for determining the expert's opinion); *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1121 (10th Cir. 2004) ("[W]hen the conclusion simply does not follow the data, a district court is free to determine that an impermissible analytical gap exists between premises and conclusion.").

[17] *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 ("Engineering testimony rests upon scientific foundations, the reliability of which will be at issue in some cases. In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. … there are many different kinds of experts, and many different kinds of expertise."; "In certain cases, it will be appropriate for the trial judge to ask, for example, how often an engineering expert's experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant engineering community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.") (citations omitted); *see also, Dodge*, 328 F.3d at 1222 ("To be reliable under *Daubert*, an expert's scientific testimony must be based on scientific knowledge, which 'implies a grounding in the methods and procedures of science' based on actual knowledge, not 'subjective belief or unsupported speculation.') (quoting *Daubert*, 509 U.S. at 590)).

[18] *Griffeth v. United States*, 672 Fed.Appx. 806, 813-14 (10th Cir. 2016) ("Experience alone may qualify a witness as an expert, but the witness still must explain how her experience is sufficient to lead to a conclusion based on the facts of the case") (citing *United States v. Fredette*, 315 F.3d 1235, 1240 (10th Cir. 2003)).

[19] *Hoffman v. Ford Motor Co.*, 493 Fed.Appx. 962, 976 (10th Cir. 2012); *see also*, *Chapagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1079 (10th Cir. 2006) (holding district court did not abuse its discretion in excluding expert's testimony where expert's opinion concerned one component of the aluminum market but his data was based on another component and he *failed to explain* that it was reasonable to use one component to opine on the other). *See also*, *Mitchell*, 165 F.3d at 782 (any step that renders the analysis unreliable renders the expert's testimony inadmissible; this is true whether the step completely changes a reliable methodology or merely misapplies that methodology) (quotation omitted).

of the "disruptive and revolutionary" technology Johnson purports to have invented that flouts the conventional knowledge of solar energy technology.[20]

Similarly, Defendants fail to identify the facts and data on which he relies in forming his opinions. In the Tenth Circuit, the assessment of the sufficiency of the facts and data is a quantitative rather than qualitative analysis.[21] The inquiry examines only whether the witness obtained the amount of data that the methodology itself demands.[22] As Johnson's methodology is unclear, it is near impossible to determine the amount of data demanded by that methodology. However, to the extent Johnson opines on the performance of his components, [23] he is relying upon some scientific and engineering principles even if he has not articulated them in a coherent manner. The goal of the reliability analysis is to ensure that the proffered expert has "employ[ed] … the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[24] One would expect that an expert evaluating solar energy technology would rely upon the data gleaned from the testing of the components of the solar energy technology, and probably expect to have data sets from more than one round of testing. However, Johnson has failed to

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[20] *See Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1235-36 (10th Cir. 2005) ("When an expert proposes a [novel] theory that modifies otherwise well-established knowledge about regularly occurring phenomenon, such as the normal ignition temperature of wood, we would expect the importance of testing as a factor in determining reliability to be at its highest. … What distinguishes the present case is that the need for testing is not at its highest because the reliability of the science of copper sulfide contamination is not in dispute, and thus the district court did not abuse its discretion in finding that the presence of a screen did not alter the reliability of the fundamental science.") (citing *Truck Ins. Exch. V. MagneTek, Inc.*, 360 F. 3d 1206, 1211-13 (10th Cir. 2004)).

[21] *United States v. Lauder*, 409 F.3d 1254, 1264 n.5 (10th Cir. 2005); Fed. R. Evid. 702 Advisory Committee Note to 2000 Amendments.

[22] *United States v. Crabbe*, 556 F.Supp.2d 1217, 1223 (D.Colo. 2008).

[23] *See, e.g.*, ECF Doc. No. 250-11, Pl. Ex. 643 at 16, heat exchanger is 95% absorbent and 98% holding (the ability to maintain temperature) for a period of time long enough to transfer the liquid for use in the Johnson turbine; at 17, 90% absorbency rate for solar receiver; and, at 18, system is approximately 95% heat absorbent.

