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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, and NELDON JOHNSON, Defendants.	**VERIFIED OBJECTION TO DECISION AND ORDER GRANTING TURNOVER MOTION [ECF 757]** Civil No. 2:15-cv-00828-DN-EJF Judge David Nuffer

Non-party Glenda Johnson objects to the proposed "MEMORANDUM DECISION AND ORDER GRANTING TURNOVER MOTION; DENYING MOTION TO STRIKE, AND OVERRULING OBJECTION TO AUTHENTICATION OF EXHIBITS" ("Decision and Order") submitted by the Receiver, Wayne Klein, for the following reasons:

1. The proposed form of Decision and Order contains findings of fact that violate Rule 56 and will be used to collateral estop Mrs. Johnson from defending herself in the lawsuit filed by the Receiver against her in Case No. 2:19-cv-00625-DN-PK.

The proposed Decision and Order contains the following language at Section E:

> Glenda Johnson argues there are disputed issues of fact regarding whose funds were used to purchase the properties because she alleges the funds were paid to her pursuant to an alleged contract between Solstice and Glenda Johnson related to the construction of solar towers to be used in connection with the abusive solar scheme. Glenda Johnson attached an alleged contract to her declaration. The purported contract, however, does not create issues of fact. Instead, this alleged contract is further proof that the fraudulent scheme was to personally enrich Neldon Johnson and his family.
>
> First, the alleged contract is unenforceable because it is in furtherance of the solar energy scheme and massive tax fraud. One who has "participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction.'" This rule is not limited to contracts that are illegal because of their subject matter, *e.g.,* a contract to manufacture illicit narcotics. Instead, "[a] bargain may be illegal by reason of the wrongful purpose of one or both of the parties making it. This is true even though the performances bargained for are not in themselves illegal . . . A party who makes such a bargain in furtherance of his wrongful purpose can not enforce it...."
>
> Next, the Court has previously found that this alleged contract was "not believable." Glenda Johnson has failed to show that she provided any consideration for the monies purportedly owing to her. There is no evidence of a bargained for exchange and it is hard to imagine what consideration Glenda Johnson could provide Solstice or RaPower that would merit the payment of $35 million for the construction of solar towers—which, under the terms of the alleged contract, she was not paying to construct.
>
> Finally, notwithstanding that the contract is unenforceable and unbelievable, Glenda Johnson could not have used funds she purportedly received from the alleged contract for many of the Real Property transactions because the transactions took place before the effective date of the contract or because the funds transferred to Glenda Johnson for the real estate purchases were from Cobblestone bank accounts and not from RaPower or Solstice.

The language is superfluous to the findings and decision of the court as to this motion and should be stricken because of the certainty that the Receiver will use this conclusion in the pending collection case against Mrs. Johnson. There is a genuine issue of material fact as to the meaning and enforceability of the contracts affecting Mrs. Johnson and this court should not enter a finding

that conclusively finds the contracts are "unenforceable and unbelievable" on summary judgment. It is not necessary or directly related to the Order, but appears to be a calculated attempt to foreclose this issue from being tried in plenary proceedings before a jury. Such a backdoor tactic should not be accepted by the Court. At a minimum, the Decision and Order should reflect that it will have no preclusive effect on any proceedings, other than this case.

2. The Decision and Order should not be entered against Glenda Johnson because she is presumed innocent of any wrong doing until there is a trial on the merits, that is a basic foundation of all our judicial authority.

This means that the right to litigate any and all issues that may affect our rights, we have the right to personally litigate those issues before those issues can impact our life liberty and pursuit of happiness, including property rights. We call this due process. For this reason, any ruling, motion, or judgment cannot have any jurisdiction until that person has the right to litigate all issues that those motions or judgments will impact their lives. Especially the rights of a non-party to the original case.

Therefore, before any impact that summary judgment can have on the non-party is when the case has been fully litigated. Therefore, she has the right to collateral attack the original case. The question of whether any money was fraudulent that Glenda may have received in this case has not been proven or litigated. Until she has had the opportunity to litigate the issues that affect her rights in the original case this court lacks jurisdiction and is being asked to overreach in this draft order.

The following will indicate the primary issues, but not all, the fact that have any impact on her rights must be given the full respect of the law including the right to a jury trial.

Mrs. Johnson should be allowed to challenge the original case decision because it was entered fraudulently and without a basis in law or fact. Below are all the reasons why this case should be allowed to proceed and the government's motion denied:

A. The IRS changed its position on the Johnson Fresnel lenses from the District Court case in proceedings before the Tax Court as more fully described herein.

