Plaintiff has rested its case. Defendants Move the Court to dismiss the case against them as a matter of law under Rule 52c:[1]

Judge Leaned Hand described the conflict between taxpayer and tax collector:

> "**Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant[2]**." *Commissioner v. Newman*, 159 F.2d 848, 851 (2d Cir. 1947), emphasis added.[3]

Tax avoidance is built into the Internal Revenue Code because Congress wishes to stimulate some activity and discourage others. Therefore the 75,000 pages of legislation adopted by Congress encourages taxpayers to search for ways to reduce taxes.

At this point in the case the Court has heard only the government's witnesses. They have only brought their best evidence from a handful of selected few witnesses they believe best establish their position.

They have provided a voluminous documentary case that primarily proves that Defendants have made public statements of their beliefs about available tax benefits. The fact statements were made does not prove a claim. Defendants do not dispute they have made these statements. They believe there are tax benefits available for purchasing RaPower-3 lenses, and have also consistently told purchasers to check with their own tax preparer to decide if they qualify. (See, e.g., PLEX **5** at pg. 2; PLEX **14** at pg. 2; PLEX **20** at pg. 3; PLEX **27** at 1-3; PLEX **94**, at pg. 5;

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[1] Rule 52c: If a party has been fully heard on an issue during a nonjury trial and the against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defended only with a favorable finding on that issue.

[2] The word "cant" means hypocritical and sanctimonious talk.

[3] See also, Learned Hand's oft quoted: "Any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes." *Gregory v. Helvering*, 69 F.2d 809, 810 (2d Cir. 1934)

PLEX **95** at pg. 5; PLEX **119** at pgs. 1-2; PLEX **174** at pgs. 1-2; PLEX **511** at 1-2; PLEX **531** at pgs. 3, 4, 5, 6; PLEX **533** at pgs. 5-6; PLEX **620** at pg. 6, among others)

From the original complaint through all of discovery, the government has never identified what the "illegal scam" consisted of—they have only asserted the unsupported conclusion there is an "illegal scam." What proof does the Court have from the government that there is an illegal tax scam?

The Tax Code is nearly impossible to clearly understand. The testimony of tax attorney Kenneth Birrell described the code sections involved in this dispute: "Well, when it comes to tax law, there are many, many different interpretations of tax law." (TR p. **356**.)

Testimony of Oveson was that he needed more research, and never finished forming an opinion (TR **351**.) This was important because, as he testified, "when it comes to tax law, there are many, many different interpretations of tax law." (TR P. **356**.) Mr. Oveson also testified:

> Q. Do tax practitioners have different opinions or interpretations of the tax code and regulations?
> A. Yes, we do.
> Q. Can parts of the tax code be interpreted differently based on the taxpayer's particular circumstances?
> A. I believe so, yes.
> Q. Could another accounting firm look at the implementation of the solar lenses to further research and development as placed in service?
> A. They could. (TR P. **394**.)

In *Union Dominion Industries, Inc. v. United States*, 121 S. Ct. 1934 (2001), the US Supreme Court reaffirmed the tradition that defendant taxpayers are entitled to the benefit of any ambiguity in the tax code. Justice Thomas wrote:

> **[I]n cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter**. See *Leavell v. Blades*, 237 Mo. 695, 700-701, 141 S.W. 893, 894 (1911) ("When the tax gatherer puts his finger on the citizen, he must also put his finger on the law

> permitting it"); *United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer"); *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) ("The provision is part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers"). Accord, *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891); *Benziger v. United States*, 192 U.S. 38, 55 (1904). **(Citing 5 prior cases.)**

Justice Stevens added, "**Justice Thomas accurately points to a tradition of cases construing 'revenue-raising laws' against their drafter**."[4]

This case turns on only a few questions:

First, whether solar energy tax credits under IRC Section 48 are available for the Defendant RaPower 3 Fresnel lens sales? The tax credit of Section 48 was adopted by Congress to provide an incentive for creation of alternative forms of energy. (Mr. Birrell, TR P. **702**.) That purpose should inform the Court's decision in this matter.

Second, whether depreciation under Section 167 is available for those same Fresnel lenses? The depreciation under Section 167 requires equipment to be both "placed in service" and to be "used in a trade or business." Solar equipment can be placed in service by using it in research and development. (Mr. Birrell, TR P. **702**.)