[24] *Dodge*, 328 F.3d at 1222-23 (citing *Kumho*, 526 U.S. at 152).

provide specifics regarding the facts and data from his testing of components[25] and merely asserts – without support – that his personal experience and years of research are sufficient facts and data. Johnson's failure to articulate the facts and data on which he relies, however, further establishes how unreliable his "expert" opinions are. [26]

Rather than address the flaws we identified regarding the lack of reliability and helpfulness of Johnson's proffered testimony, defendants spend the majority of their opposition regurgitating the supposed qualifications of Johnson – mainly his ability to obtain patents from the United States Patent and Trademark Office ("USPTO"). This is a distraction because the point of Johnson's proffered "expert" testimony is not the patent process and how one obtains a patent from the USPTO. [27] Defendants also attempt to distract the Court with veiled attacks on

[25] As noted in our motion, Johnson does not keep records of his thousands of hours of testing and has made it impossible for anyone to replicate his findings. *See* ECF Doc. No. 250 at 11-12.

[26] *See, e.g.*, *Nash v. Wal-Mart Stores, Inc.*, 2017 WL 5188339, at *7 (D. Colo. 2017) (Expert did not rely on sufficient facts or data when expert did not specify the facts and data he relied upon, including his calculations or the application of engineering principles that supported his theory, and also failed to apply industry standards to his analysis).

[27] *See generally*, Johnson's Report, Pl. Ex. 643 at ECF Doc. No. 250-11. The United States does not dispute that Johnson has successfully received patents issued by the USPTO. ECF Doc. No. 250, at 5. However, as Johnson is aware, the mere issuance of a patent from USPTO does not speak conclusively to the validity of the patent. *See, e.g.*, *International Automated Systems, Inc. v. Digital Personal, Inc.*, 565 F.Supp.2d 1276, 1305-06 (D. Utah 2008) (court invalidated patent owned by IAS, one of the defendants in this case and of whom Johnson serves as CEO and President, because the written description in the patent was incorrect). Moreover, there is no requirement to prove commercial success in order to obtain a patent, and the issuance of a patent is not indicative that an idea will work in practice and be a commercial success. S*ee*, S*tudiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1339 (5th Cir. 1980) ("useful" for patent law is not the same as "useful" in the sense of commercial marketability; to require the product to be the victor in the competition of the marketplace is to impose upon patentees a burden far beyond that expressed in the statute); *Application of Anthony*, 414 F.2d 1383, 1396 (Cust. & Pat. App. 1969) ("But certainly 'commercial usefulness,' i.e., progress in the development of a product to the extent that it is presently commercially salable in the market place, has never been a prerequisite for a reduction to practice and the subsequent patentability of any of the classes of patentable subject matter set forth in [35 U.S.C.] § 101."); *see also*, 35 U.S.C. §§ 101, 102, 103, 111, 112, setting forth requirements of patentability.

the credibility of the United States' expert, Dr. Thomas Mancini.[28] But this attack is irrelevant to the reliability and helpfulness of *Johnson's testimony* under Fed. R. Evid. 702. Johnson does not claim to have relied upon Dr. Mancini in forming his opinions or "expert" testimony. And, in one last ditch attempt to distract from the real issues, defendants again purposefully misread this Court's prior rulings with respect to defendants' technology.[29] Defendants' irrelevant arguments do not impact the logical conclusion that Johnson's proffered "expert" testimony is unreliable and should be excluded.

II. Johnson's "expert" testimony is unhelpful to the trier of fact.

Expert testimony is also subject to Fed. R. Evid. 403, and the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, or needlessly presenting cumulative evidence.[30] The United States showed that Johnson's testimony will be

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[28] *See* ECF Doc. No. 269, at 10: "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." However, as the United States explained in its opposition to Defendant's motion in limine with respect to Dr. Thomas Mancini, Dr. Mancini utilized a reliable method for evaluating the validity and validity of proposed solar energy technology. ECF Doc. No. 263, at 17-23; Pl. Ex. 699, at ECF Doc. No. 263-2.