In this case, including all aspects of discovery, pretrial proceedings and trial, the government (i.e. the IRS) claimed the Johnson Fresnel lenses were not qualified as solar energy property within the meaning of §48 of the Internal Revenue Code. However, the IRS expressly conceded in the Tax Court that the solar lenses qualify as solar energy property under the IRS code and regulations. The IRS's position before the Tax Court is that the lenses qualify for tax credits but may be limited to passive income, depending on the taxpayer's circumstances.

The Department of Justice should have alerted the District Court to this new position because it materially affects the Court's decision in this, the original case. The Department failed to do so. Taking two contradictory positions on the same lenses and applying the same law is grossly misleading. The failure to alert the District Court to the contradictory positions violates the Department's duty of candor to the Court.

Below are excerpts from the transcript from the recent Tax Court proceedings:

> IRS (Mr. Sorensen): The last point, Your Honor, is, **at no point in time has the Respondent ever contended that the lenses do not produce heat in some fashion.**
> THE COURT: That's the point I want to get to. It seems like they were -- that Respondent concedes the point that they thought -- they demonstrated by their experiment.
> IRS (Mr. Sorensen): Concede is a strong word, Your Honor. **We have never contested that the lenses do not produce some form of heat.**
> THE COURT: So Respondent does -- **in your Pre-Trial Memo, you said you agree that the lenses can be used to produce enough heat that in some system --**
> IRS (Mr. Sorensen): Some system somewhere.

> THE COURT: **-- that could potentially produce energy electricity, right, in some system?**
> IRS (Mr. Sorensen): **Could produce electricity.**

(TR 15:14-16:5) (emphasis added).

The Tax Court referenced the Pretrial Memorandum submitted by the IRS. In it the IRS states, in relevant part:

> "Petitioners view this report as a factual document that will support their position that the equipment they purchased meets the Treas. Reg. § 1.48-9(d)(1) definition of the term "solar energy property" which includes equipment materials and parts solely related to the functioning of such equipment that use solar energy directly to generate electricity." The engineers allegedly conducted a test on September 5, 2018 to show that the lenses could be used as a component in a system to produce electricity. **The respondent has <u>never</u> disputed that the lenses could be a component in a system to produce electricity[.]**

IRS Pretrial Memorandum at p. 3 (emphasis added)

The discussion continued:

> IRS (Mr. Sorensen): But yes, **the Court is correct in that we did state that in our pre-trial memo.** So we believe that with that fact involved, that nothing that these experts will testify to is relevant.
> THE COURT: Um-hum. Because the experiment goes to a point that's not in --
> IRS (Mr. Sorensen): Not in dispute. (TR 18:5-11)

> THE COURT: Okay. Mr. Jones, would you like to address the expert report point?
> MR. JONES: Yeah, the expert report --
> THE COURT: The thing that troubles me is --
> MR. JONES: Sure.
> THE COURT: -- primarily, it does seem to me that it may not just be relevant. **If Respondent agrees that you can take these lenses, and they can be used to generate enough heat through some system to power an engine and produce electricity, if that's conceded,** I don't see what more they prove by their experiment than that.
> MR. JONES: If I can get that concession on the record, I will agree. Yeah.
> THE COURT: Well, I think they said they have an agreement, but concession was too strong a word.
> MR. JONES: Right.
> IRS (Mr. Sorensen): **We don't disagree, Your Honor, that the lenses do produce heat, and that heat, in some systems, can be then used to generate electricity. We do not dispute that.**
> IRS (Mr. Sorensen): So is that -- the question, though, is that a concession. So –