The IRS has defined the term "placed in service" in Treasury Reg. 1.46-3(d)(1)(ii) to mean when it is "placed in a condition or state of readiness and availability for a specifically assigned function." This is quoted in the Kirton & McConkie letter, Exhibit **362** at page 12. That letter explains:

> However, the Tax Court has held that for property purchased for lease to others to be placed in service, "it is not necessary that the property actually be used during the taxable year in the taxpayer's profit-motivated venture. It is sufficient that the property be available for use. *Waddell v. Commissioner*, 86 T.C. 848 (1986), citing *Sears Oil Co.*

[4] The decision is discussed in Steve R. Johnson, *Should Ambiguous Revenue Laws Be Interpreted in Favor of Taxpayers?* 10 Nev. Law., Vol. 10, Issue 4, page 15-16 (2002), available at http://ir.law.fsu.edu/articles/277

> *v. Commissioner*, 359 F.3d 191, 198 (2d Cir. 1966) and *Grow v. Commissioner*, 80 T.C. 314, 326-327 (1983).

The guidance from the Treasury and the Tax Court supports Defendants' position in this dispute. Further, the US Supreme Court has held that interpreting the Internal Revenue Code should be based on "the plain meaning of the statute, its origin, and its purpose." *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979).

The testimony in this case includes not only statutory language, but also the purpose for adoption of the tax credits. Tax attorney Kenneth Birrell testified:

> Q. In performing your research, you concluded that the solar tax credit in Internal Revenue Code Section 48 is there to provide an incentive for the creation of alternative forms of energy; isn't that true?
> A. Yes. (TR P. **702**.)

In reaching other subsidiary issues, the record in this case establishes:

Testimony of Kenneth Birrell was that property was "placed in service" if used for research and development (TR **702**.) Technology does not have to be "operational or commercially viable before the taxpayer can apply for or receive the solar tax credit or depreciation." (TR **702**.)

The meaning of the words, "placed in service" is important because equipment must be placed in service to qualify for deduction under Internal Revenue Code section 179.

Ms. Anderson, who researched the meaning of these words testified:

> Q. And then, in subsection D, you talk about property being placed in service. And, based on my review, it appears to be a definition of what placed in service is, pulled from the Internal Revenue Code or Treasury Regulations, correct?
> A. Correct.
> Q. You say: You place property in service when it is ready and available for a specific use, whether in a business activity, an income producing activity, a tax-exempt activity or a personal activity. Even if you are not

> using the property, it is in service when it is ready and available for its specific use. And you confirmed that through your research?
> A. I believe that was probably verbatim from my research. (TR. P. **657**.)

Tax preparer, advisor and CPA Oveson testified:

> Q. BY MR. MORAN: Mr. Oveson, you used the term, placed in service.
> A. Yes.
> Q. What does that mean to you?
> A. Well, for us placed in service means the equipment is on site and it works and that someone can use it. For example, if I were to buy a computer for our office it means that I have that computer in the office. I can plug it into the wall. It has the programs available. I can use it to do whatever I need to do on the computer. So it means that I possess the equipment and that it operates and it can be used. (TR p. **344-345**.)

In response to questions from the Court, IRS Enrolled Agent Mr. Jameson also addressed the meaning of "placed in service" and testified:

> Under the Internal Revenue Code there is a couple of different sections about placed in service. There is three different comments. Comment number one is the asset is available and ready for use and in case there is a down time or a broken one that's considered placed in service. The third one states that if the asset is being used in the research and development or some other aspect of the business, like say advertising or something like that, but the main thing is research and development to further produce or advance the technology.
> THE COURT: Okay.
> THE WITNESS: That makes it all placed in service. (TR P. **1315**.)

Mr. Jameson investigated at the site, confirmed the lenses were being stored and available to be used, and were in fact being installed for use. This satisfied him that they were indeed "placed in service" as defined by the Internal Revenue Code:

> Q. And during your site visit, did you see solar lenses in inventory at the warehouse?

A. Yes, sir, I did.
Q. Did you make any inquiry or determination about whether those were available for use?
…
THE WITNESS: Yes, sir, I did.
Q. (By Mr. Snuffer) And what did you determine?
…
THE WITNESS: They showed me the production facility outside where they had several individuals who were taking the solar lenses and placing them into the circular units. There would be four circular units per tower and they had to get them into the circular units first before they could be placed on a tower. And they showed me how they were placed in the process of doing that.
Q. (By Mr. Snuffer) Okay. Were any of the lenses that you witnessed broken or replaced by other lenses as you were there observing?
A. They weren't at that particular time when I saw that, but when I first went out there yes, there were some broken lenses that you could see had clearly been replaced.
Q. Okay. In any event were you satisfied that they were available for use?
A. Yes, sir, I was. (TR P. **1321-1322**.)