[29] ECF Doc. No. 269 at 10, "This Court has already ruled that the viability of the technology would not determine any of the counts and is at best a 'tertiary concern.' … Accordingly, this example asserted by the US is not probative on the question of the admissibility of Mr. Johnson's Expert Opinions and Testimony." (quoting ECF Doc. No. 158 at 5). Defendants continue to make this argument in spite of this Court's recognition that "the technology's viability might be a 'material matter' about which the defendants made certain representations. (ECF Doc. No. 202 at 2). Defendants' continued misreading of the Court's rulings show that they persist in their failure "to see allegations about the technology may be material to the claims in the complaint (ECF Doc. No. 202 at 2 (noting Defendants' misreading of this Court's order on the motion to bifurcate)).

[30] *See Cinema Pub., L.L.C. v. Petilos*, 2007 WL 1066628, at *3 (D. Utah 2017).

unnecessarily cumulative[31] and that Johnson's testimony will be rife with contradictions and irrelevant observations/opinions. Defendants again fail to address the merits of the United States' arguments and attempt to deflect scrutiny of Johnson's "expert" testimony by regurgitating Johnson's "qualifications" rather than explaining why Johnson's "expert" opinions would be helpful to the Court. Johnson's testimony as the inventor of the purported technology is more appropriately offered by Johnson as a fact witness rather than an expert. While there is no absolute prohibition on a party also serving as an expert witness, and there may be less risk of confusion or difficulty in separating Johnson's lay testimony from his "expert" testimony as the fact-finder in this case is the Court, permitting Johnson to testify as both an "expert" and lay witness is still unnecessarily cumulative and unhelpful.[32] Johnson's personal stake in the outcome of the litigation is too great for him to offer independent "expert" testimony that will be of help to the Court, perhaps even more because he is the inventor of the purported technology.[33]

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[31] The United States notes that nothing prevents Johnson from offering his opinion testimony as a lay witness under Fed. R. Evid. 701, if otherwise appropriate and admissible.

[32] *See Smith*, at *3 ("Expert testimony is subject to Federal Rule of Evidence. 'The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'" (quoting Fed. R. Evid. 403)).

[33] Bias is generally considering when determining the credibility and weight of an expert's testimony. However, some courts consider bias as a reason for excluding testimony under Fed. R. Evid. 403 whether in conjunction with other reasons to exclude the proffered expert's testimony under Fed. R. Evid. 702 or by itself. *See, e.g., Conde v. Velsicol Chemical Corp.*, 804 F.Supp. 972, 984 (S.D. Ohio 1992), *aff'd*, 24 F.3d 809 (6th Cir. 1994), *Viterbo v. Dow Chemical Co.*, 646 F.Supp. 1420, 1425-26 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987); *Johnston v. United States*, 597 F.Supp. 374 (D. Kan. 1984); *United States v. Kelley*, 6 F.Supp.2d 1168, 1183 (D. Kan. 1998). A party is undoubtedly an advocate for his own cause, therefore departing from the ranks of an objective expert witness and properly excluded from testifying as an expert. *See, e.g., Ordon v. Karpie*, 543 F. Supp. 2d 124, 127-28 (D. Conn. 2006) (excluding proposed expert testimony by party because he is too intertwined in the facts of the case and the proposed testimony would not assist the trier of fact to understand the evidence or to determine a fact in issue; moreover, it would be more prejudicial than probative because of the difficulty in separating his lay testimony from what he did from his expert testimony about what was the proper protocol in the situation); *Proteus Books Ltd. v. Cherry Lane Music Co.*, 873 F.2d 502, 515 (2d Cir. 1989) (not manifestly erroneous for district court to rule that employee of plaintiff could not qualify as an expert because he was an interested party).

III. Conclusion

Because Neldon Johnson's proposed expert testimony is unreliable and unhelpful to the trier of fact, the Court should exclude his "expert" testimony.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, 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/ Erin R. Hines
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Trial Attorney