> THE COURT: But let me read the relevant sentence of the report. Find it. Okay. It's on page 11, **"Conclusion: It's clearly, by the most basic definitions, electrical power. The Johnson Fresnel Lens System produces enough solar process heat to run a Stirling engine and produce electricity.** Selecting a Stirling engine size for this application and tuning the engine generator will likely improve performance". Well, it –
> IRS (Mr. Sorensen): Up until that last sentence, Your Honor, I think we were okay.
> THE COURT: How about system? I don't think you agree there's a system.
> IRS (Mr. Sorensen): No, we don't agree. We agree the system that they tested and utilized was not the system --
> MR. JONES: Not the system.
> IRS (Mr. Sorensen): -- not the system that was envisioned.
> MR. JONES: And just if I could speak to that specific point. So this case is not about the system that International Automated Systems and RaPower3 developed and promoted and sold and so forth, or -- what the taxpayer at issue in this case purchased was the lens. And so its use is what is at issue. It gets leased to an entity called LTB. There is an understanding about what those lenses were intended to do, once they were leased, that this taxpayer has. And so the concern -- the overarching concern that Petitioners have is, is that lens -- does it qualify to solar energy property under the regs? Is it energy property under the Code, by extension?
> And so we are dealing with just the lens itself. We believe that a reading of the regs qualifies it as solar energy property because it can be used in a system that will generate electricity.
> THE COURT: Well, I think you're getting into you --
> MR. JONES: Sure.
> THE COURT: -- opening argument now. But I'm just trying to -- I mean, if we take the word "system" out, if we just say that the conclusion of these engineers was that, **by the most basic definition electrical power, the Johnson Fresnel Lens produces enough solar process heat to run an engine and produce electricity. If Respondent would agree with that**, right --
> IRS (Mr. Sorensen): As long as there's not a commercial --
> THE COURT: Right. Right.
> IRS (Mr. Sorensen): -- determination.
> THE COURT: Right.
> IRS (Mr. Sorensen): **That the lenses do produce sufficient heat, that the Stirling engine did produce some electricity, we have no problem with that.**
> THE COURT: I think you've got the concession that --
> MR. JONES: Okay.
> THE COURT: -- you want. So on that basis, I will exclude this report as not relative to any point in dispute.

(TR 26:3-27:7) (emphasis added).

The government has clearly and unequivocally conceded that the Johnson Fresnel lenses sold by the RaPower Defendants were solar equipment and therefore qualified under §48. In the

Tax Court case, the IRS took the position that the sole issue is whether the taxpayer qualified to deduct losses against active versus passive income based on the solar energy tax credit, not whether a credit was available at all for the Johnson Fresnel lenses.

B. In the Tax Court case, Dr. Mancini radically changed his testimony from the position taken in this case.

The District Court's Findings of Fact (ECF 467) relied exclusively upon the testimony of Dr. Thomas Mancini for its findings and conclusions that the lenses would not generate electricity, either on their own or in combination with other components. (See, ¶¶ 258-264.) The Court found Dr. Mancini's testimony and demeanor credible and relied on him for all of the Court's findings that the Johnson Fresnel solar lenses were not capable of producing heat. (See ¶ 267.) However, in testimony about the same solar lenses before the Tax Court, Dr. Mancini testified to the opposite of his testimony at the trial in the District Court proceeding:

MANCINI TESTIMONY:

On Direct Examination:

> Q That's okay. Okay. So again, it sounds like we don't have a disagreement with the ring. The ring with the lenses on it comes to a focal point where there is heat absorption. And so from that point, **do you believe that it's possible to implement any number of different systems that might generate or that would generate electricity?**
> A **Yes**. I mean, I think the discussion yesterday about maybe putting photocells at that location or something like that, although there are other issues and so forth. **Yes. The answer to that is yes.**

(TR 506:17 -507:2, emphasis added.)

On Cross Examination:

> Q And we heard testimony yesterday from Randy Johnson, for example, where they had also intended just to use one tower alone. And so you're -- I just want to make sure I'm being clear. **You're saying there's no reason why that couldn't be done.** You could use this one tower or --
> A **That's correct. They could use just one tower and the power cycle there, yes.**

(TR 509: 18-24) (emphasis added.)

> Q Yeah. So you testified in direct when Mr. Bradbury was asking you that you think it probably could be a viable system. And I got specific points here, but I think in your direct you said this so we can save some time here, but you kind of made the overarching statement that, yeah, get better personnel, I guess wash the lenses. I think you have an issue about sandblasting the towers and painting them, things like that. But get all this in place. **You think the technology could probably work to generate electricity in five years,** you said. Is that --
> A Oh, I don't know. I don't know five years. But **I think if you got the right team on it, and you really invested the money in it, you could probably make something that would generate electricity <u>using the concept as it stands</u>**.

(TR 516:4-18) (emphasis added.)

> But, during trial before this Court, Mr. Mancini's testimony was to the contrary:
>
> A. My first opinion is that the IAS solar dish system has not produced any electricity or any other useful form of energy from sunlight.
> Q. Why do you think that?
> A. I never saw anything operating. It's a series of components that, once I analyzed them, really don't fit together into a system that will operate efficiently or effectively at all.