This determination of "placed in service" is important because once it is placed in service it qualifies for Section 179 depreciation. As Ms. Anderson testified: "However, once the equipment is placed in service, the member can then take advantage of the Section 179 deduction." (TR P. **656**.)

This does not mean the property must be in use, but only that it is available for use. (Ms. Anderson, TR P. **674**; Ex. **570**, Ex. **23**.)

The words "solar process heat" are used in Section 48. Section 48 is one of the sections Defendants are accused of violating by a "scheme" to defraud.

Accordingly, the meaning of "solar process heat" is critical to the government's case.

"Solar process heat" is used but not defined in the Internal Revenue Code. There is no regulation that explains the meaning.

The interplay between producing "solar process heat" and a tax credit under Section 48 has been covered in the following testimony:

Dr. Mancini explained on direct examination:

> Q. Are you familiar, Dr. Mancini, with the concept called solar process heat?
> A. Yes.
> Q. Would you please describe it for the Court.
> A. **Solar process heat is basically a way of taking thermal energy that you collect and applying it to some other application, other than generating power**, using the heat. For example, a couple of the examples I'm familiar with are heat provided to a laundry, for example, to heat water up so that they wouldn't have to burn natural gas to do it. Or I actually worked on a project, when I was a professor, to heat some potash out in eastern New Mexico as part of a processing step. It's fairly low-grade energy. It's a difficult thing to do to find area to put collectors where they are going to be used, and of course you don't have thermal storage, so you're only operating when the sun shines. So process heat turned out to be not a very -- not a very useful way to use solar energy. (TR P. **105-106**.)

Then on cross-examination he added:

> Q. You gave me a definition of solar process heat. And I took notes. This was what I got from your testimony. Let's see if I got you right. **Solar process heat is using collected solar heat for some purpose other than power**. Is that how you understand the words solar process heat?
> A. Yeah. It's fundamentally for some process or some other use to do a useful activity.
> Q. Would you agree with me that if you collect solar heat through Frensel lenses in order to do research and development that that is solar process heat?
> …
> THE WITNESS: I don't know.

> …
> THE WITNESS: I don't know the answer to that. I suppose if you were doing research and development and as part of the process where heating water for a site that could be considered process heat. (TR P. **199-200**.)

The Court asked witness Richard Jameson about solar process heat and he testified:

> The lenses, in order to be eligible for the solar energy credits under Section 38 and under Section 48, must be used to produce solar processed heat. They were designed and are being used to produce solar process heat to my understanding when they are placed in service. Once they meet the requirement of Section 38 and then go down to Section 34 and meet that requirement on the solar process heat, they then fall under the ability to take depreciation under 1016 or under 162 depending upon which way you want to go. But they have to meet those two criteria first.
> THE COURT: Your conclusion that they were used to produce heat was based on what?
> THE WITNESS: Based on the placed in-service letter and the fact that when I was out at the site I did see the solar lenses on a tower and they were -- it was making a hole in the ground that would, you know, fry things. It was pretty hot.
> THE COURT: And then your last statement I guess reflects what you just told me. Because the lenses produce heat, they're clearly eligible for the energy credit as per Internal Revenue Code Section 48. (TR P. **1314-1315**.)

The lenses do produce solar process heat as stated in Section 48.

The testimony about qualifying for depreciation was addressed by both the Anderson Law letter and then by the Kirton & McConkie letter. Both reached the identical conclusion: If the property is used in a trade or business it qualifies for depreciation as a non-passive business activity. As Ms. Anderson, who researched the issue, testified:

> Q. Okay. And so you say: Simply stated, if the taxpayer does most of the work, income or loss will be non-passive. And you drafted that language, right?
> A. I did.
> Q. There is no specific number of hours associated with this test. And that you gleaned from your research?
> A. I believe so.
> Q. In addition, the term "substantially" is not defined in the regulations.
> A. This is looking more like it was still part of something I had copied out of the regulation, to be honest.
> Q. Okay. So this is a result of your research?
> A. It's either my paraphrase of the research or the research verbatim.
> (TR P. **651**.)

