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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.	Civil No. 2:15-cv-00828-DN-DOA **RULE 60 MOTION TO SET ASIDE JUDGMENT AGAINST DEFENDANTS (NEWLY DISCOVERED EVIDENCE) (FRAUD ON THE COURT) (CHANGE IN LAW)** Judge David Nuffer

Pursuant to Rule 60b (2) and (3) Defendant Neldon Johnson moves this Court for an Order setting aside the Judgment against them due to both "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," and "(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;" and a change in the law because of a recent US Supreme Court decision, as follows:

CHANGE IN LAW

The law governing this case has been changed by the recent US Supreme Court decision in *Liu v. SEC*, Case No. 18-1501 decided on June 22, 2020. The decision entered in this case did not follow the requirements of that decision. Only net profits, not gross receipts used in this case, are permitted as the measure of disgorgement. The government failed to show any proof of net profits. The decision was based entirely on "deposits" into bank accounts and the government witnesses admitted there could be double-deposits or even triple-deposits counted in that gross number. The government has the burden of proving net profits and they offered no proof, therefore failed to meet their burden of proof and this case should be dismissed for failure of the government to prove the correct measure of damages. The requirements and limits on calculating disgorgement damages have been clarified by the US Supreme Court and make the calculation of damages in this case improper.

CHANGE IN IRS POSITION

The IRS changed its position on the Johnson Fresnel lenses in proceedings before the Tax Court as more fully described herein. Whereas, in its pleadings, motions, discovery and trial before this Court 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 Johnson Fresnel lenses qualify as solar energy property under the IRS code and regulations. Their 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 Court to this new position because it materially affects the Court's decision in this 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 Court to the contradictory positions violates their duty of candor to this Court.

Below are excerpts from the transcript from the recent Tax Court proceedings[1]:

> 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**.[2]

The 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 never disputed that the lenses could be a component in a system to produce electricity[.]** (Reading from the IRS Pretrial Memorandum at p. 3, emphasis added)

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1 *Preston Olsen & Elizabeth Olsen v. Commissioner of Internal Revenue*, Tax Court Cases 26469-14 and 21247-16. Copies of relevant pages from the transcripts of the *Preston Olsen* tax court case are attached as Exhibit 1 to this Motion.

2 Exhibit 1, TR 15:14-16:5. (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.[3]
>
> 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.

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3 Exhibit 1, TR 18:5-11. (emphasis added).

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.[4]

The Fresnel lenses sold by the Defendants were solar equipment and therefore qualified under §48. In the Tax Court, the IRS took the position that the issue for decision is whether the taxpayer could 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.

4 Exhibit 1, TR 26:3-29:7. (emphasis added).

CHANGE OF DR. MANCINI'S TESTIMONY

This Court's Findings of Fact (ECF 467) relied exclusively on the testimony of Thomas Mancini for findings 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 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 this 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**.[5]
>
> 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**.[6]
>
> 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

5 Exhibit 1, TR 506:17 -507:2 (emphasis added.)

6 Exhibit 1, TR 509: 18-24 (emphasis added.)

> 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 using the concept as it stands.**[7]

But, during trial before this Court, Mr. Mancini's testimony was to the contrary[8]:

> 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.**[9]

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.[10]

But during 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.[11]

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7 Exhibit 1, TR 516:4-18 (emphasis added.)

8 Copies of the transcripts from Dr. Mancini's testimony from this case are attached as Exhibit 2 to this Motion.

9 Exhibit 2, TR 86:1-8 (emphasis added.)

10 Exhibit 1, TR 523: 19-24.

On the economic viability, or "commercial grade" of solar equipment, in the Tax Court he 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.[12]

But during trial before this 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.[13]

> 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.**[14]

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11 Exhibit 2, TR 91:5-13.

12 Exhibit 1, TR 480: 9-25. (emphasis added.)

13 Exhibit 2, TR 111:21 – 112:10.

14 Exhibit 2, TR 162:21-24 (emphasis added.)

For the foregoing reasons this Court was misled by the Department of Justice and Internal Revenue Service and their witnesses. The prior decision in this case was predicated on that misleading information and should be revised. The Department of Justice should have brought this to the Court's attention, but has failed to do so. Therefore, this Court should reassess the prior decision, set it aside, and dismiss the case brought against the Defendants.

Timeliness

This motion is timely under Rule 60(b) as the basis for the motion (the IRS Tax Court Case) was held beginning January 21, 2020 and the transcript from that proceeding was not available to Defendants until February 3, 2020. Defendants could not have known of the government's changed position or of Dr. Mancini's changed testimony until the transcript of the proceedings in the Tax Court became available.

Dated: July 2, 2020

/s/ Neldon Johnson
Neldon Johnson, Pro Se

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.

Greg Shepard (sent via email):

/s/ Neldon Johnson