(TR 86:1-8)

On the Tracking System his testimony before the Tax Court was:

> And I think during the second visit, I think they were tracking it automatically, but I don't know that. But Randale was operating it, so I assume that that same dish was tracking in both elevation and azimuth. But it was not fully populated with lenses at that point either.

(TR 523: 19-24)

But during the District Court trial, Mr. Mancini's testimony was:

> Q. At any time on your site visit, Dr. Mancini, did you see any of the collectors automatically tracking the sun?
> A. No, ma'am. There were only two. On each visit there was one collector moved. During the first visit it moved only in azimuth, and during the second visit they had both an elevation and an azimuth on that collector, but they were both moved manually. I saw none track automatically.

TR 91:5-13

On the economic viability, or "commercial grade" of solar equipment, in the Tax Court Dr. Mancini testified:

> THE COURT: Well, could I ask a question about that. It seems to me, commercial grade can be a lot of different things. On the one hand, an invention that has gone through all four stages of development and really works and is ready to be sold, you might say is commercial. When it's going to be highly profitable given the market and the competing products and the tariffs and the taxes, that's whole different question, right?
> THE WITNESS: And that's why I said, **I'm not aware of a good definition of commercial grade, what that means.** And that's why I'm trying to qualify it a little bit here. But the work I did in those cases was technical work. It was not related to that. Certainly, commercial grade has a lot to do with profitability and whether you can sell it in the open market. And you might try, and it doesn't work. And you don't make it.

(TR 480: 9-25) (emphasis added.)

But during trial before the District Court, Mr. Mancini's testimony was:

> A. **It's my opinion that the IAS solar technology will never be a commercial solar energy system producing electrical power or any other form of useful energy.**
> Q. And what are the two primary reasons for that conclusion?
> A. The two primary reasons are, first of all, the components are just a series of components. They don't really fit together as a system that will -- will make a commercial grade solar energy system. And the second is that the -- probably, one of the major underpinnings for all of my conclusions here are that the resources, both in intellectual capacity in terms of training and background and in terms of sheer numbers of people working on this project are not sufficient to produce or develop a commercial system.

TR 111:21 – 112:10

> A. Well, certainly as it's currently represented, it's, **in my opinion it will never be a commercial system or will ever produce electricity or any other useable form of energy.**

TR 162:21-24

The contradictions in Mr. Mancini's testimony alone are reason to pause the actions of the Receiver and consider whether this court has been misled as to whether the IRS

considers the solar lenses as qualifying energy equipment and to answer why it has changed its view based on the forum of its argument.

3. The Memorandum and Order should not enter because there remain issues to resolve as to the appropriateness of the receivership and the government's candor with the Court.

These facts demonstrate that the government should not be allowed to take property of a non-party (Glenda Johnson) without a full and fair trial before a jury. During the trial the government's expert witness misled the court, attacked the solar energy property and lied about it being viable solar energy property. The government's own website describes what constitutes solar energy property. See exhibit solar energy website attached hereto as Exhibit __.

The foregoing testimony from the Tax Court case shows that the government's expert witness either knew about information found on the government website, or should have known. The information obtained from the website clearly establishes that the property in question would be classified as solar energy property. Mr. Mancini deliberately tried to mislead the Court from the truth about the equipment, how it operated and its ability to function and produce solar energy.

Dr. Mancini's testimony caused great injury to Defendants' case. His testimony was fraudulent. The statements made in his depositions and written reports were not true. He knew that they were not true. This Court relied on Dr. Mancini's testimony to reach its conclusions after trial, in appointing a receiver and in allowing the receiver to repossess Defendants' and others' property, incurring millions of dollars in fees and expenses, paid for from Defendants' and non-parties' assets.

In the IRS Tax Court case, the government reversed its position and changed its theory about Defendants, soliciting a different conclusion and opinion from Dr. Mancini. His testimony was changed and he admitted that the system could work. Dr. Mancini's testimony in this case and

the actions of Plaintiff and its counsel caused great harm to Defendants, including but not limited to:

1. Destroying the reputation of Mr. Johnson.
2. Destroying the reputation of IAS.
3. Destroying the value of the IAS stock.
4. Causing severe emotional stress and anxiety to the Johnsons, the Shepards and others.

During the trial of this case, there were no witnesses that established that any statement about the solar lenses or any of the solar energy property in question was false, untrue or misleading. All the witnesses called by the government said they had full access to the solar energy property in question. They were free to examine the solar energy property in question. They were able to observe solar energy property performing as advertised. All witnesses asserted that the solar energy property concentrated the solar flux creating high temperatures at the focal point. All of the witnesses that had observed the solar energy equipment did in fact work according to any statements made concerning the operation of said equipment. All of the witnesses testified they believed in the technology and expected the technology to generate electricity as promised.