Code Section 469 gives guidance for "passive" verses "active" business activity. Testimony and exhibits from Richard Jameson explains that although there is a "per se" rule involving rental activities, there are seven tests to be used to determine the final result. "Test number two is, if you do substantially all the work in that particular business, then you meet that particular test, where you're able to deduct everything under that particular guideline. And 'substantially' is not defined in the code sections." Therefore, "substantially" could "mean one hour, ten hours, two weeks." (TR p. **1340-1341**.)

Jameson also explained: "there are many code sections that actually overlap not only with C-Corporations but S-Corporations, partnerships, self-employed individuals, and just regular individuals, because our tax laws are so complex, that it may be that may be aimed at one specific target but a lot of those regulations overlap onto other areas within the code section." (TR p. **1326**.)

Government bears burden to prove three issues:

First, a violation of the IRC by a false or fraudulent tax scheme.

Second, that Defendants knew or should have known of the false or fraudulent nature of the tax scheme.

Third, a reasonable approximation of an amount to be disgorged.

Government has failed to meet their burden to prove all of these and therefore the case ought to be dismissed:

False or fraudulent tax scheme:

Not proven: The following parts of the record show that the solar lenses qualify for tax credit and depreciation:

1st: Fresnel lenses are a well known way to generate solar process heat. Mancini provided Exhibit **754** identifying Fresnel Lenses as one of the four well-known concentrated solar power systems. Of these four, only three have proven viable. Mancini's Exhibit **755** listed Fresnel Lens concentrated solar power systems as one of those three commercially viable systems.

2nd: Kirton & McConkie memorandum (Exhibit **362**.) Birrell testified it was "an accurate statement of the law." (TR P. **696**.) He "tried to address the issues that I thought were relevant." (TR P. **697**.) He "expected for the client to rely on the… memorandum." (Id.) He knew and expected the memorandum "would be shown to people as part of a marketing effort." (TR P. **701**.)

3rd: Anderson Law memorandum (Exhibits **23** and **570**.) Ms. Anderson also testified she did her own research, had enough time to complete her work, did a competent job, and had enough information to complete her work. (TR P. **643-644**.)

4th: We have the testimony and exhibits from Richard Jameson giving an analysis of the tax laws. He explained the lenses qualify for the deduction of depreciation and for Section 48 tax credits provided to the IRS (Exhibits **163** and **638**.)

5th: Lynette Williams testified that she relied on her Certified Public Accountant for tax advice, who confirmed that there were potential tax benefits. (TR P. **1040**.)

6th: Attorney Preston Olson testified that he relied on his tax advisor and his own research and common sense when determining there were tax benefits available for solar lens purchases. (TR P. **1156-1157**.)

7th: Robert Aulds testified that he relied on his tax accountant to decide the system qualified. (Depo. Tr. P. **188**.) He "went by what his accountant said" and nothing from RaPower or its website. (Depo. Tr. P. **188**—also P. **175**.)

The record in this case shows that although the IRS may disagree, six separate tax professionals including lawyers, CPAs and Enrolled Agents have concluded the Internal Revenue Code allow the solar lenses tax credits and depreciation.

The government may disagree. But disagreement has nothing to do with meeting its burden of proof. This case ought to be dismissed.

Knew or should have known:

Even if the Court disagrees with the meaning of the Internal Revenue Code, the government is not entitled to any relief because the issue that the Defendants "knew or should have known" that the lenses do not qualify for favorable tax treatment is not proven because:

1st: Defendants had the Kirton & McConkie memorandum advising them the lenses qualified for depreciation and tax credit.

2nd: Defendants Anderson law memorandum advising them of the same thing.

3rd: Defendants' beliefs are justified by the testimony of Richard Jameson, who provided tax advice and filed tax returns for over thirty of the lens purchasers.

4th: Other tax advisers independently evaluated the tax returns for lens purchasers and confirmed the lenses qualified for depreciation and tax credit. Defendants consistently deferred to the customer's own tax advisor to confirm or deny that the purchase would affect their taxes.

5th: The government has not proven how it is even possible to be engaged in a tax scheme when the scheme consistently tells purchasers to check with their own tax advisor to decide what effect, if any, purchasing lenses will have on their taxes.

The government's case defies common sense: No person operating a "scam"

-advises purchasers to check with tax preparers,

-spends eight years in development of lenses,

-secures 7 patents on unique improvements to manufacturing Fresnel lenses,

-obtains 26 solar related patents on a system that required more than $40 million in development costs,

-does the kind of manufacturing and assembly work shown in Ex. 1500

IF all they were doing was a tax scam. No "scammer" has produced as much or made so many patentable innovations along the way. Surely the Court can see through this false accusation! At a minimum, Defendants have never behaved as if they knew or should have known they were involved in anything other than a legitimate and valuable research and development project. They worked for years before any tax benefits became available. The taxes were a nice incentive from the government to continue the development. But tax benefits had NOTHING to do with beginning or pursuing this effort. There was no scam, and Defendants have never acted as if they knew or suspected they were involved in a scam.

DAMAGES were not proven:

Court's Order on March 29th Docket No. 359:

> This Order finds:
> -A party is **not unjustly enriched if the gains he acquired flow from any legitimate business activity**.
> -A **claimant bears the burden of showing the disgorgement amount is a reasonable approximation of defendants' unjust enrichment**.

The government has failed to distinguish between revenues from lens sales and from other sources. When asked by the Court about the accounting introduced by the government in summaries, the government explained on Thursday April 5TH:

> when we're trying to arrive at a reasonable approximation of the defendant's gross receipts because of the way the defendants promoted the scheme they told people it was $105 as a down payment for each lens.
> THE COURT: Right.
> MS. HEALY-GALLAGHER: So if we take the total number of lenses sold and multiply it by $105 that's the bottom end or a potential bottom end of the disgorgement that the defendants could be liable for. And then, of course, defendants also told people that they had to submit $1,050 total per lens. So the top end of the disgorgement could be the total number of lenses sold times $1,050. Now, of course, there is evidence that not everybody paid for every single lens in the amount of $1,050. But again, we do not have defendant's accounting records.
> THE COURT: Can you remind me the number of lenses at the bottom of 742B?
> MS. HEALY-GALLAGHER: That is 49,415. (TR p. **892**)

The government has not made a "reasonable approximation" but only provided widely speculative guesses from the bottom guess of $5,188,575 to a top guess of $51,885,750. Whether the top or the bottom, it is speculation, fails to constitute a reliable number based on a reasonable method of calculation.

That is not the kind of "proof" that amounts to a "reasonable approximation". There is no proof that any sale was based primarily or even partially on the expectation of tax benefits. The only proof any purchasers claimed tax benefits involve only a handful of purchasers. To the contrary we also have testimony that other purchasers did not seek or use tax benefits. Matt Shepherd did not claim any tax benefits.

The government has not offered any proof to establish a reasonable approximation of the lens sales related to tax benefits and excluding those sales that had nothing to do with tax benefits.

The excuse offered by the government for its failure is that they did not get enough discovery to make a better computation. However:

-WE ARE NOT IN DISCOVERY WE ARE <u>AT TRIAL</u>

-SHOULD HAVE BEEN ADDRESSED IN DISCOVERY

-COURT ORDERED DISCOVERY IN DOCKET **283** REQUIRING PRODUCTION OF THREE CATEGORIES OF DOCUMENTS BE PRODUCED:

> 1. The computer program, or data extracted from it, that (among other things) purportedly tracks solar lens customer names and sales, serial numbers of lenses, and the location of any customer's lens;
>
> 2. All RaPower-3 solar lens purchase agreements with customers since 2010; and
>
> 3. The solar lens purchase contract between SOLCO I and a "company back East" with a down-payment of $1 million (Docket **283**, P. 2.)

-THESE ARE THE ONLY ITEMS THE GOVERNMENT RAISED TO THE COURT WHEN THEY OBTAINED AN ORDER TO COMPEL PRODUCTION

-CANNOT REDUCE THE BURDEN OF PROOF NOW BECAUSE THE GOVERNMENT FAILED TO DO DISCOVERY

-THERE IS NO REASONABLE PROOF!

It is critical that the Defendants be "unjustly enriched" before the government is entitled to disgorgement. The record in this case includes the following statement of undisputed fact:

> In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement if they did not receive the tax benefits Defendants promote. In January 2015, Johnson, via Shepard, reiterated this offer to customers who were being audited for having claimed the tax benefits that Defendants promote. He said, "We … believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction. You can most likely get the IRS to drop the penalties."