The Court's conclusion stating that in-service letter was false is undermined by the waffling testimony of Dr. Mancini.

The Court was never shown a fraudulent statement made concerning the solar energy property. The Court was never shown by any evidence that the system would not concentrate solar energy. The Court was never presented a scientific conclusion that the solar energy property in question could not and would not concentrate solar flux energy. The government's use of Dr. Mancini's testimony affected all aspects of its view of Defendants' actions, statements, reliability and credibility.

The Court used lack of proof to be proof. This clearly violates the principle established facts are needed to prove something in a court. The Supreme Court has ruled that a lack of evidence is not evidence. See, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999). Therefore, the Court using the lack of evidence to establish truth violated due process and equal protection under the law. While that may not have been apparent before, the changed position and testimony by the IRS in the *Preston Olson* case make it evident now.

4. The Court can fix the government's deception and manipulation of the evidence now.

After trial there was an expert who used the solar lenses to produce electricity with a Sterling Engine. (See ECF 451). He provided a report to the District Court. Defendants asked for reconsideration of the trial conclusions because of the evidence of produced electricity. The motion was denied by just saying it was too late. (See ECF 529). The IRS's own regulations state, in form 3468, that if a project takes two or more years then the equipment purchased would be considered placed in service at the time the equipment was purchased. Therefore, once the product in question produced electricity then it proved the product in question satisfy the requirements of form 3468.

Shortly after the trial the concentrated solar energy system was brought to a state of electricity production. The solar energy concentrated PV system was shown to the government expert witness, Dr. Mancini. The same system was shown to the plaintiff's attorneys long before trial. This same system was shown working in the focal point of the Fresnel lens. This system was being recorded by the video recording person while the Johnson Fresnel lenses were making electricity. (See ECF 451). This system was making electricity when the recorder was recording was taking a video of it working. Electricity being produced was the kind of electricity that would be produced from any PV system.

The same photovoltaic chips used in the home PV system have been used in the focal point of the concentrated PV system and has been documented producing electricity. The prototype concentrated PV system demonstrated that the system would produce the same quality electricity as any other PV system. During the trial the plaintiff asked about the system Mr. Johnson testified that the prototype CPV was working. Plaintiff attorneys remarked that this was only a PV system. This clearly demonstrated that the court was aware of the CPV system. They knew that it produced the same quality electricity as any other PV system. Therefore, the statement made in the conclusion of law based upon the facts about the quality of electricity that the system can produce is false.

The new CPV production model is available for the court to see working. Experts in the field of electrical engineering have seen it work and will testify in court as expert witnesses that the system is working according to the specifications required. This is new evidence and was not available at the time of trial. A Rule 60 motion for newly discovered evidence gives this court jurisdiction to evaluate this evidence. This again demonstrates that the expert witnesses knew or should have known that a CPV system prototype was available at trial. If a CPV was demonstrated and would produce the same type of electricity as any other PV system then it should qualify for the same tax credits offered by other systems producing the same type of electricity. This means that Dr. Mancini's testimony was false therefore it would be fraud on the court.

This new CPV system should also convince the court that the product in question was capable of producing the same electrical energy with the same quality as any other PV system.

CONCLUSION

The Decision and Order should not enter as there are real concerns the Court should recognize relating to the adoption of the Decision and Order as precedent in other cases, including

the Receiver's collection case against Glenda Johnson and others. Additionally, the contradictory testimony from Dr. Mancini offered by the government in the tax court proceedings should give this court pause before it continues to allow the Receiver to liquidate assets to pay a judgment that appears to be based on false testimony as to the qualification of the Johnson Fresnel lenses as qualified solar energy property. The Court should take more time to review these issues before entering the present order.

Dated this 22nd day of May, 2020.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Joshua D. Egan
Attorneys for Glenda Johnson

I declare under the penalty of perjury, that the foregoing is true and correct.

DATED this 22nd day of May, 2020.

/s/Glenda E. Johnson
Glenda E. Johnson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed using the court's CM/ECF filing system and that system sent notice of filing to all counsel and parties of record. In addition, the foregoing was mailed or emailed as indicated to the following who are not registered with CM/ECF.

/s/ Steven R. Paul
Steven R. Paul
Attorneys for Glenda Johnson