There can be no "unjust enrichment" when Defendant Neldon Johnson has offered on multiple occasions to refund all of the lens purchase payments if tax benefits are not available. Significantly, even after knowing that the IRS was disallowing the benefits in multiple audits, purchasers determined to keep their lenses rather than seeking refunds. They want to be involved. As Preston Olsen testified: "the technology seems borderland revolutionary. I think it is going to be incredibly profitable unless they're put out of business by the government." (TR P. **1154**.) Despite all the risks involved Preston Olsen put his dollars behind this project:

> Q. And why did you go forward with additional purchases if you were aware of those risks?
> A. I still really believe in the company. I think they're going to figure it out. I think their technology is very interesting. (TR P. **1172**.)

Similarly witness Lynette Williams rejected the offer to return her lenses and get a refund. She wanted to keep her lenses, even after the IRS audit and rejection of her deduction. (TR P. **1000-1001**.)

Robert Rowbotham testified that he believed it was possible to make a profit from owning the lenses, even with market risks. (TR P. **952.**)

Matt Shepherd purchased lenses because he wanted to profit from owning, and did not claim any tax benefits. This sale (because it involved NO tax issue) is by any measure a "legitimate business activity" and therefore cannot be subject to disgorgement.

Before trial, you ordered at Docket No. 359: "A party is **not unjustly enriched if the gains he acquired flow from any legitimate business activity**." Purchasing in a promising solar energy project, as the witnesses in this case have testified *motivated them,* separate from any tax effects, is a "legitimate business activity." Therefore the gains, if there have been any, are from a "legitimate business activity" and cannot be unjust. There should be no disgorgement.

Peter Gregg testified that he purchased because of the "groundbreaking" bladeless turbine technology, not tax benefits. (Gregg Depo. P. 163, lines 7-13, 22-P. 164, line 9.) He is in it to "make money." (Gregg Depo. P. 87, lines 9-13.)[5]

Because there is no "reasonable approximation" offered as proof in this case, only a widely speculative range of numbers amounting to dubious guesses, and because the purchasers were motivated by the enthusiastic desire to purchase the technology being developed by Defendants, there has been no "unjust enrichment." Therefore disgorgement should not be ordered in this case.

DAMAGES: Ought to be dismissed.

If the Court grants our motion as to the meaning of the tax code, this case ought to be dismissed in its entirety.

If the Court denies our motion as to the meaning of the tax code, then it needs to address whether the Defendants knew or should have known the tax benefits were illegal. On that issue, if the Court decides the Defendants did not know or should have known, then the question of damages is no longer involved because both prongs must be satisfied before damages are assessed. The Court could still issue an injunction, but it would be prospective only, requiring the Defendants to no longer represent tax benefits are available. But damages would be unavailable.

If the Court denies our motion as to the meaning of the tax code, and further determines the government has met its burden to show the Defendants knew or should have known benefits were unavailable, the Court can still dismiss damages from the case. Damages ought to be dismissed because the government has clearly not met their burden or the requirements set by the Court's Order on March 29th Docket No. 359: "A **claimant bears the burden of showing the disgorgement amount is a reasonable approximation of defendants' unjust enrichment."** There has been no "reasonable approximation" established by the government in this case and therefore damages ought to be dismissed.

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[5] Gregg does not expect to realize any return until after the company recovers its development costs. (Gregg Depo. P. 61, lines 5-12.)

Responding to the government's PowerPoint:

Nothing in the government's response addresses the constant recommendation given by Defendants for purchasers to "GET YOUR OWN TAX ADVICE"—even slides they used include this advice to check with their CPA.

A solar project **does not need to succeed** to qualify.

A solar project **does not need to be commercially viable** to qualify.

The **technology does not need to work** to qualify.

The tax purpose was to **stimulate innovation**—and it has worked!

The best evidence of stimulating innovation is the numerous solar energy related patents that have been granted.

NOTHING suggests that all taxpayers CANNOT qualify.
Several of the government's slides show some purchasers can qualify if they meet conditions.
-EVEN UNDER THE MOST NARROW VIEW, SOME PURCHASERS WILL MEET THE CONDITIONS AND WILL QUALIFY.
-If SOME will qualify, and ALL are told to get tax advice from a qualified tax advisor about their circumstances, there cannot be "an illegal tax scheme".

Research and development qualifies as a "useful function" employing solar process heat.

The government focuses on producing "electrical power" when the tax code only requires solar process heat to be used for a useful function. That was done here. The government is wrong.